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THE WAGES OF STEALTH OVERRULING
(WITH PARTICULAR ATTENTION TO
MIRANDA V. ARIZONA)

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THE WAGES OF STEALTH OVERRULING¹
(WITH PARTICULAR ATTENTION TO *MIRANDA V. ARIZONA*)

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ABSTRACT

Over the last few years – and especially following the 2006 Term – commentators have criticized the Supreme Court for engaging in “stealth overruling.” This article examines the phenomenon, trying to ascertain why the justices engage in the practice and how we should feel about it. The article focuses on the gradual overruling of *Miranda v. Arizona*, because here tangible evidence is available about the benefit to the justices – and costs to the rest of us – of the practice of stealth overruling. The article demonstrates that by engaging in stealth overruling the justices are able to see that their will is done by lower courts and public officials, yet avoid any negative effect from public opinion. While the strategy benefits the justices, it has costs. Doctrine is rendered incoherent, and public officials are encouraged to evade federal law. Of greatest concern, stealth overruling tempers the dialogue between the Court and the public about the proper meaning of the Constitution, leaving the course of constitutional law solely in the justices’ hands.

TABLE OF CONTENTS

INTRODUCTION.....	2
I. WHAT IS "STEALTH OVERRULING"?	7
A. <i>Overruling</i>	9
B. <i>Stealth</i>	14
II. THE CASE OF THE DISAPPEARING <i>MIRANDA</i> RULE.....	17
A. <i>The Gradual Overruling of Miranda</i>	17
B. <i>Stare decisis and Miranda</i>	25
III. THE MOTIVES OF OVERRULING BY STEALTH.....	29
A. <i>The Motive of Minimalism</i>	29
B. <i>The Difficulties of Collegial Decision-making</i>	33
C. <i>The Reason That Does Work: Ducking Publicity</i>	34
IV. THE WAGES OF STEALTH OVERRULING.....	40
A. <i>Speaking to Separate Audiences: the Problem of Stealth Overruling</i>	41
B. <i>The Costs of Acoustic Separation</i>	45
1. Creating doctrinal confusion.....	45
2. Encouraging defiance and defection.....	50
C. <i>Public Participation in the Endeavor of Constitutional Law</i>	52
1. The case for stealth overruling, and its premises.....	53
2. The case for popular engagement with constitutional lawmaking.....	55
CONCLUSION.....	63

INTRODUCTION

In the spring of 2004, in twinned cases, the Supreme Court overruled Miranda v. Arizona. Miranda was the 1966 decision holding (as everyone surely knows) that no statement obtained by police interrogation of a suspect in custody can be admitted into evidence if certain warnings had not been given to the suspect. In Missouri v. Seibert, the Court decided that despite initial hopes that Miranda would provide “bright line” guidance to police officers, the rule itself had proven “not to be administrable,” and that its continued maintenance was “inconsistent” with the body of precedent that had grown around it. In United States v. Patane, the Court concluded that the cost of applying the exclusionary remedy to unwarned police confessions was “simply too great,” particularly given Miranda’s shaky constitutional status. The Court’s rulings spelled a return to the long-standing “voluntariness” analysis, pursuant to which only involuntary or coerced statements of

criminal suspects would be held in violation of the Constitution and inadmissible. In both cases the Court made clear that police departments could choose to read suspects the warnings if they wished, and emphasized that recording of suspects' statements remained an option, just as it had after Miranda. But, the majority justices held, the Constitution had nothing to say about any of this.

Reaction to the overruling of Miranda may not have been precisely what the Justices anticipated or bargained for. It turned out the Miranda decision was an icon, a firmament in the constitutional canon – or at least that was what the public thought. There were angry editorials, discussions on Sunday morning talk shows, and anxious statements from academics and politicians about the fidelity of the Roberts Court to principles of stare decisis, which had played prominently in the confirmation hearings of both the Chief Justice and Justice Samuel Alito. When, during the 2006 Term, the Court overruled four additional precedents – among them Flast v. Cohen and McConnell v. Federal Election Commission, the judiciary committees of both houses of the Democratic Party-controlled Congress commenced hearings into whether the Justices were fulfilling their constitutional responsibilities properly. Chastened Justices assured Members of Congress they did indeed respect stare decisis, and the Roberts Court took its oft-noted turn to the left.

Those two paragraphs are fiction, of course. The principal opinions in these cases not only did not claim to overrule prior precedents; sometimes they specifically denied it. Rather, the decisions were portrayed as faithful applications of governing precedent, well within the proper bounds of interpretation.² And though there was some public reaction to these decisions, it was barely a blip on the historical Supreme Court seismograph.

Still, the many critics of these decisions claimed that the overrulings had in fact occurred, but by “stealth.”³ Underscoring the fact

² See infra notes __-__ and accompanying text.

³ See, e.g., Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. Rev. of Books, Sept. 27, 2007, at 92 [hereinafter Dworkin, *Supreme Court Phalanx*] (accusing Justices Scalia and Alito of “remaking constitutional law by overruling, most often by stealth, the central constitutional doctrines that generations of past justices, conservative as well as liberal, had constructed”); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 Tul. L. Rev. 1533, 1538 (2008) [hereinafter Stone, *Roberts Court*] (accusing Alito and Scalia of “purport[ing] to respect a precedent while in fact cynically interpreting it into oblivion”).

that something well out of the ordinary was happening, challenges to the justices' claims of fidelity to precedent came from both sides of the ideological divide.⁴ Even, on the Supreme Court itself, dissenting and concurring justices united in accusing the authors of the principal decision of acting disingenuously, of overruling *sub silentio* what they would not overturn explicitly.⁵

Stealth overruling is assuredly not unique to the Roberts Court – the Warren Court, for example, did it as well – yet for all the recent criticism, the practice remains under-explored and ill-understood. This is unfortunate, as stealth overruling has significant implications for two cardinal values, the legitimacy of judicial review and the rule of law. This Term, in *Citizens' United v. Federal Election Commission*, a closely-divided Court explicitly overturned where just two Terms earlier they had employed stealth.⁶ Public response to *Citizens United* has been loudly and widely negative. In contrast, in fully three cases this Term the justices [continued their project of undermining the decision in *Miranda v. Arizona*,⁷ but quietly, with no explicit overruling – and little notice in the mainstream press of what they are about].⁸ Why the difference in treatment? And more important, how should we feel about it?

Although there has been some commentary on stealth overruling, to date no one has really tried to come by any data or hard information indicating why the justices would choose to overrule by stealth rather than overtly, or the effects of their choosing to do so. Stealth overruling has been addressed as a matter of critique or philosophy, but not as a question of motive and effect.⁹ That shortfall is addressed here, with particular

⁴ For conservative critics of these decisions, see Robert Bork, “4 + 1,” *National Review*, July 30, 2007 (criticizing the reasoning of Hein); Bruce Fein, “Hoisted On Their Own Petard,” *Washington Times*, May 1, 2007, at A16 (calling Carhart “an orgy of intellectual incoherence”); Richard A. Posner, *How Judges Think* 277-78 (2008) (criticizing Hein and Carhart).

⁵ See, e.g., *Wis. Right to Life*, 551 U.S. at 534 (Souter, J., dissenting) (declaring that “[t]here is neither a theoretical nor a practical basis to claim that McConnell . . . survives”); *id.* at 499 n.7 (2007) (Scalia, J., dissenting) (calling the principal opinion’s attempt to reconcile precedent “unpersuasive”). For more see *infra* ___-___ and accompanying text.

⁶ *Citizens United v. FEC*, No. 08-205 (U.S. Jan. 21, 2010).

⁷ 384 U.S. 436 (1966).

⁸ Law Review readers: So far, the Court has decided two of these three cases, *Florida v. Powell*, No. 08-1175 (Feb. 23, 2010) and *Maryland v. Shatzer* No. 08-680 (Feb. 24, 2010). The cases were precisely consistent with this speculation, offered, for what it is worth, before the decisions came down last week. Obviously this will be filled in when the third case is decided.

⁹ For examples of the literature on stealth overruling, see, e.g., Dworkin, *supra* note ___; Metzger, *supra* note ___; Peters, *supra* note ___; Stone, *supra* note ___. See also Steiker,

attention to the slow undermining of the *Miranda* rule. Doing so provides information as to why the justices choose the technique, what the countervailing considerations are, and how stealth overruling decisions are treated by government officials and lower courts that the Supreme Court must govern. This information, in turn, permits normative judgment based on facts, not speculation.

Polling data on the *Miranda* decision, and studies of media reactions to its recent progeny, provide substantial support for the conclusion that stealth overruling occurs when the justices have reason to be concerned about a strong negative reaction to their decision, yet are determined to change the law nonetheless. And while some might claim that it is appropriate for the justices to engage in stealth overruling in order to shield decisions about constitutional meaning from majoritarian passion,¹⁰ the argument here is just the opposite: that ultimately the legitimacy of judicial review turns on public scrutiny of what the justices are doing, and the ability for dialogic engagement with their constitutional decisions. For this reason if no other, stealth overruling should be viewed with skepticism.

But stealth overruling is both more complicated, and ultimately more troubling, still. Critics of stealth overruling miss the fact that the practice comes at a cost to the justices who employ it. Overruling is only effective if lower courts and individual actors understand and implement the justices' will. In deciding by stealth rather than explicitly, the justices necessarily pay a price in the clarity of the message they convey. One might assume, in fact, that the tradeoff in efficacy would serve as an internal check on the use of stealth overruling.

This article demonstrates that the justices are able to eliminate their own costs of stealth overruling by speaking to different audiences simultaneously in the same opinion. The justices can cloak what they are doing from the public at large, while making their intentions perfectly plain to lower courts and to officials. The *Miranda* decisions are instructive. There is irrefutable evidence that the public thinks *Miranda* is the law, and gives the rule high approval. Yet – egged on by the Supreme Court – government agents violate the rule with impunity, and lower courts admit the fruits of their labors when they do so.¹¹

This ability to speak to separate audiences only serves to call into further question the propriety of stealth overruling. At the least, it

supra note ____, which is not about stealth overruling, and in fact comes to a very different conclusion about the justices' intentionality, but which does a nice job of treating the "acoustic separation" point made in Part IV in a related criminal procedure context.

¹⁰ See infra notes ____-____ and accompanying text.

¹¹ See infra Part IV.B.

confuses existing doctrine, making it difficult for officials and lower courts to decide like cases alike, thereby threatening the rule of law. Inevitably, like cases are treated dissimilarly. Worse yet, stealth overruling encourages government officials to ignore the apparent holdings of the Supreme Court, knowing their actions will be approved nonetheless, with a knowing wink. While this is perhaps effective in ensuring the justices achieve short-run policy objectives, it breeds cynical defiance of Court rulings that may prove hard to contain at another time.

Part I of this article examines precisely what it was that so bothered commentators regarding the 2006 Term of the Supreme Court, seeking to define the conduct called stealth overruling with greater precision. Strictly speaking “stealth overruling” is a misnomer. In reality, what disturbs critics is the disingenuous treatment of prior precedents in a manner that obscures fundamental change in the law. Existing precedents are not given their logical scope, or are trimmed to almost nothing, without sufficient (or any) explanation.

Part II, A sets the stage for the analysis of the effects of stealth overruling by showing how *Miranda* has been stealth overruled. Part II, B then underscores the point by demonstrating how *Miranda* could have been overruled explicitly. So why was it not?

Part III makes the case that the best explanation for the practice – and often the only conceivable one – is to avoid public attention to the Court’s diminishing its own precedents. In doing so, this Part rejects the arguments that stealth overruling is a completely admirable exercise in gradualism, or the unavoidable consequence of collegial decisionmaking on a multi-member court. Stealth overruling shares none of the supposed virtues of minimalism; moreover, any justice engaging in such conduct could simply vote individually to overrule explicitly. Rather, relying on polling information and media coverage of the *Miranda* decisions, Part III presents evidence strongly suggestive of the fact that *Miranda* has been treated in the fashion it has precisely to avoid public attention to its undoing.

Part IV then considers the costs and benefits of stealth overruling, informed by data from the aftermath of the *Miranda* stealth decisions. Section A shows how the justices are able to speak to two separate audiences simultaneously; they ensure that *Miranda* is undermined, while the public is led to believe it is still viable. Section B discusses how this system of sending separate messages breeds doctrinal confusion and cynical defiance by government officials. Section C then takes up the ultimate normative questions regarding stealth overruling. Is it appropriate for the justices to shield their decisions from public view in order to safeguard the autonomy of constitutional law and protect the

Court as an institution? Section C rejects these claims, arguing instead that the legitimacy of judicial review rests in the public's ability to speak to Supreme Court rulings and engage in dialogue with the Court over constitutional meaning.

I. WHAT IS "STEALTH OVERRULING"?

Commentators accused the justices of overruling by stealth in as many as seven cases during the Court's October Term 2006.¹² In *Gonzales v. Carhart*, the Court upheld congressional legislation banning what is known in political lingo as "partial birth abortion," although markedly similar legislation had been struck down in *Sternberg v. Carhart* just six years earlier.¹³ In *Federal Election Commission v. Wisconsin Right to Life*, the Court accepted an as-applied challenge to the constitutionality of a critical section of the Bipartisan Campaign Reform Act that in effect doomed the section, despite rejecting a facial challenge to the very same provision in the 2003 decision *McConnell v. Federal Election Commission*.¹⁴ *Hein v. Freedom from Religion Foundation* involved the question of whether taxpayers had standing to challenge the executive branch's use of federal funds to pursue "faith-based initiatives."¹⁵ *Flast v. Cohen* would have suggested the answer was yes; the Court held no, distinguishing executive from legislative action.¹⁶ In

¹² In a strongly-worded article in the New York Review of Books, Ronald Dworkin accused the justices of "remaking constitutional law by overruling, most often by stealth." Dworkin, *Supreme Court Phalanx*, supra note ___, at 92. Writing on The Washington Post's op-ed page, the columnist E.J. Dionne accused the Court in WRTL of having "pretended to follow the earlier ruling while ripping its guts out." E.J. Dionne, *Not One More Roberts or Alito*, Washington Post, June 29, 2007, at A21. Some members of Congress, which recently had confirmed both the Chief Justice and Justice Alito, having heard much from them during their confirmation hearings about the import of stare decisis, expressed the view that they had been bilked. See Senator Charles E. Schumer, Keynote Address before the Fifth Annual American Constitution Society Annual Convention (July 27, 2007), available at <http://acslaw.org/pdf/Schumer%20speech.pdf>. See also Metzger, supra note ___ (citing "lack of candor" in *Hein*, *United Haulers*, and *Gonzales*); Peters, *Under-the-Table Overruling*, supra note ___, at 1068-71 (noting "underruling" in *Gonzales*, *WRTL*, and *Parents Involved*), Stone, supra note ___, 1538-39 (seeing stealth overruling in *Gonzales*, *WRTL*, *Hein*, *Morse*, and *Parents Involved*).

¹³ *Gonzales*, 550 U.S. 124; *Sternberg*, 530 U.S. 914.

¹⁴ *Wis. Right to Life*, 551 U.S. at 526 (Souter, J., dissenting) (noting that the principal opinion "simply inverts what we said in *McConnell*"); compare *McConnell*, 540 U.S. at 246 (upholding provision).

¹⁵ 551 U.S. 587 (2007).

¹⁶ See *Flast*, 392 U.S. at 102 (defining the issue presented as "the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of

the 2003 Term case of *Grutter v. Bollinger*, the Court held that “diversity” was a compelling state interest to justify certain race-conscious admissions rules for undergraduate or post-graduate admissions, but in *Parents Involved in Community Schools v. Seattle Schools District No. 1* the Justices struck down such measures in primary and secondary education.¹⁷ In *Morse v. Frederick* the Justices upheld the suspension of a student for unfurling a banner that read BONG HiTS 4 JESUS, despite the broad protections accorded student speech in *Tinker v. Des Moines Independent Community School Dist.*¹⁸ There were similar claims about *United Haulers*, a dormant commerce case, and *Bowles v. Russell*, involving the time limits for habeas appeals.¹⁹

What was notable about the accusations of stealth overruling was that they emerged from both sides of the traditional left-right divide. Prominent conservatives joined left-leaning critics in condemning the way the Court was proceeding.²⁰ These criticisms were fueled no doubt by similar complaints of stealth overruling from the justices’ own colleagues on both sides of the ideological line. In *Hein*, for example, Justice Scalia – who voted *with* the principal opinion — accused it of drawing “utterly meaningless distinctions,” and thereby undermining the rule of law.²¹ In this he joined Justice Souter, dissenting, who also saw “no basis” for the plurality’s distinction “in either logic or precedent.”²² In *Federal Election Commission v. Wisconsin Right to Life*, Justices Souter and Scalia (writing

a federal spending program”); *Hein*, 551 U.S. at 618 (Scalia, J., dissenting) (arguing that, unless *Flast* is overruled, that case governs in *Hein*); *id.* at 637 (Souter, J., dissenting) (stating that the plurality’s distinction of *Flast* has “no basis...in either logic or precedent”).

¹⁷ See *Grutter*, 539 U.S. at 326 (holding that diversity is a compelling state interest in university admissions); *Parents Involved*, 551 U.S. at 724 (distinguishing *Grutter* as reliant upon “considerations unique to institutions of higher education”).

¹⁸ *Tinker*, 393 U.S. 503; compare *Morse*, 551 U.S. at 437 (Stevens, J., dissenting) (accusing the Court of “trivializ[ing] the two cardinal principles upon which *Tinker* rests”). Admittedly, given prior exceptions, *Tinker* itself was starting to look like a piece of Swiss cheese. See *Hazelwood* 484 U.S. 260 (permitting schools to regulate some school-sponsored expression); *Fraser*, 478 U.S. 675 (permitting regulation of student speech when “rationally related to legitimate pedagogical concerns”).

¹⁹ *Bowles*, 551 U.S. 205; *United Haulers*, 550 U.S. 330. For discussions of stealth overruling in *Bowles*, see *Bowles*, 551 U.S. at 220 (Souter, J., dissenting) (accusing the Court of “refusal to come to grips” with precedent); *Dodson*, *Jurisdictionality*, *supra* note ___, at 48, (calling *Bowles* a “sleeping case” that “undermines precedent and lacks principled reasoning for its result”). For a discussion of *United Haulers*, see *Metzger*, *Remarks*, *supra* note ___, at 464 (criticizing the *United Hauler* court’s failure to adequately distinguish precedent).

²⁰ See *supra* notes ___-___ and accompanying text.

²¹ *Hein*, 551 U.S. at 618 (Scalia, J., concurring).

²² *Hein*, 551 U.S. at 637 (Souter, J., dissenting).

for seven justices between them!), made similar arguments.²³ Summing up the Term in a rare opinion (in the *Parents Involved* case) read from the bench, Justice Breyer said “It is not often in the law that so few have so quickly changed so much.”²⁴

The question is whether these claims of stealth overruling are apt. Are the justices doing anything other than properly distinguishing prior decisions? To answer this question, it is necessary to give greater precision to the terms “overruling” and “stealth.”

A. *Overruling*

In *Webster v. Reproductive Health Services*, Justice Scalia provided a taxonomy of options the Supreme Court faces when considering a precedent – in that case *Roe v. Wade*. He chastised the other justices in the majority regarding the disposition of the case for failing to seize the bull by the horns and flatly overrule *Roe*. “Of the four courses we might have chosen today – to reaffirm *Roe*, to overrule it explicitly, to overrule it sub silentio, or to avoid the question – the last is the least responsible.”²⁵

With a little reordering and explication, Justice Scalia’s taxonomy can prove useful to the task at hand. In any given case the Court is left with the following array of options:

Overrule explicitly . . . Overrule sub silentio . . . Distinguish the precedent . . . Reaffirm

The definitional trouble comes in the middle of the spectrum. The question one properly asks is whether it is possible to identify a meaningful difference between overruling a precedent *sub silentio*, and simply distinguishing it. If not, then there may be nothing unusual about the sort of overruling commentators are complaining about, whether done by stealth (the word implies misbehavior, a question we will come to shortly) or otherwise.

When the justices in the 2006 principal opinions responded directly to the taunts coming from either side of them (they didn’t always), their claim was that they were engaging in the proper business of the law

²³ See *Wis. Right to Life*, 551 U.S. at 534 (Souter, J., dissenting) (“[t]here is neither a theoretical nor a practical basis to claim that *McConnell* . . . survives”); *id.* at 499 n.7 (Scalia, J., dissenting) (calling the principal opinion’s distinction from *McConnell* “unpersuasive”). Summing up the Term in a rare opinion (in the *Parents Involved* case) read from the bench, Justice Breyer said “It is not often in the law that so few have so quickly changed so much.” Dworkin, *Supreme Court Phalanx*, *supra* note ___, at 92.

²⁴ Dworkin, *Supreme Court Phalanx*, *supra* note ___, at 92.

²⁵ *Webster*, 492 U.S. at 537 (Scalia, J., dissenting).

by drawing distinctions from existing precedents. Thus, in *Hein*, Justice Alito took pains to deem the view he rejected a “*broad* reading of *Flast*.”²⁶ Similarly, in *WRTL*, the Chief Justice pointed out that he was merely refining a prior precedent:

McConnell held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. *We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban – the issue we do have to decide – we give the benefit of the doubt to speech, not censorship.*²⁷

Contrary to critics of stealth overruling, who tend to see a binary choice between following existing precedents to their logical conclusion and discarding them to reach the contrary result, the justices they criticize seek a middle way.²⁸

Strictly speaking, stealth overruling does not involve the overturning of precedents in the way explicit overruling does. If a case is formally overruled, its holding no longer governs. This was demonstrably not the case for at least some of the 2006 decisions. *Hein*, for example, declined to apply the rule of *Flast v. Cohen* to the actions of the executive branch, but there is no indication that it stripped taxpayers of standing to challenge congressional spending in violation of the Establishment Clause. That was *Flast’s* holding, and it remains. Similarly, it might seem that *Morse v. Frederick* should have come out differently under *Tinker*, but there is no reason to believe *Tinker* will not apply to other cases, particularly those not involving encouragement of unlawful conduct, the distinction relied upon by the justices.²⁹

Rather, the precise complaint of commentators seems to be that the justices are – through disingenuous reasoning – depriving precedents of

²⁶ *Hein*, 551 U.S. at 592 (plurality opinion).

²⁷ *Wis. Right to Life*, 551 U.S. at 482 (plurality opinion) (first emphasis added).

²⁸ See *Hein*, 551 U.S. at 615 (rejecting the contention that “we must either overrule *Flast* or extend it to the limits of its logic,” and declaring that “We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it”).

²⁹ See *Morse*, 551 U.S. at 406-09. Lower courts have in fact read *Morse* this way. See, e.g., *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 741 (8th Cir. 2009) (applying *Tinker* rather than *Morse* where there is no student advocacy of drug use); *Lowry v. Watson Chapel Sch. Dist.*, 508 F.Supp.2d 713, at 723 n.3 (E.D. Ark. 2007) (in denial of summary judgment against student, distinguishing *Morse* and declaring that *Tinker* controls where no illegal activity involved).

their force in one of two specific ways. A decision deemed stealth overruling fails to extend a precedent to its logical conclusion. Or, it limits an existing rule “to its facts.”³⁰

An analogy to non-constitutional common law decisionmaking highlights the first method of depriving a prior precedent of force. While the endeavor of the common law is one of drawing distinctions, those distinctions nonetheless must be persuasive, at least to those within the practice.³¹ Persuasiveness is a function of the relationship between the original rule and its rationale. In other words, distinctions drawn by a subsequent court must be germane to the purpose or justification for the rule itself.³² When they are not, then one begins to see the gap between distinguishing prior precedents, and overruling them.³³ When the justices fail to extend a precedent as the logic of its rationale would require, that is one form of stealth overruling.

Hein is a good example of such a case. The question in *Hein* was whether the rule of *Flast v. Cohen* governed. *Flast* had held that despite the general rule against allowing standing solely on the basis of being a taxpayer, standing would be extended to taxpayers complaining about government spending in violation of the Establishment Clause.³⁴ *Hein* distinguished *Flast* on the ground that there the expenditure was by Congress, whereas in *Hein* “Congress did not specifically authorize the use of federal funds” and such expenditures came “out of general Executive Branch appropriations.”³⁵

As the dissenting and concurring justices in *Hein* explained, however, this distinction between the Executive Branch and Congress was

³⁰ As Stanford Law Professor Pam Karlan explained aptly at the end of the 2006 Term, “I think, practically, the court has overruled a number of cases. But the chief can say with a straight face, “I didn’t vote to overrule it. I simply limited the earlier decisions to its fact, or I refused to extend the earlier decision.” Morning Edition: The Roberts Court and the Role of Precedent (NPR radio broadcast July 3, 2007).

³¹ See Monaghan, *Stare Decisis*, supra note ___, at 766-67 (“Every court and every lawyer knows that there are precedents that simply cannot be distinguished”); Schauer, *Precedent*, supra note ___, at 587 (“Precedent rests on similarity, and some determinations of similarity are incontestable within particular cultures or subcultures”).

³² See Dorf, *Dicta*, supra note ___, at 2040 (arguing that the holding of a precedent should be derived from its rationale, not merely from the combination of its facts and outcome); Collier, *Precedent*, supra note ___, at 799 (describing the view that “the ratio decidendi is the rule or principle that the precedent-setting court considered to be necessary for its decision”).

³³ See Posner, *How Judges Think*, supra note ___, at 184 (observing that “distinguishing a precedent is a useful pragmatic tool when it is not merely a euphemism for overruling”).

³⁴ *Flast*, 392 U.S. at 105-06 (announcing holding).

³⁵ *Hein*, 551 U.S. at 592 (plurality opinion).

completely unrelated to the purposes of the *Flast* rule itself. And, in fact, Justice Alito's opinion made no effort to argue otherwise. Justice Scalia said the Alito opinion relied upon "utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently."³⁶ Justice Souter echoed the point – "I see no basis for this distinction in either logic or precedent" – and went on to demolish the separation of powers argument, writing "there is no difference on that point of view between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one."³⁷

The drawing of unpersuasive distinctions violates a cardinal principle of the rule of law, that likes must be treated alike.³⁸ Too much can be made of the imperative: ultimately it all depends on what Frederick Schauer calls "categories of likeness."³⁹ But it is precisely here that Justice Alito failed. The Executive Branch may have been different from Congress in *Flast* in some meaningful way. If so, it behooved him to explain this distinction in a manner germane to the subject at hand. A court that does not explain its distinctions from prior precedent has failed in its most basic of obligations.

Second, the exercise of distinguishing a prior precedent fails if, at its end, the latter decision is so completely unfaithful to the prior precedent that one questions whether that prior precedent exists any longer other than in its narrowest application. Reducing a precedent to essentially nothing was the common complaint about the decision in *Federal Election Commission v. Wisconsin Right to Life*.⁴⁰ In *WRTL*, as we have seen, the principle opinion purported to do nothing but define *McConnell*'s "functional equivalent" test, holding that "a court should find an ad is the functional equivalent of express advocacy only if the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."⁴¹ While all this might seem quite reasonable – and is an understanding of the First Amendment's requirements over which reasonable people could differ – it was almost impossible to maintain that the holding of *McConnell* had any force after

³⁶ Hein, 551 U.S. at 618 (Scalia, J., concurring).

³⁷ Hein, 551 U.S. at 637, 639-40 (Souter, J., dissenting).

³⁸ See, e.g., Aristotle, *The Nicomachean Ethics*, §§ 1131a-1131(b) (identifying equality of distribution with justice); Cardozo, *The Nature of the Judicial Process*, supra note ___, at 33 (declaring that "it will not do to decide the same question one way between one set of litigants and the opposite way between another").

³⁹ Schauer, *Precedent*, supra note ___, at 595-97. See also Llewellyn, *The Bramble Bush*, supra note ___, at 48 (discussing the difficulty of sizing one's categories of likeness).

⁴⁰ 551 U.S. 449 (2007).

⁴¹ *Wis. Right to Life*, 551 U.S. at 469-70.

WRTL. The argument why is complex, but Justice Scalia explained it with reference to a paradigm case. The decision, he said:

would apparently protect even *McConnell*'s paradigmatic example of the functional equivalent of express advocacy – the so-called “Jane Doe ad,” which “condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’”⁴²

In other words, if certain paradigm cases would be struck down under *McConnell*'s holding, but upheld under *WRTL*'s, then *WRTL* reduced *McConnell* essentially to its facts.⁴³

Because *WRTL* left nothing of *McConnell*, but declined to offer a justification for overruling it, both the dissenting and concurring justices concluded that the principal opinion had failed in its basic obligation of fidelity to a precedent. Any claim that the *WRTL* test was “compatible with *McConnell*—seems to me indefensible,” wrote Justice Scalia, who noted that “seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so.”⁴⁴ Justice Souter agreed, saying the test of the principal opinion is “flatly contrary to *McConnell*,” and “simply inverts what we said in *McConnell*.”⁴⁵

Note that the practice of stealth overruling does not inherently carry any particular ideological valence. It depends on which precedents are being diminished. The actions of the Roberts Court are fresh, but they are hardly unique. *Plessy v. Ferguson* was overruled by the Warren Court largely without drawing any distinctions at all, let alone meaningful ones. *Brown* was a reasoned rejection of *Plessy* in the context of school desegregation, of course.⁴⁶ But the series of *per curiam* decisions striking down segregation elsewhere were nothing but pure fiat, a point made repeatedly in their wake.⁴⁷ *Apprendi v. New Jersey* forbade non-jury fact-

⁴² Wis. Right to Life, 551 U.S. at 498 n.7 (Scalia, J., concurring) (citations omitted).

⁴³ See Jed Rubenfeld, Freedom and Time: A Theory of Constitutional Self-Government 178-195 (2001) (laying out “paradigm case” method of interpretation).

⁴⁴ Wis. Right to Life, 551 U.S. at 498 n.7 (Scalia, J., concurring).

⁴⁵ Wis. Right to Life, 551 U.S. at 526 (Souter, J., dissenting). In *Morse v. Frederick*, Justice Stevens made a similar claim about the majority opinion’s failure to deal appropriately with the key precedent of *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, saying “the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests.” *Morse*, 551 U.S. at 437 (Stevens, J., dissenting).

⁴⁶ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁴⁷ See, e.g., *Mayor v. Dawson*, 350 U.S. 877 (1955) (*per curiam*) (desegregating public beaches); *Holmes v. Atlanta*, 350 U.S. 870 (1955) (*per curiam*) (desegregating public golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (*per curiam*) (desegregating bus system).

finding that pushed a criminal sentence above the statutory maximum for the offense charged.⁴⁸ Many (including the principal dissent) argued that the reasoning of the opinion was entirely at odds with *McMillan v. Pennsylvania*, which had upheld a similar scheme, but the *Apprendi* court expressly declined to overrule *McMillan*, citing considerations of reliance.⁴⁹ In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court took on facts remarkably similar to those in *Pennsylvania Coal Co v. Mahon*, a case regarding the threshold for regulatory takings of land – but came to the opposite result, without overruling *Mahon*.⁵⁰ Once again, critics sounded notes similar to those involving the 2006 cases.⁵¹

B. *Stealth*

Which brings us to the problem of stealth. The claim of stealth overruling implies knowledge and intent. When critics insist that justices are overruling by stealth, they are asserting that the author and those joining the decision know the distinctions just don't work, and that claims of fidelity to the germinal precedent just won't wash. They are casting aspersions.

It is primarily in this way that stealth overruling is to be distinguished from its close cousin, over-ruling *sub silentio*. Though the two could be said to be the same, in truth over-ruling *sub silentio* also could imply an accidental or unknowing treading on pre-existing precedents. Precisely because appellate courts face so many precedents,

of Montgomery, Ala.). For criticism of the meagerness of the post-Brown rulings, see Bickel & Wellington, Legislative Purpose, *supra* note ___, at 3; Sacks, Forward, *supra* note ___, at 99.

⁴⁸ 530 U.S. 466 (2000).

⁴⁹ See *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Apprendi*, 530 U.S. at 487 n.13 (“We do not overrule *McMillan*. We limit its holding...”); cf. *id.* at 533 (O’Connor, J., dissenting) (arguing that “it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of stare decisis”). For discussions of *Apprendi*, see Huigens, Harris, Ring, *supra* note ___ (calling the distinction between *McMillan* and *Apprendi* an “irrelevant fortuity” and their supposed consistency “no more than nominal”); Levine, Confounding Boundaries, *supra* note ___ (arguing that the principles underlying *Apprendi* require overturning *McMillan*).

⁵⁰ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁵¹ For discussions of *Keystone*, see Epstein, Takings, *supra* note ___, at 15 (accusing Stevens in *Keystone* of “demot[ing] Holmes’s observations [in *Mahon*] essentially to gratuitous dicta”); Michelman, Takings, *supra* note ___, at 1600 n.2 (making a similar point); Arlin, Property Rights, *supra* note ___, at 319 n.140 (observing that *Mahon* may no longer be valid).

over-ruling *sub silentio* is always a possibility.⁵² It may simply be the case that a prior precedent can no longer stand in light of the appellate court's latest pronouncement.⁵³ But the judges writing the latest pronouncement may not be aware of this, and the fact may not become clear until some time later, in another case.

The hallmark of stealth overruling is that the justices are perfectly aware that they are overruling, but hide the fact that they are doing so. (The likely motive, as we will see, is avoiding publicity. But the motive need not define the act itself.) Necessarily the test is a subjective one.⁵⁴ Nonetheless, there are objective indicia that can provide some guidance.

The law often turns to objective tests when – even though the intent of the actor really seems the ticket – subjective intent cannot be truly known or easily discerned. For example, official immunity for constitutional torts ends when an actor acted without “good faith.”⁵⁵ The true faith of the official seems the relevant consideration, but the test applied is one of “objective” good faith – officers are held to know about “clearly established” rules whether they in fact did or not.⁵⁶

In cases in which stealth overruling is at issue, there will commonly be such objective evidence. Litigation is a public process. Lawyers for litigants write briefs. Disagreeing justices write opinions explaining why. In important cases, commentators follow what is happening. In the run-up to the 2006 Term cases, there were frequent arguments that prior decisions were on the line, and that the Court should

⁵² See Shannon, *Overruled by Implication*, supra note ___, at 156-57 (outlining conceptual and practical obstacles to doing all overruling expressly).

⁵³ See Moore's Federal Practice, supra note ___, §134.05[6], (stating that “there are circumstances in which a prior decision will be overruled implicitly rather than explicitly. A lower court is not bound to follow a decision that has been implicitly overruled”).

⁵⁴ See Gerhard, *Silence is Golden*, supra note ___, at 493 (noting that “[e]ven if we can show [that the Justices’] legal reasoning is deficient, we have not shown that they are acting deceitfully”); Shapiro, *In Defense of Judicial Candor*, supra note ___, at 734 (“the question of candor turns ultimately on the judge's state of mind”). But see Idleman, *A Prudential Theory of Judicial Candor*, supra note ___, at 1318 (proposing an “objective definition” of judicial candor).

⁵⁵ See *Graham*, 490 U.S. at 399 n.12 (noting “objective good faith” requirement for official immunity); *Harlow*, 457 U.S. at 816-18 (rejecting “litigation of the subjective good faith of government officials” in favor of a reasonable-person test). See also *Leon*, 468 U.S. at 222-24 (establishing exception to the exclusionary rule where police rely in objective good faith on subsequently invalidated search warrants); but see *LaFave*, *Expediency*, supra note ___, at 915 (describing the difficulty of inferring subjective bad faith from judicial mistake of law).

⁵⁶ See *Harlow*, 457 U.S. at 818 (giving civil immunity to officials performing discretionary functions unless they “violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

(or should not) overrule.⁵⁷ One can presume that if the arguments about why certain precedents and rulings cannot stand consistently together were aired and not treated, that failure to treat was intentional on the part of the opinion authors. Similarly, if the universal (or almost universal) reaction to an opinion is that it is plainly unworkable, then that is evidence of the subjective state of mind that might be called “stealth.”⁵⁸ In a practice like the law, the consensus of the profession matters.⁵⁹

In this regard, the contemptuous chorus from the dissenting and concurring opinions in the 2006 Term cases is telling. The dissenters and concurring opinions were unusually irate precisely because their colleagues would not come clean. In *WRTL*, Justice Souter wrote that “*McConnell*’s holding . . . is overruled,” and asked “[b]y what steps does the principal opinion reach this unacknowledged result, less than four years after *McConnell* was decided?”⁶⁰ Similarly, in another potential stealth overruling case, Justice Stevens responded to the majority’s claim that one of his prior decisions was inconsistent with the result he advocated. Yes, he replied, acknowledging the fact. “My fellow dissenters and I believe the Court was right to correct its course.” His colleagues in the majority, however, he taunted, “will not even admit that

⁵⁷ The Freedom from Religion Foundation, in its brief, argued strenuously that the holding of *Flast* did not turn on the congressional origin of the challenged spending program. See Brief for Respondents at 28, *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007) (No. 06-157). Even opponents of the *Flast* decision regarded it as implicated in *Hein*. See Walter M. Weber, *Supreme Standing*, available at <http://article.nationalreview.com/?q=MTE0NjQyNTUzMTg3NDBIYTMzTU1ZTY1NzQ1MzF1Mjk=> (Jan. 5, 2007) (arguing that *Flast* is ripe for overruling). The *WRTL* appellants and their opponents similarly saw *McConnell* on the line. See Matthew Murray, *High Court to Hear Case Involving Issue Ads, Roll Call*, April 23, 2007 (quoting appellants’ lawyers saying that “This ad is precisely the kind of ad that was before the court in the *McConnell* case”); Editorial, *Toward Freer Speech*, *L.A. Times*, Jan. 30, 2007, at A16 (editorializing approvingly that an a decision in favor of *Wisconsin Right to Life* would amount to a reversal of *McConnell*).

⁵⁸ For arguments that egregious omission, misreading, or illogic can suggest judicial bad faith, see Johnson, *Race and Recalcitrance*, supra note ___, at 137 (attributing to “resistance, or at least deliberate inattention,” Fifth Circuit’s failure, in remand opinion, to respond to Supreme Court’s criticism); Peters, *Under-the-Table Overruling*, supra note ___, at 1071-1072 (arguing that the departures from precedent in *Stenberg*, *McConnell*, and *Gutterm* are so great that they “cannot honestly be justified by some material difference in facts”).

⁵⁹ See Lipkin, *Indeterminacy, Justification, and Truth*, supra note ___, at 609 (“[i]n easy cases, qualified constitutional practitioners agree on the meaning of the constitutional provisions”); Ripstein, *Law, Language, and Interpretation*, supra note ___, at 340 (observing that “the socialization and training provided by law school determine[s] what will seem easy and what hard”).

⁶⁰ *Wis. Right to Life*, 551 U.S. at 525 (Souter, J, dissenting).

we deliberately changed course, let alone explain why it is now changing course again.”⁶¹

We now have a working definition: “overruling” is the (a) failure to extend a precedent to its logical conclusion, drawing distinctions that are unfaithful to the prior precedent’s rationale; or (b) reducing a precedent to its very circumstances, without justifying its de facto overturning.⁶² And “stealth” is when the justices who do this know better, such that their decisions are in fact “dissembling”.

II. *The Case of the Disappearing Miranda Rule*

Miranda v. Arizona provides a particularly apt vehicle for examining the costs of stealth overruling. The public is supportive of the doctrine, apparently believing it alive and well. Yet, section A shows that by the definition above it has been effectively overruled. Section B then makes the argument that *Miranda* is a perfectly plausible candidate for explicit overruling, raising the question of why the Court has chosen to do so by stealth.

A. *The Gradual Overruling of Miranda*

The decision in *Miranda* resulted from difficulties the Supreme Court faced in ensuring confessions obtained by police met the requirements of the Fifth Amendment’s ban on compulsory self-incrimination and the Fourteenth Amendment Due Process Clause. Before *Miranda*, the admissibility of confessions had been analyzed under the common law “voluntariness” test, which looked to the totality of circumstances under which a confession was acquired to see if it was the result of coercive force.⁶³ The test had proven problematic. Confessions were obtained out of sight of judicial officers.⁶⁴ Determining what had

⁶¹ Bowles, 551 U.S. at 216 n. 1.

⁶² The justices can also extend precedents beyond the scope of their logic. No doubt this practice occurs. But it is not treated here, as it is unlikely to be “stealthy,” in the way that is discussed, i.e., done in a way to avoid publicity. Extensions of precedent hardly cover up the implications, even if the basis for ruling is not airtight as a logical matter.

⁶³ See, e.g., Haynes, 373 U.S. at 513 (characterizing the inquiry as whether “the defendant’s will was overborne”); Payne, 356 U.S., at 562 (noting the question is “whether the confession was coerced”); Lyons, 322 U.S., at 603 (identifying the test as “whether the accused, at the time he confesses, is in possession of ‘mental freedom’ to confess” (citing *Ashcraft v. Tennessee*, 322 U.S. 143 (1944))).

⁶⁴ See, e.g., Lisenba, 314 U.S. at 226–35 (obtaining confession after violating state laws by both detaining suspect for 32 hours of interrogation and by not allowing him to be heard before a magistrate); Spano, 360 U.S. at 323 (1959) (obtaining confession after defendant remained silent for five hours of interrogation but confessed in ninth hour and

happened often involved a swearing contest between police and suspects.⁶⁵ There was evidence – deeply troubling – about the interrogation techniques some were using.⁶⁶ Perhaps most important, because the totality test put each case on its own facts, Supreme Court review on a case-by-case basis was doing little to offer clear guidance either to police or the lower courts.⁶⁷ Faced with these difficulties, the Court appeared to be considering – in *Escobedo v. Illinois* – requiring the presence of counsel as a safeguard.⁶⁸ But in *Miranda* (and its companion cases) the Court took a different tack.

In order to assess whether *Miranda* has been stealth overruled, it is important to focus on both its rule and the rationale upon which the rule is based. The *Miranda* rule is that a prosecutor “may not use” statements “stemming from custodial interrogation” in the absence of “procedural safeguards effective to secure the privilege against self-incrimination.”⁶⁹ The safeguards to which the Court adverted, of course, were the now-ubiquitous *Miranda* warnings. The scope of the rule was clear beyond peradventure: the Court’s plain statement about the ban on the “use” of statements meant not only that the statements themselves were to be excluded from evidence, but so too the “fruits” of such statements: “unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation* can be used against him.”⁷⁰ The dissenting justices acknowledged that the rule applied not only to statements but fruits as well.⁷¹

then took police to search for a murder weapon); *Crooker*, 357 U.S. at 441 (eliciting confession after refusing to provide counsel to suspect who requested one).

⁶⁵ This conflict most often benefited police. See, e.g., *Lisenba*, 314 U.S., at 239 (refusing, because of conflicting testimony, to overturn a lower court finding on the defendant’s claims of “physical violence, threats or implied promises of leniency”); *Kamisar, Fortieth Anniversary*, supra note ____, at 167 (discussing “the readiness with which the lower courts accepted police claims” in the context of *Davis v. North Carolina*, 384 U.S. 737 (1966)).

⁶⁶ See, e.g., *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (obtaining a confession after holding a teenage suspect incommunicado for three days); *Thomas v. Arizona*, 356 U.S. 390, 404 (1958) (obtaining confessions at threat of lynching).

⁶⁷ See *Graham, Self-Inflicted Wound*, supra note ____, at 161 (“[A] trial judge could pick through the Court’s opinions and find authority for admitting almost any confession.”); *Grano, Formalism*, supra note ____, at 243 (characterizing the voluntariness test as making “everything relevant, but nothing determinative.”).

⁶⁸ *Escobedo*, 378 U.S. at 490–91.

⁶⁹ *Miranda*, 384 U.S. at 444.

⁷⁰ *Miranda*, 384 U.S. at 479 (emphasis supplied).

⁷¹ See *Miranda*, 384 U.S. at 500 (Clark, J., dissenting) (“The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof.”); *id.* at 545 (White, J. dissenting) (stating

Miranda's rationale was easy to follow, because the decision was structured around it. First, the Court explained that the Fifth Amendment privilege applied in the stationhouse – and indeed “in all settings in which [a person’s] freedom of action is curtailed in any significant way.”⁷² Second, the Court held that the process of custodial interrogation contains “*inherently* compelling pressures.”⁷³ The emphasized word was essential to the holding. It is only because the Fifth Amendment applies to police custodial interrogation, and because such interrogation is *inherently* compelling, that the procedural safeguards were required to avoid violating the Fifth Amendment’s ban on “compelled” self-incrimination.⁷⁴

Given the Court’s subsequent decisions, it is also instructive to see what the justices said – and did not say – about the philosophical basis for the Fifth Amendment’s ban on compelled self-incrimination. Although the Court mentioned a concern for trustworthy or reliable confessions, it is an aside, in a footnote.⁷⁵ The *Miranda* opinion does not say one word about the need to “deter” police from failing to provide the required safeguards.⁷⁶ Rather, the Court believed the Fifth Amendment required its holding because “custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”⁷⁷

Miranda was instantly controversial, and in fact led to the undoing of the Warren Court. Crime rates were rising and both Richard Nixon and George Wallace made the Supreme Court and crime a major issue in their 1968 bids for the presidency. Nixon won.⁷⁸ Through an odd combination of circumstances, by 1972 four of the justices – including Chief Justice Warren Burger – were of Nixon’s choosing, and all could be counted on to further his anti-crime agenda.⁷⁹

the decision “leaves open” in each case the question of whether disputed evidence is the fruit of a prohibited interrogation).

⁷² *Miranda*, 384 U.S. at 467.

⁷³ *Miranda*, 384 U.S. at 467 (emphasis supplied).

⁷⁴ *Miranda*, 384 U.S. at 467.

⁷⁵ See *Miranda*, 384 U.S. at 456 n.24 (discussing the problem of false confessions).

⁷⁶ See *Miranda*, 384 U.S. at 468–72 (calling the warnings “absolute” prerequisites and emphasizing “the individual’s right to choose between silence and speech. . .”).

⁷⁷ *Miranda*, 384 U.S. at 455.

⁷⁸ On the rise in crime, see Lerman, *Rights of The Accused*, supra note ____, at 43 (noting “the rate of violent crime doubled during the 1960s”). On the Nixon and Wallace campaigns, see Beckett, *Making Crime Pay*, supra note ____, at 38 (describing the candidates’ focus on crime).

⁷⁹ See generally Dean, *Rehnquist Choice*, supra note ____, (describing the events from Warren’s resignation through Rehnquist’s appointment). See also Levy, *Against the Law*, supra note ____, at 139 (finding that in the 15 self-incrimination cases heard during the first two years of the Burger Court, in all but one “the right claimed under the Fifth Amendment lost. . .”).

Nixon's appointees instantly began the work of cutting back on *Miranda*. *Harris v. New York* held that statements taken in violation of *Miranda* could be offered by the prosecutor to impeach the testimony of the defendant should he take the stand.⁸⁰ *Michigan v. Tucker* raised the question whether the fruits of an unwarned statement were admissible even if the statement was not. The Court ducked the question, holding that because the warnings in that case were close to what *Miranda* required and were administered before *Miranda* was decided, the evidence was admissible.⁸¹ But substantial *dicta* in then-Justice Rehnquist's opinion sought to rework *Miranda*. Announcing the holding, Rehnquist concluded that because the purpose of *Miranda* was to "deter" police conduct (something found nowhere in the *Miranda* decision) it made little sense to apply it to the case at hand.⁸² Rehnquist also separated the *Miranda* rule from the *Miranda* Court's actual rationale: "We . . . first consider whether the police conduct complained of directly infringed upon respondent's right against self incrimination *or* whether it instead violated *only* the *prophylactic rules* developed to protect that right."⁸³ But *Miranda*, as we have seen, plainly rested on a determination that unwarned statements are "inherently" compelled.⁸⁴

Two cases in the early 1980's further undercut *Miranda*'s constitutional rationale, plainly holding the *Miranda* warnings were only a "prophylactic." In *New York v. Quarles*, Justice Rehnquist relied on his *Tucker dicta* to adopt a public safety "exception" to *Miranda*.⁸⁵ The required warnings could be skipped if officers needed to elicit a fact to protect the public safety – in this case the location of a gun the defendant had hidden. Permitting admission of the weapon into evidence, the Court made clear that had there been "actual coercion" of Quarles' statement it would have been a "constitutional imperative" to exclude the evidence.⁸⁶ But "[t]he prophylactic *Miranda* warnings" are not themselves "rights protected by the Constitution."⁸⁷

⁸⁰ *Harris*, 401 U.S. at 222. Commentators harshly criticized Burger's deviation from the language and logic of *Miranda*. See Levy, *Against the Law*, supra note ___, at 152–53 ("There was nothing remotely equivocal about what Warren had said."); Dershowitz & Ely, *Anxious Observations*, supra note ___, at 1226 (calling Burger's treatment of *Miranda* misleading).

⁸¹ *Tucker*, 417 U.S. at 448.

⁸² *Tucker*, 417 U.S. at 448.

⁸³ *Tucker*, 417 U.S. at 439 (emphasis added).

⁸⁴ *Miranda*, 384 U.S. at 467.

⁸⁵ *Quarles*, 467 U.S. at 652.

⁸⁶ *Quarles*, 467 U.S. at 658 n.7.

⁸⁷ *Quarles*, 467 U.S. at 654 (quoting *Tucker*, 417 U.S. at 444).

Then, in *Oregon v. Elstad*, the court again excused failure to comply with *Miranda*.⁸⁸ In *Elstad* the police arrested a juvenile in his parents' home and obtained a confession without reading him his rights.⁸⁹ Later, at the police station, they read the rights and obtained another confession.⁹⁰ The trial court suppressed the first statement, but allowed admission of the statement made after warnings were given.⁹¹ One would have thought that under classic "fruits" doctrine the second statement also would be suppressed absent some break in the causal chain.⁹² But Justice O'Connor, again relying on *Tucker*, held the fruits inquiry only applied to cases of actual coercion.⁹³ "The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, . . ."⁹⁴

Soon enough a case presented the obvious question: if *Miranda* was but a "prophylactic," and the Constitution only prohibits "actual compulsion," then where did the Supreme Court get off requiring the exclusion of *all* unwarned confessions in state and local prosecutions (i.e., whether or not there was "actual compulsion")? After all, the Court's authority over the state courts extends only to the mandates of the Constitution itself. In the immediate aftermath of *Miranda*, Congress had passed a law basically overruling *Miranda* and replacing it with the prior "voluntariness" analysis.⁹⁵ The statute had lain dormant, because no one at the Department of Justice was anxious to test its constitutionality.⁹⁶ But the Fourth Circuit, its way well-paved by cases like *Quarles* and *Elstad*, moved the question front and center: if *Miranda* was not constitutional, then surely Congress could replace the decision with the old constitutional test.⁹⁷

⁸⁸ 470 U.S. 298 (1985).

⁸⁹ *Elstad*, 470 U.S. at 301.

⁹⁰ *Elstad*, 470 U.S. at 301.

⁹¹ *Elstad*, 470 U.S. at 302.

⁹² See *Murphy*, 378 U.S. at 79 (holding a witness cannot be compelled to give testimony unless "the compelled testimony and its fruit" cannot be used against him).

⁹³ *Elstad*, 470 U.S. at 309.

⁹⁴ *Elstad*, 470 U.S. at 310.

⁹⁵ 18 U.S.C. § 3501 (2006). On the statute's enactment, see Graham, *Self-Inflicted Wound*, supra note ___, at 319–30 (describing how supporters made "little effort to disguise their intent to blackjack the Court into changing its course.").

⁹⁶ The Justice Department in 1969 issued a memorandum defending the statute. See Kamisar, *Overrule Miranda*, supra note ___, at 925–27. But this support quickly ended. See *Davis*, 512 U.S. at 463–64 (Scalia, J., concurring) ("[W]ith limited exceptions the provision has been studiously avoided by every Administration . . .").

⁹⁷ See *United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir. 1999). While the government initially raised the issue of §3501 below, it was the Washington Legal Foundation who pressed it at the Court of Appeals. See Brief for Washington Legal

Thus confronted, the Court “resolved” *Miranda*’s constitutional status by ostensibly reaffirming the seminal decision. In *Dickerson v. United States*, by a 7-2 vote, the Court held the congressional statute unconstitutional.⁹⁸ None other than Chief Justice Rehnquist wrote for the Court majority.⁹⁹ Rejecting calls to overrule *Miranda*, and seemingly recanting his position in cases such as *Tucker* and *Quarles*, the Chief Justice described *Miranda* as a “constitutional decision” holding that because of the “coercion inherent in custodial interrogation” “certain warnings *must* be given before a suspect’s statement made during custodial interrogation could be admitted into evidence.”¹⁰⁰ The Chief Justice conceded that language in prior opinions suggested that *Miranda* was not of constitutional dimension. Rather than try to square up the seemingly irreconcilable, however, the Chief Justice stated that they – as well as some other decisions extending *Miranda* – simply demonstrated that “no constitutional rule is immutable.”¹⁰¹ Justice Scalia authored a fraught dissent in *Dickerson* sounding precisely the themes he sounded in the 2006 stealth overruling cases. Of course rules are mutable and can be modified, he wrote: “The issue is whether, *as mutated and modified*, they must *make sense*.”¹⁰² “The requirement that they do so is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.”¹⁰³

Although *Dickerson* looked to have saved *Miranda*, the 2004 decisions in *Missouri v. Seibert* and *United States v. Patane* shredded whatever was left of *Miranda*’s rationale, and adopted rules that plainly undercut it. After *Seibert* and *Patane* police have every incentive to violate *Miranda*.

Seibert arose out of police practices that developed in the aftermath of *Oregon v. Elstad*. Some police and prosecutors took *Elstad* as a license to develop policies involving deliberate use of “question-first” tactics.¹⁰⁴

Foundation, et. al. as Amici Curiae Supporting Appellant, *United States v. Dickerson*, 166 F.3d 667 (No. 97-4750), 1997 WL 33484776.

⁹⁸ *Dickerson*, 530 U.S. at 432.

⁹⁹ On the unlikelihood of Rehnquist upholding *Miranda*, see Katz, *Strategic Behavior*, supra note ____, at 333 (noting that between the decisions in *Tucker* and *Dickerson*, Rehnquist participated in 57 major *Miranda*-related cases, and “arguably in all” voted to “distinguish or limit” *Miranda*.)

¹⁰⁰ *Dickerson*, 530 U.S. at 431–32, 443 (emphasis added).

¹⁰¹ *Dickerson*, 530 U.S. at 441.

¹⁰² *Dickerson*, 530 U.S. at 455 (Scalia, J., dissenting) (emphasis in original).

¹⁰³ *Dickerson*, 530 U.S. at 455 (Scalia, J., dissenting).

¹⁰⁴ See *Seibert*, 642 U.S. at 611, and 611 n.3 (describing “question-first” interrogations, and citing several cases where police departments adopted the tactic as policy).

Under these policies, police intentionally failed to deliver *Miranda* warnings, obtained a confession, then read the warnings and obtained a second (ostensibly admissible) statement.¹⁰⁵

Although a majority of justices in *Seibert* seemed at times to want to rule out these “question-first” practices, the fractured opinions in effect instructed police how to ignore *Miranda*. Justice Souter wrote the plurality opinion, which, despite its disdain for the question-first practice, contained no clear condemnation of it. Rather, the plurality said lower courts should apply a multi-factored test in each case to determine whether the intervening *Miranda* warnings can “function effectively as *Miranda* requires . . . to advise the suspect that he had a real choice about giving an admissible statement at that juncture.”¹⁰⁶ Souter did state that, given that the very object of “questioning first” is to obtain the second statement, it was difficult to imagine that the warnings could operate in this way.¹⁰⁷ But it was easy to see how police could take Souter’s multi-factored test, which looks at things such as the time between confessions and the reliance in the later questioning on the prior confession, and use it to work around *Miranda*.¹⁰⁸

Justice Kennedy’s concurring opinion in *Seibert*, which, given the fractured majority can be read as binding, does the same.¹⁰⁹ Justice Kennedy was plainly annoyed by the “deliberate” use of questioning-first, which led him to focus on a “bad faith” test.¹¹⁰ But his general distaste for *Miranda* overcame his annoyance at the police ignoring judicial rules. Hence, even when bad faith — i.e., the deliberate circumventing of *Miranda* — was present, Justice Kennedy determined that a second statement should be admitted if “curative measures” were taken “designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and the *Miranda*

¹⁰⁵ After *Elstad*, scholars also documented a rise in questioning “outside *Miranda*,” whereby officers simply continued questioning a suspect who invoked his rights. See Weisselburg, *Saving Miranda*, supra note ___, at 132–40 (reviewing training materials on the practice).

¹⁰⁶ *Seibert*, 542 U.S. at 611–12.

¹⁰⁷ *Seibert*, 542 U.S. at 613.

¹⁰⁸ *Seibert*, 542 U.S. at 615 (listing these factors).

¹⁰⁹ On the weight of concurring opinions, See *Marks*, 430 U. S. 188 (1977). Justice Breyer appeared most eager to save *Miranda* in that he would look only to bad faith in deciding whether the subsequent decision should be admitted. *Seibert*, 542 U.S. at 617 (Breyer, J., concurring). But lower courts have not found his concurring opinion determinative. Lower courts are also split on whether Justice Kennedy’s concurrence is binding, in part because seven justices opposed Kennedy’s solution. See *infra* Part IV.A.

¹¹⁰ *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

waiver.”¹¹¹ These curative measures included such items as “a substantial break in time and circumstances” or “an additional warning.”¹¹² Thus, under both opinions, police could question first, then rely on the factors to obtain an admissible confession after reading *Mirandas*. As we will see, this is just what many do.

Alongside *Seibert*’s instruction manual on how to violate *Miranda*, *United States v. Patane* practically provided police with an engraved invitation to ignore it at will.¹¹³ The issue in *Patane* was that ducked in *Tucker* years earlier: whether fruits of an un-Mirandized statement are admissible.¹¹⁴ The Court held yes. Even if the “fruits” ruling was *dicta* in *Miranda*, itself a contestable judgment, the principle had been followed for forty years.¹¹⁵

It is virtually impossible to square the opinions in *Patane* with *Miranda*. The central thrust of Justice Thomas’s plurality opinion was to return Fifth Amendment law to its focus on voluntariness. “Introduction of the nontestimonial fruit of a voluntary statement . . . does not implicate the Self-Incrimination Clause.”¹¹⁶ What about the *Miranda* rule itself? “[I]t must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination.”¹¹⁷ This conflicted squarely with *Miranda*’s holding that such statements were “inherently” compelled, and that their admission was prohibited precisely to protect that privilege. Perhaps recognizing the inconsistency, Justice Kennedy (joined by Justice O’Connor), simply turned *Miranda* into a balancing test. In *Elstad*, *Quarles* and *Harris*, Justice Kennedy wrote, evidence obtained in violation of *Miranda* was admitted.¹¹⁸ “This result was based in large part on our recognition that the concerns underlying the *Miranda* rule must be accommodated to other objectives of the criminal justice system.”¹¹⁹ Here, exclusion could not be justified by “a deterrence rationale sensitive to both law enforcement

¹¹¹ *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

¹¹² *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

¹¹³ *U.S. v. Patane*, 542 U.S. 630 (2004).

¹¹⁴ See *supra* notes ___-___ and accompanying text.

¹¹⁵ *Tucker* had raised questions on this score, but it had lain dormant for thirty years. See *supra* note ___ and accompanying text. Justice O’Connor had also revived the issue in *Quarles*, but she was writing alone. *Quarles*, 467 U.S. at 668 (O’Connor, J., concurring in part).

¹¹⁶ *Patane*, 542 U.S. at 643.

¹¹⁷ *Patane*, 542 U.S. at 644.

¹¹⁸ *Patane*, 542 U.S. at 644 (Kennedy, J., concurring).

¹¹⁹ *Patane*, 542 U.S. at 644 (Kennedy, J., concurring).

interests and a suspect's rights during an in-custody interrogation."¹²⁰ The problem, of course, is that Justice Kennedy's reasoning would apply to *any* confession the trustworthiness of which was not in doubt, and that is distinctly *not* what *Miranda* held.

[para on this Term's three *Miranda* decisions]

As numerous commentators have observed, *Miranda* has effectively been overruled.¹²¹ Taken together, *Seibert* and *Patane* invite police officers to simply ignore *Miranda*.¹²² Any confession obtained may well lead the police to physical evidence sufficient to convict. And if not, the two-step methodology is likely to pry loose a confession that under the *Seibert* plurality or Justice Kennedy's concurrence would be admissible.

B. *Stare decisis and Miranda*

But maybe *Miranda* *should* be overruled. Under the factors employed by the Supreme Court to determine whether overruling is appropriate despite the rule of *stare decisis*, there is certainly the argument that it should be. If *Miranda* was an apt case for overruling, and effectively has been overruled, this raises the ultimate questions of why the Court did so by stealth, and what the costs of doing so have been.

The Court frequently reminds us that adherence to precedent is not an "inexorable command."¹²³ Particularly in constitutional cases, the justices emphasize, undue insistence on the principle of *stare decisis* would tether the country to judicial interpretations of the Constitution absent the rare and difficult event of a constitutional amendment.¹²⁴ Thus, the question of whether to overrule a prior precedent requires a delicate analysis. On the one hand, the justices are perfectly aware that it is unseemly for them to constantly change the meaning of the Constitution,

¹²⁰ *Patane*, 542 U.S. at 645 (Kennedy, J., concurring).

¹²¹ See Slobogin, *Toward Taping*, supra note _____, at 309 (calling *Miranda* "a hoax"); Thompson, supra note _____, at 647 ("Seibert and Patane represent the coup de grace for the demise of *Miranda*."); Weisselburg, *Mourning Miranda*, supra note _____, at 1521 ("Miranda is largely dead. It is time to 'pronounce the body,' as they say on television, and move on.").

¹²² See, e.g., Thompson, *Evading Miranda*, supra note _____, at 670 ("The cumulative effect of the Court's jurisprudence has been to free interrogators to obey or disobey *Miranda*'s strictures depending on the balance of advantages and disadvantages.")

¹²³ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

¹²⁴ See *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality opinion) (citing the Court's "considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases"); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting) ("in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions").

especially when doing so seems only to reflect a change in membership on the Court.¹²⁵ On the other hand, there is the problem of being stuck with wrong decisions if the justices do not displace them.¹²⁶

The Court's factors for assessing when overruling is appropriate reflect these concerns. Although these factors seem to have changed over time, and are stated differently in different cases, basically there are four. The Court asks whether a rule has proven unworkable, whether subsequent legal developments have made the rule idiosyncratic and contrary to the texture of the law, whether subsequent factual developments have rendered it perverse, and whether reliance interests justify adherence nonetheless.¹²⁷

Reliance can be moved off the table immediately for overruling, *Miranda* would require undoing nothing. Overruling it would not mean that police forces *had* to stop giving the warnings; only that they could.¹²⁸

¹²⁵ As Justice Jackson once remarked, “moderation in change is all that makes judicial participation in the evolution of the law tolerable.” Jackson, *Decision Law and Stare Decisis*, supra note ___, at 334. See also Payne, 501 U.S. at 850-52 (Marshall, J., dissenting) (proclaiming that overrulings caused solely by changes in the Court's makeup threaten the “conception of the judiciary as a source of impersonal and reasoned judgments”); *Vasquez v. Hillary*, 474 U.S. 254, 265 (noting that stare decisis “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals”); Israel, *Art of Overruling*, supra note ___, at 218 (“the overruling decision represents a source of danger to both professional and popular acceptance of the Court as the disinterested interpreter of the Constitution”); Maltz, *Death of Stare Decisis*, supra note ___, at 484 (citing “the public perception that in each case the majority of the Court is speaking for the Constitution itself, rather than simply for five or more lawyers in black robes.”).

¹²⁶ See *Casey*, 505 U.S. at 963-64 (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) (accusing the majority of “stubbornly refus[ing] to abandon an erroneous opinion”). Justice Roberts gently acknowledged the necessity of overruling bad precedents in his confirmation hearings. See U.S. Sen. Judiciary Comm. Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court (2005) at 2005 WL 2214702 (citing *West Coast Hotel* and *Brown* as times when overruling's drawbacks are “a price that has to be paid”).

¹²⁷ See *Casey*, 505 U.S. at 854-55 (listing workability, reliance, legal evolution, and change in circumstances as factors to be considered in overruling); *Gant*, 129 S.Ct. at 1728 (Alito, J., dissenting) (listing as factors reliance, circumstantial change, workability, evolution of surrounding caselaw, and the quality of reasoning of the precedent); Payne, 501 U.S. at 827-30 (citing quality of reasoning, how many votes the precedent garnered, and whether the precedent has “defied consistent application by the lower courts”).

¹²⁸ Indeed, Paul Cassell sought to assure the court in *Dickerson* that police were likely to continue reading the warnings. Transcript of Oral Argument at 34-35, *Dickerson*, 530 U.S. 428 (No. 99-5525). But See *Kamisar*, *Thirty-Five Years Later*, supra note ___, at 388 n.6 (doubting police would do so in “exceptional” cases and predicting police would use a “diluted” version).

True, criminal defendants might no longer get the warnings, but if *Miranda* is an appropriate case for overruling, there was no entitlement in the first place. When it comes to overruling *Miranda*, reliance is of no moment.

On the other hand, subsequent legal developments suggest overturning *Miranda* would be altogether appropriate. That was precisely the point of the last section – that *Miranda* had effectively been overruled anyway. In any case of stealth overruling, this factor by definition will be met. *Miranda* has been reduced to nothing more than a rule that if a suspect’s statement is taken without warnings but is nonetheless voluntary, that statement may not be admitted in the prosecution’s case-in-chief. However, it can be used to impeach the defendant’s statements,¹²⁹ to extract a second statement after reading *Miranda* warnings,¹³⁰ or to obtain physical evidence condemning the defendant.¹³¹ Any germinal development of *Miranda* has been squelched, and even its most logical consequences curtailed. Subsequent developments have thus undercut the basis for *Miranda* substantially.

As to whether *Miranda* is “workable,” this is complicated given that the Court itself has done the most to hobble the functioning of *Miranda*. Time has proven evanescent any concern that it was difficult for police officers to read *Miranda* warnings. Studies have shown that police could and did read the warnings regularly to suspects.¹³² And though some confessions undoubtedly are lost because of *Miranda*, the data here show it is a relatively small number.¹³³ The real problem with *Miranda*’s workability has come from the fact that the Court has distorted the rule and its rationale. It is the Court itself that has muddied the clarity of the *Miranda* rule.

Nonetheless, there is a growing consensus on the left and the right alike that *Miranda* has proven a “spectacular failure” in that a doctrine designed to empower criminal suspects now favors the police in its very

¹²⁹ Harris, 401 U.S. at 226.

¹³⁰ Seibert, 542 U.S. at 615–17.

¹³¹ Patane, 542 U.S. at 644.

¹³² See Zalman & Smith, *supra* note ____, at 909 tbl.2 (finding, in a survey of 99 large police departments, 86.9% of respondents found *Miranda* did not make policing more difficult). See also Cassel & Hayman, *Interrogation in the 1990s*, *supra* note ____, at 880 (reporting at most a noncompliance rate of 2 percent in a survey of 173); Thomas, *Stories*, *supra* note ____, at 1975–76, (finding a compliance rate of 95 percent in a survey of 211 cases, but noting the shortcomings of the survey, including a likely reporting bias).

¹³³ Compare Cassell, *Miranda’s Social Costs*, *supra* note ____, at 438 (stating *Miranda* has caused prosecutors to lose cases against as many as 3.8% of all criminal suspects questioned), with Schulhofer, *Miranda’s Practical Effect*, *supra* note ____, at 544 (arguing the number is only 0.78%).

application.¹³⁴ Under the present regime, *Miranda* has become a seductive narcotic, inducing many suspects to talk. Relatively soon after *Miranda* itself – but after the composition of the Court had changed – the Court adopted a standard of determining waiver of *Miranda* rights that substantially undercut the rule itself.¹³⁵ Today interrogators take advantage of the low waiver threshold by “conditioning” suspects to talk despite the warnings, by de-emphasizing warnings in the telling,¹³⁶ or by supplementing warnings with the reasons that talking is a good idea, or that asking for a lawyer is a bad one.¹³⁷ As a result, when read their rights most defendants choose to waive them, and spill the beans.¹³⁸

¹³⁴ Thomas, *Illusion*, supra note ____, at 1092 (“[B]y most accounts, *Miranda* has been a spectacular failure.”). See also White, *Waning Protections*, supra note ____, at 78 (describing how police interpret and apply rules from post-*Miranda* cases “in light of their particular concerns.”). Even the staunchest advocates for *Miranda*, such as Yale Kamisar and Stephen Schulhofer, are not sanguine about the job it is doing in its present state. See Schulhofer, *Miranda’s Practical Effect*, supra note ____, at 544; Kamisar, *Fortieth Anniversary*, supra note ____, at 194–97.

¹³⁵ The waiver problem had always been the Achilles heel of *Miranda*. The suspect had to be given all these warnings because she was ill-informed and unable to take care of herself. But if this were the case, how could she ever be in a position to know whether to waive the *Miranda* rights? Absent requiring a lawyer for every suspect, this was a real problem. The court exacerbated it in *North Carolina v. Butler*, when it indicated a knowing waiver could be found based only on the facts that (a) rights had been read; and (b) the suspect talked. See *Butler*, 441 U.S. at 373. Without some more affirmative requirement, any heft *Miranda* was likely to have was reduced greatly. See Thomas, *Separated at Birth*, supra note ____, at 1082 (“[T]he *Miranda* version of the Fifth Amendment permits waiver to be made carelessly, inattentively, and without counsel”).

¹³⁶ See White, *Waning Protections*, supra note ____, at 78–81 (describing de-emphasizing the warnings as “[p]erhaps the most common strategy employed by interrogators seeking *Miranda* waivers. . . .”); Leo, *Impact Revisited*, supra note ____, at 663 (quoting one detective who de-emphasizes the warnings to “make it seem like more of an obligation . . .”).

¹³⁷ See White, *Waning Protections*, supra note ____, at 87 (explaining how police seeking a waiver portray themselves as acting in the suspect’s best interests); *id.* at 95–99 (describing how a detective continued interrogating a suspect who had invoked his right to counsel, and telling him lawyers “really mess up the system. . . .”).

¹³⁸ On the high rate of waivers, see Cassel & Hayman, *Interrogation in the 1990s*, supra note ____, at 860 tbl.3 (83.7 percent of suspects from a sample of 129 waived their rights); Leo, *Interrogation Room*, supra note ____, at 276 (78.3 percent of suspects from a sample of 175 waived their rights). On suspects making incriminating statements, see, e.g., Leo, *Interrogation Room*, supra note ____, at 280 tbl.7 (finding that of 182 interrogations that went beyond the administration of *Miranda* warnings, 22.53% of suspects gave an incriminating statement, 17.58% of suspects gave a partial admission and 24.18% gave full confessions). See also Malone, *After Twenty Years*, supra note ____, at 76 (“Next to the warning label on cigarette packs, *Miranda* is the most widely ignored piece of official advice in our society.”).

The effect is that a decision designed to protect suspects has become in many cases a safe harbor for police officers.¹³⁹ Studies suggest two types of suspects assert their rights: those with prior felony convictions and those economically well-off enough to have had exposure to lawyers in the past.¹⁴⁰ This is hardly the group one would want *Miranda* to advantage. As to the rest, however, as Justice Souter said in *Seibert*: “giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility.”¹⁴¹

The foregoing is not an argument to overrule *Miranda*; rather, it explains why, by the Court’s own standards regarding *stare decisis*, perhaps *Miranda* is apt for overruling. Reliance interests are zilch. *Miranda* has been gutted as a legal matter, and as a factual matter its impact might very well be perverse. And yet, the Court hasn’t overruled the decision explicitly. At which point, one really must ask, why not?

III. THE MOTIVES OF OVERRULING BY STEALTH

This Part examines three possible reasons why justices might choose to overrule by stealth, rather than explicitly. Two of them – a desire for minimalism, or the difficulties of aggregating votes on a collegial court – do not work. The most likely explanation is that stealth overruling is employed to avoid anticipated negative publicity attendant explicit overruling.

A. *The Motive of Minimalism*

Commentators offer different versions of the argument that judges should be minimalists. Cass Sunstein urges that in order to leave space for

¹³⁹ See Fried, *Order and Law*, supra note ____, at 45 (“[M]ost professional law-enforcement organizations had learned to live with *Miranda*, and even to love it, to the extent that it provided them with a safe harbor. . . .”); Thompson, *Evading Miranda*, supra note ____, at 649 (*Miranda* “insulates a stressful interrogation process from judicial scrutiny to determine whether the confession was voluntarily given” and “in cases in which the rights are invoked, the police may be able to ignore *Miranda*, perhaps deliberately, and elicit statements for impeachment use as well as uncovering other admissible derivative evidence.”).

¹⁴⁰ See Leo, *Interrogation Room*, supra note ____, at 286 (finding suspects with felony records four times more likely to invoke *Miranda* rights than those without a record); *Interrogations in New Haven*, supra note ____, at 1644 (finding suspects with prior records less likely to give incriminating statements); Stuntz, *Miranda’s Mistake*, supra note ____, at 993 (describing affluent suspects and recidivists as those most likely “to know that talking to the police is a tactical error . . .”). But see Leo, *Interrogation Room*, at 291 (noting that “class” had no effect on success rate of police interrogation).

¹⁴¹ *Seibert*, 542 U.S. at 608–09.

democratic deliberation, the Supreme Court should in certain circumstances take care to issue decisions that cover no more ground than necessary.¹⁴² Adrian Vermeule, sometimes co-authoring with Sunstein, argues that there are decision costs judges can avoid by being minimalists.¹⁴³ Judges see only a piece of a puzzle, and may lack all the information they need to resolve a matter.¹⁴⁴ By deciding narrowly, judges avoid adopting erroneous decisions with far-reaching consequences. These concerns are heightened in constitutional cases because it is difficult to change judicial rulings. “Restraint,” in various forms, has been urged upon the Justices for a long time.¹⁴⁵

Minimalism may seem particularly appropriate when it comes to precedents like *Miranda*, which were so very maximalist in the first place. That, for example, was the argument Justice Alito looked to make in *Hein*, declining to “extend” *Flast* given “serious separation-of-powers concerns.”¹⁴⁶ A respect for *stare decisis*, combined with a lesson learned about judicial method, might cause a justice to move slowly in scraping away even unwanted residue. Perhaps this explains stealth overruling.

In fact, gradualism is a technique often associated with the present Chief Justice and his Court.¹⁴⁷ There may be an historical reason for this. Although swapping William Rehnquist for John Roberts in the Court’s center chair was seen by commentators as an ideologically-even trade, the common expectation was that Justice Alito would be more conservative than Justice O’Connor, whom he replaced.¹⁴⁸ This led to understandable

¹⁴² See One Case at a Time, supra note ____.

¹⁴³ See Vermeule, Judging Under Uncertainty, supra note ____, at 259-261 (discussing decision costs).

¹⁴⁴ See Sunstein, Trimming, supra note ____, at 1087 (noting that minimalism is indicated when “judges lack the information to justify width or breadth” of ruling”).

¹⁴⁵ See, e.g., Sutherland, Establishment According to Engel, supra note ____, at 40 (“[t]he Court...has wisely created for itself canons of self-limitation, lest it be asked or be inclined to attempt too much...”); McCleskey, Judicial Review, supra note ____, at 365 (describing a doctrine of judicial restraint that “acknowledges the undemocratic character of judicial review”).

¹⁴⁶ See *Hein*, 551 U.S. at 611.

¹⁴⁷ See Cass R. Sunstein, The Minimalist, L.A. Times, May 25, 2006 (noting Judge Roberts’s minimalist philosophy); but see Jeffrey Rosen, The Trial of John Roberts, New York Times, Sept. 13, 2009 (warning that if the Roberts court issued a “sweeping 5-4 decision” in *Citizens United*, Roberts’ “paeans to judicial modesty and unanimity would appear hollow”).

¹⁴⁸ On Roberts, see Joan Biskupic, Roberts, Rehnquist Compel Comparisons: Close Relationship Underscores Transition, USA Today, Sept. 7, 2005, at A12 (quoting Walter Dellinger on the similarity of Rehnquist and Roberts). On Alito, see, e.g., Henry Weinstein, Alito’s Judicial Record a Portrait of Conservatism and Consistency, L.A. Times, Nov. 1, 2005, at A18 (reporting widespread agreement that “Alito is considerably more conservative than Justice Sandra Day O’Connor”).

concern on the left about a sudden rightward turn on the Court, especially with regard to contentious social issues.¹⁴⁹ Perhaps for this reason, in their confirmation hearings both Roberts and Alito gave assurances about adherence to *stare decisis*. Roberts told Senator Specter that “[j]udges have to have the humility to recognize that they operate within a system of precedent”; Alito, for his part, called *stare decisis* “a fundamental part of our legal system,” citing its virtues.¹⁵⁰ In the 2006 stealth overruling cases it was most often the Chief Justice and Justice Alito who were balking at overturning prior decisions. Many have either noted or praised the gradualism of the Roberts Court.¹⁵¹

Even if minimalism were the motive, the argument for stealth overruling would run into two difficulties. First, the justices may want to acquire empirical information about the effects of their rulings, but the Court’s ability to collect such information in a way that fully depicts the actual effects on the ground is dubious.¹⁵² More likely the justices just want to see what kind of reaction a half-way ruling engenders, but that is about publicity, not collecting information about the effects of judgments. Second, the demands of judging still require a principled stopping-point, a half-way ruling that can be explained. Justice Alito may favor *Hein* over an interpretation of *Flast* that allows challenges to executive agency action. But Justice Alito, being a judge, lacks the luxury of choosing the challenges he feels courts should entertain, unless he can think of a principled basis for distinguishing those he would allow from those he would not.

More problematically, decisions like *Seibert*, *Patane* and some of the 2006 stealth cases are not in fact minimalist. While minimalism leaves

¹⁴⁹ See Jo Becker, Television Ad War On Alito Begins; Liberals Try to Paint Court Pick as Tool Of the Right Wing, Wash. Post, Nov. 18, 2005, at A03 (reporting criticisms by liberal groups of Alito’s “record on affirmative action, voting rights, job discrimination and other subjects,” including abortion, as well as ads run by a liberal coalition urging viewers not to let “the right wing...take over your Supreme Court”).

¹⁵⁰ See U.S. Sen. Judiciary Comm. Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court (2005) (statement of Judge Roberts) at 2005 WL 2204109; U.S. Sen. Judiciary Comm. Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court (2006) (statement of Judge Alito), at 2006 WL 75414.

¹⁵¹ See Anderson, Measuring Meta-Doctrine, supra note ___, at 1089-90 (concluding that Roberts “may be among the more minimalist members of the Court remaining”; Editorial, Voting Rights Act Still Needed, Grand Rapids Press, June 28, 2009, at editorial page (praising the Court for “follow[ing] Chief Justice Roberts’ philosophy of judicial minimalism, [and] ruling on a narrow statutory basis,” thus avoiding constitutional challenge to the Voting Rights Act).

¹⁵² See generally Scott Baker and Claudio Mezzetti, A Theory of Rational Jurisprudence (MS 2010) (explaining how courts use rules to gather more information from subsequent cases, and predicting some inconsistency in doctrine while this happens).

things undecided, stealth overruling simply leaves things undone. There has been no subtlety about the Court's negative view of *Miranda*, nothing unresolved. Rather, decisions like *Seibert* and *Patane* purport to live with the core of the rule while doing everything they can to undermine it. They don't hesitate to extend *Miranda*; they slice it back with the viciousness one applies to a long-untended hedge. The same was true of *Hein*. *WRTL* gutted *McConnell*, leaving nothing but the burial.

Nor do the primary rationales for minimalism play when it comes to decisions like *Miranda*. Certainly democratic deliberation is not fostered by failing to overrule *Miranda*, which itself limited what democratic politics would permit.¹⁵³ As Justice Scalia said in *Dickerson*, there is "little harm in admitting that we made a mistake in taking away from the people the ability to decide for themselves what protections (beyond those required by the Constitution) are reasonably affordable in the criminal investigatory process" and "much to be gained by reaffirming for the people the wonderful reality that they govern themselves . . ."¹⁵⁴ Similarly, there is no judicial modesty with regard to decision errors in cases like *Hein*, *WRTL* or *Carhart v. Gonzales*. There is no modesty at all.

The decision in *Citizens United* suggests that rather than being minimalist, the justices are playing a sophisticated game of sequencing rulings to make their decisions appear less activist. Just two Terms after ostensibly deciding on minimalist grounds in *WRTL*, the *Citizens United* Court trumped itself by overruling both *McConnell* (which *WRTL* had gutted) and *Austin v. Chamber of Commerce* (which *WRTL* undermined but technically left untouched).¹⁵⁵ Why the sudden change? *WRTL* was met by no loud burst of anger, so perhaps the Court judged the moment safe for explicit overruling. If so, the majority misjudged terribly.¹⁵⁶ But the remarkable thing is that in explaining why explicit overruling was necessary, Justice Kennedy's majority opinion in *Citizens United* blamed the "complexity of the regulations" put in place by the Federal Election Commission after *WRTL*, which themselves created "the equivalent of prior restraint".¹⁵⁷ But who could criticize the FEC for trying to reconcile the largely irreconcilable, *WRTL* and *McConnell*. In effect, the Court's own decision in *WRTL* had made the doctrine unworkable and thus ripe for overruling!

¹⁵³ *Miranda*, 384 U.S. 436.

¹⁵⁴ *Dickerson*, 530 U.S. at 464–65 (Scalia, J., dissenting).

¹⁵⁵ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). See Hasen, *Beyond Incoherence*, supra note ___, at 1092 ("Without directly overruling *Austin*...the *WRTL* principal opinion seriously undermined [it]").

¹⁵⁶ See infra notes ___ - ___ and accompanying text.

¹⁵⁷ *Id.* at 18-19.

This is not minimalism, properly understood. It is a sophisticated dance in which the Justices take a determined lead, and choose their steps carefully. It is, in its own right, aggressive decision-making.¹⁵⁸

B. The Difficulties of Collegial Decision-making

Alternatively, stealth overruling may occur simply because – as Anthony Amsterdam puts it pithily – the justices must decide by “a committee.”¹⁵⁹ In a justifiably well-regarded article, Frank Easterbrook criticizes the way scholars criticize the Supreme Court.¹⁶⁰ One must distinguish, he urges, between criticism of the conduct of the Justices voting or writing individually, and the same when it pertains to the conduct of the Court majority.¹⁶¹ The Justices must decide by majority vote, after all, and there are well-known dysfunctions with voting processes that may frustrate their ability to develop a coherent and consistent jurisprudence in this context.¹⁶²

The “committee” explanation does not justify stealth-overruling, however, because in each case it is possible to separate the Court majority into the action of individual justices.¹⁶³ Each justice has a choice: either vote to overrule explicitly, or not. In any given case, the question is whether an individual justice’s decision to overrule by stealth was appropriate. Even Easterbrook does not excuse the conduct of justices acting as individuals. “I do not mean to say,” Easterbrook stresses, “that it is pointless to criticize a particular Justice for inconsistency or thick-headedness.”¹⁶⁴

Thus, the question in *WRTL* was whether the Chief Justice or Justice Alito were each acting properly in refusing to overrule *McConnell*.

¹⁵⁸ See Peters, Under-the-Table Overruling, *supra* note ___, at 1102-3 (noting that stealth overruling “may be a logical extension of minimalism,” but does far more than minimalism to change constitutional law).

¹⁵⁹ Amsterdam, Perspectives, *supra* note ___, at 350. See also Idleman, A Prudential Theory of Judicial Candor, *supra* note ___, at 1384-85; Shapiro, In Defense of Judicial Candor, *supra* note ___, at 1384-85.

¹⁶⁰ Easterbrook, Ways of Criticizing, *supra* note ___.

¹⁶¹ See Easterbrook, Ways of Criticizing, *supra* note ___, at 802-03; see also Gerhardt, Silence is Golden, *supra* note ___, at 476 (discussing the fallacy that the Court “operates as if it were a single person making a perfectly rational choice among clearly defined, competing values”).

¹⁶² See Easterbrook, Ways of Criticizing, *supra* note ___, at 814-823 (discussing cycling, path dependence, and strategic voting within the Court).

¹⁶³ See Peters, *supra* note ___, at 1103 (explaining that the question ultimately is for those who did not choose to explicitly overrule); Dorf, *supra* note ___ at 2065 (arguing each judge has opportunity to concur separately).

¹⁶⁴ Easterbrook, Ways of Criticizing, *supra* note ___, at 803.

Were the proffered distinctions between *WRTL* and *McConnell* sufficient to justify refusing to either follow the precedents or explicitly overrule them? None of their colleagues felt so at the time, and as the subsequent decision in *Citizens United* made clear, those colleagues were right.

C. *The Reason That Does Work: Ducking Publicity*

There is one quite persuasive – perhaps even obvious – explanation that remains for why justices engage in stealth overruling: avoiding the publicity attendant explicit overruling.¹⁶⁵ Although public opinion is not often given as a basis for the Court’s decisions, it has played a role with regard to *stare decisis*. As we have seen, part of the concern about overruling in constitutional cases is the way the public will perceive the decision, especially if it appears fueled by little else but a membership change on the Court.¹⁶⁶ This point was poignantly made in *Planned Parenthood v. Casey*. The Joint Opinion of Justices Kennedy, O’Connor, and Souter dwelt in somewhat agonized terms with the crisis of legitimacy the Court would experience if it overruled *Roe*; they concluded that a “terrible price would be paid for overruling.”¹⁶⁷ Although the analysis was somewhat muddled, the conclusion was almost certainly correct. *Casey* was a case of extremely high salience, and the justices had seen ample evidence of the uproar that would attend a decision to overrule *Roe v. Wade*.

What was true regarding overruling in *Casey* might be only slightly less the case with regard to *Miranda*. The Court’s decision in *Dickerson* occurred in the glare of publicity, and polls at the time showed extremely strong public support for *Miranda*.¹⁶⁸ The *Dickerson* case was followed in the media from the time the Fourth Circuit handed down its surprising ruling, and was consistently front-page news.¹⁶⁹ Public support

¹⁶⁵ See Peters, *supra* note ___, at 1090 (public scrutiny provides an “incentive for the Court to overrule precedents it believes to be wrong without being seen to do so”).

¹⁶⁶ See *supra* note ___ and accompanying text.

¹⁶⁷ *Casey*, 505 U.S. at 864. See also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (favoring respect for precedent given “the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments”).

¹⁶⁸ See Lerman, *Accused*, *supra* note ___, at 51 (noting that when *Dickerson* was decided, 86% of the public agreed with the *Miranda* requirements).

¹⁶⁹ A search of the major newspapers database on Lexis showed the Fourth Circuit decision was front-page news in 2 newspapers and non-front page news in 7; the Department of Justice’s brief urging cert was front page news in 9 and non-front page news in 15; arguments were front-page news in 6 and non-front page in 10; and the decision was front page news in 21 and non-front page in 12. See, e.g., Tom Jackman, ‘Miranda’ Rule Challenged; Court in Va. Rejects Required Reading of Rights, *Wash. Post*, Feb. 10, 1999, at A01; Linda Greenhouse, Justices to Hear Case That Tests *Miranda*

for *Miranda* ranged from 70% in the always conservative Rasmussen poll, to a whopping 94% in a Gallup survey.¹⁷⁰ Equally remarkable, support for the precedent varied little based on race or political partisanship.¹⁷¹

The outcome in *Dickerson* appeared driven in some important part by public opinion. In language that was widely noted, the Chief Justice said “We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”¹⁷² Accepting that this drove the result, Salt Lake City’s conservative *Deseret News* was derisive, arguing “the court isn’t supposed to care about public opinion.” Still, it observed that “anyone on the street” would favor reading people their rights, because it is “as American as having the referee’s explanation of a penalty broadcast through stadium loudspeakers.”¹⁷³ Many commentators fingered public opinion as the explanation for the Court’s surprising move.¹⁷⁴ It may well have been the case that there simply was not at the time a majority of the Court committed to overruling *Miranda*. But some of those non-overruling votes may well have been driven by public opinion themselves.¹⁷⁵

In confirmation hearings following *Dickerson*, the decision became a benchmark for one’s fidelity to *stare decisis*. The left-leaning justices took the pledge, one presumes happily. But the same troth was pledged on the right. Alito signed on to Rehnquist’s reasoning in *Dickerson*, explaining, “I think that all the branches of Government had become familiar with it and comfortable with it, and had come to regard it as a

Decision, N.Y. Times, Dec. 7, 1999, at A1; Joan Biskupic, High Court Confronts *Miranda* ‘Conundrum’, Wash. Post, April 20, 2000, at A01; Linda Greenhouse, The Supreme Court: The Precedent; Justices Reaffirm *Miranda* Rule, 7-2; A Part of ‘Culture’, N.Y. Times, June 27, 2000, at A1.

¹⁷⁰ See Gallup, Public Opinion 2000, supra note ____, at 200; Putting The Supreme Court in Perspective, World Net Daily.com, Dec. 20, 2000, available at <http://www.wnd.com/index.php?pageId=7700>.

¹⁷¹ Lerman, Accused, supra note ____, at 51.

¹⁷² *Dickerson*, 530 U.S. at 430.

¹⁷³ Jay Evensen, Op-Ed, ‘Popular culture’ won out in *Miranda*, *Deseret News*, July 2, 2000, at AA01.

¹⁷⁴ See Starr, First Among Equals, supra note ____, at 206 (“Stability when public opinion is genuinely engaged once again proved to be one of the Court’s highest values.”); Consovoy, Rehnquist Court, supra note ____, at 94 (“In *Dickerson*, Chief Justice Rehnquist asserted that somehow society has come to rely upon *Miranda* . . .”).

¹⁷⁵ Justice Breyer indicated as much during oral arguments of *Dickerson*, when he called *Miranda* “a hallmark of American justice” that “probably 2 billion people throughout the world know. . . .” Transcript of Oral Argument at 31, *Dickerson*, 530 U.S. 428 (No. 99-5525).

good way . . . of dealing with a difficult problem.”¹⁷⁶ Justice Thomas denied the *Miranda* decision was “judicial activism,” explaining, “I see it as the Court trying to take some very pragmatic steps to prevent constitutional violations.”¹⁷⁷ The only wishy-washy nominee was Anthony Kennedy, who said *Miranda* was on the “verge of the law,” and that it “is not clear to me that it necessarily followed from the words of the Constitution.” Still “it is in place now, and I think it is entitled to respect.”¹⁷⁸

Not only would the justices have to renege on these commitments to overrule *Miranda*, but public pressure remained on them when *Seibert* and *Patane* were considered. From the time the Court granted certiorari, the media identified these as cases to be watched. Joan Biskupic explained in *USA Today* when the decisions came down, “[t]he two disputes had drawn more attention than the usual criminal law disputes because of the stature that *Miranda* warnings hold in constitutional law and in popular fiction”¹⁷⁹ Editorials urged the Court to reject the “question-first” strategy.¹⁸⁰

Although it is far-fetched to believe the confusing jumble of opinions in *Seibert* and *Patane* were written for the media, they could not have been written to better effect. *Seibert*, with its seeming rejection of the eye-catching “question-first” strategy, was the sexy case to follow. From *The New York Times* to *The Washington Post* to the *Houston Chronicle*, the lead was something akin to “Police Tactic to Sidestep *Miranda* Rights Rejected.”¹⁸¹ The *Patane* decision invariably was buried deep – and the focus was on the fact that *Patane* told the cops he already

¹⁷⁶ Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 320 (2006).

¹⁷⁷ Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 102nd Cong. 334 (1991).

¹⁷⁸ Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 204–06 (1987).

¹⁷⁹ Joan Biskupic, Justices invalidate ‘question-first’ tactic of police, *USA Today*, June 29, 2004, at 11A.

¹⁸⁰ E.g., Editorial, A *Miranda* Loophole, *Wash. Post*, Dec. 14, 2003, at B06; Editorial, An End Run Around *Miranda*, *N.Y. Times*, Dec. 9, 2003, at A30; Editorial, The Value of *Miranda*, *L.A. Times*, Nov. 15, 2003, at B30.

¹⁸¹ See, e.g., Curt Anderson, Decision limits two-step police interrogations, *Houston Chron.*, June 29, 2004, at A3; Linda Greenhouse, Tactic of Delayed *Miranda* Warnings is Barred, *N.Y. Times*, June 29, 2004, at A17; Jerry Markon, Police Tactic to Sidestep *Miranda* Rejected, *Wash. Post*, June 29, 2004, at A1.

knew his rights and didn't need them read.¹⁸² Some stories noted the "mixed message" of the decisions, but this was deep into the story.¹⁸³ Only the Court-and law-savvy SCOTUSblog saw *Patane* as the big story, which assuredly it was.¹⁸⁴

Is it remotely plausible that the treatment of the two cases would have been the same had *Miranda* been overruled explicitly? *Seibert* and *Patane* did not even make it to the front page of many newspapers.¹⁸⁵ Is it possible the overruling of *Miranda* would have been anything other than screaming front page news? Why take the chance, when *Miranda* can be whittled to nothing slowly, suffering a death by many cuts?

A counter-example – the case of *Montejo v. Louisiana* – underscores the point. *Montejo* was decided during the 2008 Term.¹⁸⁶ The facts were outrageous. Following appointment of counsel at a preliminary hearing, the police took a defendant on a hunt for the murder weapon, during which they obtained from him a waiver of his *Miranda* rights as well as a note to the victim's widow inculcating himself. The question presented was whether in doing so without the defendant's lawyer's knowledge or consent, the police violated the rule of *Michigan v. Jackson*. *Michigan v. Jackson* squarely held that following the assertion of counsel in criminal proceedings, the police may not question a suspect or obtain a waiver of the right to counsel without that lawyer present.¹⁸⁷

¹⁸² See, e.g., Linda Greenhouse, Tactic of Delayed Miranda Warnings is Barred, N.Y. Times, June 29, 2004, at A17; Jerry Markon, Police Tactic to Sidestep Miranda Rejected, Wash. Post, June 29, 2004, at A1.

¹⁸³ See, e.g., Brad Knickerbocker & Alexandra Marks, Two Court rulings highlight a delicate balance on Miranda, Christian Sci. Monitor, June 29, 2004, at 10; David G. Savage, Divided High Court Upholds Miranda Warnings, L.A. Times, June 29, 2004, at A20.

¹⁸⁴ *Patane* and *Seibert*: The Miranda Cases, SCOTUS Blog, June 28, 2004, available at http://web.archive.org/web/20040630001625/http://www.goldsteinhowe.com/blog/archive/2004_06_27_SCOTUSblog.cfm.

¹⁸⁵ A search of the major newspapers database in Lexis showed the decisions made the front page of 2 newspapers, but the other 10 news articles on them were not on the front page. See, e.g., William Lamb, Police technique to win confessions is struck down, St. Louis Post-Dispatch, June 29, 2004, at A01; Jerry Markon, Police Tactic to Sidestep Miranda Rights Rejected, Wash. Post, June 29, 2004, at A01; Linda Greenhouse, Tactic of Delayed Miranda Warning is Barred, N.Y. Times, June 29, 2004, at A17. While *Seibert* and *Patane* were handed down on a busy news day – the same day decisions in *Hamdi*, *Rasul* and *Padilla* were released and the day United States transferred political authority to the interim Iraqi government – many cases make front-page news despite such timing. See, e.g., Epstein & Segal, Issue Salience, *supra* note _____, at 73 (arguing front-page stories carried by The New York Times are a reliable measure of a decision's salience).

¹⁸⁶ *Montejo*, 129 S.Ct. 2079.

¹⁸⁷ *Jackson*, 475 U.S. at 636.

The Louisiana Supreme Court distinguished *Michigan v. Jackson* on the ground that *Montejo* did not affirmatively ask for a lawyer at his preliminary hearing; rather, he remained silent when one was appointed to him.¹⁸⁸

The *Montejo* Court overruled *Michigan v. Jackson* in a way that gives the lie to any claim that modesty and minimalism are driving the Court. No one had asked that *Michigan v. Jackson* be overruled, the Court did it on its own initiative.¹⁸⁹ In doing so, there was no showing that *Michigan v. Jackson* was inconsistent with other decisions, or that the factual premises behind it had changed.¹⁹⁰ In contrast to *Miranda*, however, *Montejo* was an easy mark, a decision in which the Court could be confident to fly under the radar. The case had garnered no significant notice from the time the Court granted certiorari, through its decision.¹⁹¹

The hullabaloo surrounding *Citizens United* may seem to undercut the publicity argument, but that decision may have been a case of miscalculation.¹⁹² The *WRTL* decision occasioned some legal commentary for stealth overruling, but it went down with relatively little public notice, and even less of an outcry.¹⁹³ Perhaps the reaction was enough to embolden the justices to proceed to decision in *Citizens United*.

¹⁸⁸ *Montejo*, 129 S.Ct. at 2082–83.

¹⁸⁹ This issue was not raised by the parties, but by the amici brief of 17 attorneys general who called the Jackson rule “unnecessary.” Brief for States of New Mexico, et al. as Amici Curiae Supporting Respondents, *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009) (No. 07-1529), 2008 WL 5417429. Justices repeatedly questioned *Montejo*’s counsel about overruling Jackson at oral arguments, and two months later the Court asked for supplemental briefing on the issue.

¹⁹⁰ See *Montejo*, 129 S.Ct. at 2094 (Stevens, J., dissenting) (arguing the majority “rejects Jackson outright” “on its own initiative”).

¹⁹¹ A search of the major newspapers database in Lexis showed no news coverage of *Montejo* when the court granted cert, one non-front page article on oral arguments, and one front page story and four non-front page stories when *Montejo* was decided. See, e.g., Jeff Adelson, Interrogation of Tammany killer OK’d, *Times-Picayune*, May 27, 2009, at 1; David Stout, Court Eases Restrictions on Questioning Suspects, *N.Y. Times*, May 27, 2009, at A15; Jessie J. Holland, Court relaxes rules on police questioning, *Boston Globe*, May 27, 2009, at 6.

¹⁹² See Barry Friedman and Dahlia Lithwick, Did the Roberts Court misjudge the public mood on campaign finance reform?, *Slate*, Jan. 25, 2010 (suggesting that the *Citizens United* court misjudged its decision).

¹⁹³ The decision was front-page news in 6 newspapers and non-front page news in 12, according to a search of the major newspapers database in Lexis. Among editorials, *The New York Times* and *The Washington Post* were harshly critical of the decision. However, many other editorial boards focused instead on the apparent inconsistency with *Hein*. See, e.g., Editorial, Political speech: yes, *L.A. Times*, June 26, 2007, at A22; Editorial, Free Speech and Campaigns, *Chi. Trib.*, June 26, 2007, at C12.

Still, *Citizens United* serves only to underscore the sort of publicity explicit overruling of important precedents can engender. The case was front page news virtually everywhere.¹⁹⁴ The President criticized it. It became the focus of controversy at the State of the Union address, when the President challenged the justices publicly over the decision, and one justice in reacted in a negative way.¹⁹⁵ Polls show overwhelming dissatisfaction on both sides of the ideological line, and Congress is considering action in response.¹⁹⁶

Of course, *Citizens United* also might have been part of a strategic calculation. The Supreme Court enjoys a certain amount of “diffuse support,” which is to say the public will support the institution despite results it dislikes.¹⁹⁷ So, the justices may simply take the publicity hit in the cases that matter most to them. Justices Kennedy and Scalia had dissented in *Austin*, and had been looking to overrule it.¹⁹⁸ Finally having the votes, perhaps they were disinclined to back away. That might also have been necessary if the Federal Election Commission was unlikely to follow *WRTL* faithfully, a point we come to presently.

Whatever the case with *Citizens United*, history unequivocally demonstrates that Court decisions attracting broad, negative attention tend to encourage attacks and jeopardize the Court as an institution. It is easy to see why the justices might want to avoid this sort of publicity when possible. Whether it is plausible and legitimate for them to do so is the focus of the final Part.

¹⁹⁴ The decision made the front page of 20 newspapers, according to a search of the major newspapers database in Lexis. It also sparked 20 editorials and 46 non-front page news articles. See, e.g., Adam Liptak, Justices, 5-4, Reject Corporate Campaign Spending Limit, N.Y. Times, Jan. 22, 2010, at A1; Robert Barnes and Dan Eggen, Court rejects corporate political spending limits, Wash. Post, Jan. 22, 2010, at A01.

¹⁹⁵ See Adam Liptak, A Rare Rebuke, In Front of a Nation, N.Y. Times, Jan. 29, 2010, at A12 (describing President Obama’s remarks and the response of Justice Alito).

¹⁹⁶ See Dan Eggen, Corporate sponsorship is campaign issue on which both parties can agree, Wash. Post, Feb. 18, 2010, at A15 (reporting 80% of respondents in a poll of 1,005 disagreed with the decision, including 85% of Democrats and 76% of Republicans); James Oliphant, Campaign finance bill aims to blunt court ruling, Chi. Trib, Feb. 12, 2010, at C14 (examining a “legislative counterattack” proposed 22 days after the decision).

¹⁹⁷ See Easton, Re-Assessment, *supra* note ___, 436-7 (setting out the concepts of specific and diffuse support); Friedman, Mediated, *supra* note ___, at 2614-29 (explaining diffuse support and exploring its application to the Court).

¹⁹⁸ McConnell, 540 U.S. at 323 (Kennedy, J., concurring) (“Instead of extending *Austin*...I would overrule it”); *WRTL*, 551 U.S. at 490 (Scalia, J., concurring) (calling *Austin* “wrongly decided”).

IV. THE WAGES OF STEALTH OVERRULING

Many commentators take the position that judicial decisions should be “candid.”¹⁹⁹ If candor were an absolute requirement of judging, stealth overruling would be deeply problematic. Other scholars, however, doubt the absolute necessity, or even propriety, of judicial candor.²⁰⁰ They argue, among other things, that candid opinions can hurt the legitimacy of the judiciary,²⁰¹ that the public may not obey controversial judgments if they are candidly phrased,²⁰² that legal doctrine requires a certain amount of disingenuousness to appear coherent and continuous,²⁰³ or that the production of joint opinions may require some dissembling.²⁰⁴ We have already rejected the latter argument, the idea that stealth overruling is inevitable because of the difficulty in garnering a majority of the justices in favor of explicit overruling.

The final section of this article, Section C, below, considers the normative merits of these other arguments in favor of stealth overruling. Such arguments necessarily are based in the need to keep constitutional law autonomous from immediate public passions, or in the justices’ desire to protect the Court as an institution by making its doctrine appear more continuous. Before turning to the ultimate normative questions, however,

¹⁹⁹ See Schwartzmann, *Judicial Sincerity*, supra note ___ (providing a nonconsequentialist argument for judicial candor, grounded in moral and political values); Idleman, *A Prudential Theory of Judicial Candor*, supra note ___, at 1334-81 (identifying and critiquing the nine principal rationales for judicial candor); Leflar, *Honest Judicial Opinions*, supra note ___, at 740-41 (calling for judges to be candid about the “moral, social, or economic” reasons for their decisions); Shapiro, *In Defense of Judicial Candor*, supra note ___ (considering and mostly rejecting arguments against candor).

²⁰⁰ For three surveys of the arguments against judicial candor, see Idleman, *A Prudential Theory of Judicial Candor*, supra note ___, at 1381-95; Schwartzmann, *Judicial Sincerity*, supra note ___, at 988-89; Shapiro, *In Defense of Judicial Candor*, supra note ___, at 739-750.

²⁰¹ See Idleman, *A Prudential Theory of Judicial Candor*, supra note ___, at 1388-94 (citing unanimity, civility, and doctrinal continuity as traits that enhance judicial legitimacy but which are sometimes disserved by candor).

²⁰² See Hirsch, *Candor and Prudence*, supra note ___, at 866 (defending the euphemistic use of “desegregation” rather than “integration” in *Cooper v. Aaron*).

²⁰³ See Gilmore, *Law, Logic*, supra note ___, at 37 (praising “the pretense that change is not change”); Shapiro, *In Defense of Judicial Candor*, at 739-742 (taking up and rejecting this argument); Idleman, *A Prudential Theory of Judicial Candor*, supra note ___, at 1392-94 (taking a less skeptical view of this argument);

²⁰⁴ See Idleman, *A Prudential Theory of Judicial Candor*, supra note ___, at 1384-85; Greenawalt, *Neutral Principles*, supra note ___, at 1007 (“Supreme Court Justices, and other judges, vary considerably in their willingness to join opinions they do not find intellectually persuasive”).

there are intriguing subtleties and additional costs of stealth overruling that need be assessed.

To make stealth overruling work, the Court must be able to communicate independently with two separate audiences. It must direct lower courts and officials as to what it wants done, while persuading the public that nothing (significant) is happening. Section A explains how the Court is able to achieve this sort of “acoustic separation.” Section B then describes the costs associated with it, including confusion in the doctrine and the encouragement of defiance of Supreme Court decisions. Section C concludes, arguing that constitutional lawmaking by an independent judiciary is illegitimate unless subject to public scrutiny and dialogic engagement.

A. *Speaking to Separate Audiences: the Problem of Stealth Overruling*

The Supreme Court’s primary function is not resolving individual cases, but handing down rules that govern the conduct of individuals and the lower courts.²⁰⁵ Stealth overruling complicates this task. Because the justices who engage in stealth overruling are treating precedents less than candidly, they necessarily send mixed messages. Yet, those messages must be interpreted and followed by the lower courts and government officials.

Stated differently, stealth overruling involves a tradeoff. On the one hand, the Court obscures what it is doing in a way that avoids engendering negative publicity and possible backlash. On the other hand, the cost of doing so is that the message transmitted to those who must implement the decision is less clear than it otherwise might be, risking non-compliance with the preferences of the justices in the majority. This is the case even if those who must implement the decision would like very much to follow the justices’ lead. The problem is exacerbated if those implementers are hostile to the Court’s mission and can be expected to take advantage of any lack of clarity.

The difficulty the justices face in this regard was apparent after *WRTL*, and may help explain the *Citizens United* decision.²⁰⁶ As we have seen, Justice Kennedy criticized the regulations promulgated by the Federal Election Commission to implement *WRTL*. Even assuming all

²⁰⁵ See *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923) (Court’s function is to guide lower courts and resolve important public questions, not “merely to give the defeated party in the Circuit Court of Appeals another hearing”); Shapiro, *Limits*, supra note ____, at 275-296 (chronicling the Court’s efforts to avoid error correction).

²⁰⁶ *Citizens United v. FEC*, No. 08-205 (U.S. Jan. 21, 2010).

good faith on the part of the FEC, however, squaring *WRTL* with the prior *McConnell* decision was no easy task. To the extent the FEC was less a partisan for free speech than the Court, and more concerned about corporate money in elections, its failure to do what the justices may have wanted (but did not precisely say) was entirely predictable. Stealth overruling may not always be effective.

The effectiveness of stealth overruling ultimately turns on the ability of the justices to achieve what Meir Dan-Cohen has called “acoustic separation.”²⁰⁷ In Dan-Cohen’s work he distinguished between “conduct” rules and “decision” rules. The former are those that govern the conduct of ordinary individuals; the latter the rules judges would apply in resolving cases. Ideally, we may not want the two to be the same. To use one of Dan-Cohen’s examples, greater compliance with the criminal law might be achieved if the public-at-large adhered to the notion that “ignorance of the law is no excuse.” But the court would achieve more equitable results if it tempered this general rule with a dozen or more mitigating circumstances: did the defendant rely on an authoritative statement of the law? Was the offense an omission, rather than an act? Is the charge based on a regulation, rather than a statute?²⁰⁸

For the whole thing to work, however, the law must achieve “acoustic separation.” The public must know the general principle, but not the doctrines that courts will apply. Otherwise, the members of the public will adjust their behavior to the decision rules, undermining the value of the distinction.

In stealth overruling, then, the justices must speak to two audiences. That is to say, the justices must effectively limit prior precedents and establish the legal rules they prefer in a way that lower courts and officials (because these are constitutional decisions) will follow. But the public must remain unaware of these instructions, or the value of stealth is lost.

In the *Miranda* context, the Court has shown that it is fully capable of addressing these different audiences separately in the same opinions. As Carol Steiker said in a related context, “the police are very apt to ‘hear’ the decision rules that the Supreme Court makes (and that lower federal and state courts apply) and thus to adjust their attitudes about what behavior ‘really’ is required by the Court’s conduct rules.”²⁰⁹ Yet, as she

²⁰⁷ Dan-Cohen, *Acoustic Separation*, supra note ____.

²⁰⁸ Dan Cohen, *Acoustic Separation*, supra note ____, at 646.

²⁰⁹ Steiker, supra note ____, at 2538. Steiker’s analysis of the Burger and early Rehnquist’s Court’s treatment of Warren Court’s criminal procedure decisions is extremely instructive. She argues that those justices largely preserved the substantive decisions, but sharply altered the “decision” rules about things like the admissibility of

observed, the media would have a hard time explaining these decision rules to the public, who largely miss what was happening.²¹⁰ Precisely the same is true here. As we have seen, the public supports *Miranda* and appears to believe it is alive and well.²¹¹ Police officials and the lower courts nonetheless have plainly understood that the justices, despite appearing to uphold *Miranda*, think the rule is wrong and thus can often be violated with impunity.

Examining the cases involving police interrogation that arose after *Seibert* and *Patane* were decided lands a reader in a virtual cabbage-patch of disingenuous police behavior, or flat-out ignoring of *Miranda*. In case after case after case, *Miranda* warnings are not read, without any really plausible explanation why. Officers investigating a vehicular homicide lock the suspect in the back of a police car and interrogate him: no *Mirandas*.²¹² Officers take a suspect into custody and confront him with illegal drugs, asking whose they are. No *Mirandas*.²¹³ Or, *Miranda* warnings are read and suspects assert their rights, only to have them ignored. People ask for lawyers, and agents plow on.²¹⁴ Particularly in *Patane* “fruits” cases, lawyers for the government readily concede the *Miranda* violation.²¹⁵ After all, it doesn’t matter, because the physical evidence necessary for conviction will still be admitted. Unless one is willing to believe that some forty years after *Miranda* law enforcement officials simply do not know they have to read the warnings, or forget

evidence. *Id.* at 2471-2532. Interestingly, Steiker was skeptical that this acoustic separation was intentional on the part of the justices. *Id.* at 2542. With regard to stealth overruling, on the other hand, the claim here is the opposite.

²¹⁰ Steiker, *supra* note ____, at 2538.

²¹¹ In the four decades since *Miranda*, public support for the decision has more than doubled. Compare Stuart Taylor Jr., *The Rehnquist Court*, National J., May 21, 2005 (citing a Newsweek poll showing 86% approval of Dickerson) with Lain, Hero or Zero, *supra* note ____, at 1421-24 (describing 1966 polls showing a 2-to-1 opposition to *Miranda*, and noting flaws). By 2000, a national survey found 91% of those polled support the decision – including every racial group – and a majority of those strongly supported it. Ronald Weitzer & Steven A. Tuch, *Race and Policing in America: Conflict and Reform* 144-45 (2006). On the public’s knowledge of *Miranda*, see Leo, *Impact Revisited*, *supra* note ____, at 651 (citing polls showing that in 1984, 93% of those surveyed knew they had a right to an attorney if arrested and in 1990 80% of respondents knew they had a right to remain silent).

²¹² Tengbergen, 9 So.3d at 732.

²¹³ Walker, 518 F.3d at 984.

²¹⁴ See, e.g., *Brown v. State*, 663 S.E. 2d 749, 754 (Ga. 2008) (allowing police to use statements obtained after a suspect’s request for counsel to support a warrant for DNA from that suspect).

²¹⁵ See, e.g., *Thevenin*, 948 A.2d at 860 (“It is conceded that no *Miranda* warnings were given”); *Knapp*, 700 N.W. 2d at 903 (recounting a detective’s testimony that he intentionally withheld warnings to “keep the lines of communication open”).

them a lot, the conclusion is evident: they simply are dispensing with them because, all things considered, law enforcement has received the Supreme Court's message not to take *Miranda* seriously. They know they will not be penalized for violating the rule.

It's not just the agents; to make the whole thing work, the Supreme Court's decisions have reduced the lower courts to a group of *post hoc* rubber-stamping magistrates. There are the occasional judges and courts that simply cannot excuse blatant subterfuge.²¹⁶ But most simply go along. In the vehicular homicide case mentioned above, the court actually stated, "The fact that [the suspect] was questioned while handcuffed in the backseat of a police vehicle without *Miranda* warnings does not in and of itself show a deliberate and calculated method to undermine the safeguards guaranteed in *Miranda*."²¹⁷ But what was it, then? Total incompetence? In *United States v. Heron*, the Seventh Circuit blessed introduction of a confession obtained by a nine-year veteran of the Drug Enforcement Agency who engaged in an evident version of the "question-first" strategy.²¹⁸

The lower courts seem to have gotten the message that *Miranda* just doesn't matter. Examining lower court decisions in the aftermath of *Patane*, the vast majority of them are admitting evidence despite apparent *Miranda* violations. Since *Patane* there are 32 three- or four-star cases on Westlaw in the federal courts involving the case; of these, the evidence was admitted in 29, or 90.6%.²¹⁹ *Patane* being relatively clear as to the admissibility of fruits despite the failure to comply with *Miranda*, the pattern should not be surprising (though it is still impressive in terms of the frequency with which law enforcement simply ignores *Miranda* in *Patane*'s wake). But the statistics are similar in post-*Seibert* cases, in which the Court's message was decidedly more ambivalent. There were

²¹⁶ See, e.g., Carrasco-Ruiz, 587 F.Supp.2d at 1094 ("[N]o plausible explanation has been offered for failing to give [the defendant] the *Miranda* warnings at the beginning of the interrogation."); Villa-Gonzalez, 2009 WL 703682, at *13 (D. Neb. March 16, 2009) (suppressing, under the Fourth Amendment, physical evidence gained from a warrant supported by statements a defendant made after invoking his right to counsel).

²¹⁷ Tengbergen, 9 So. 3d at 735.

²¹⁸ *Heron*, 564 F.3d at 879. The court simply deferred to the lower court's view that the failure to read *Miranda* warnings was not deliberate, a finding that is hard to fathom given the DEA's years of experience, and the implausible explanation that was offered. *Id.* at 886-87.

²¹⁹ These figures exclude habeas petitions and claims under 42 U.S.C. §1983, and are limited to cases decided after Dec. 31, 2005. This was done to focus on prosecutions where the police conduct at issue occurred largely after the decision in *Patane*.

96 post-*Seibert* three- or four-start Westlaw cases in federal court: of these, the evidence was admitted in 76 cases, or 79.2 % of the time.²²⁰

Acoustic separation, then, appears to be working. Although the Court has taken no hit with the public for overruling a time-honored and popular precedent, police officials and lower courts understand the legal status of the decision. *Miranda* can be ignored with virtual impunity.

B. *The Costs of Acoustic Separation*

The question is whether achieving this sort of acoustic separation is costless. If so, then the only remaining issue is the normative issue taken up in Section C. As it happens, however, there are costs associated with the successful use of acoustic separation to make stealth overruling work. One cost of stealth overruling is that inevitably the doctrine is jumbled, causing confusion in the lower courts and leaving room for treating like cases unlike. Perhaps more seriously, the Court is fostering low-level defiance of its decisions, in a way that may well threaten the justices' long-term institutional efficacy.

1. Creating doctrinal confusion

If likes are treated alike, ultimately it is not because the Court resolves every case according to this ideal, but because it gives sufficiently clear and transparent marching orders to the lower courts that they can dispose of cases in an equivalent fashion.²²¹ Political scientists studying courts often see the lower courts as striving to impose their own preferences on cases despite orders from above.²²² As we will see, in the post-*Seibert* and *Patane* decisional data, there may be some truth to this. But even assuming the lower courts want to travel in the traces with the Supreme Court, those traces must be clear.²²³

²²⁰ This data also excludes habeas petitions and claims under 42 U.S.C. §1983, and is limited to cases decided after Dec. 31, 2005.

²²¹ See Hathaway, Path Dependence, supra note ___, at 652-54 (arguing precedent helps judges to treat likes alike).

²²² See McNollgast, Politics and the Courts, supra note ___, at 1635-36 (depicting lower-court judges as strategic actors trying to pursue personal policy agendas despite the threat of reversal); Cameron, Defiance, supra note ___, at 5 (“legal doctrine within the federal judiciary emerges from an unrelenting struggle between the few – the hierarchical superiors – and the many – the hierarchical subordinates”). But see Cameron, Hierarchy of Justice, supra note ___, at 690 (concluding empirically that lower-court judges obey the Supreme Court).

²²³ See Klarman, Jim Crow to Civil Rights, supra note ___, at 5 (observing that “when the law is clear, judges will generally follow it”); Canon, Judicial Policies, supra note ___, at 49 (finding “ambiguous, vague, or poorly articulated” opinions are more likely to

The first evil of stealth overruling is that in some cases it makes it difficult if not impossible for the lower courts to know what they are being instructed to do.²²⁴ When the justices say one thing and do another, or deliberately obscure what they are saying, meaning naturally gets confused and lost. This seems self-evident. The lack of clarity not only ensures likes are often not treated alike, it also undermines the virtue of predictability almost universally thought important in the law.²²⁵

This argument about lower court confusion holds despite the fact that the prior section argued lower courts are “getting the message” about *Miranda*. Superficially, the two arguments may seem to be in tension. However, even though lower courts in some stealth overruling cases do get the general sense of what outcomes should be, there still will be more difficult cases in which those outcomes are uncertain given doctrinal confusion. Moreover, when lower courts do disagree with the trend of the doctrine, they will take advantage of doctrinal confusion in resolving cases, ensuring likes are not treated alike.

The reaction in the lower courts to *Missouri v. Seibert* is a case in point. In *Seibert*, the Court ruled by a vote of 5-4, but the majority split into three separate opinions.²²⁶ In a gentle description of the situation, New Jersey’s intermediate appellate said “[t]he *Seibert* opinions have sown confusion in federal and state courts, which have attempted to divine the governing standard that applies in successive interrogation cases involving warned and unwarned confessions.”²²⁷

Many of the lower courts have followed Justice Kennedy’s opinion in *Seibert*, on the basis that under the rule in *Marks v. United States* – which applies when there is a fractured majority – Kennedy’s opinion offered the “narrowest” grounds supporting the disposition.²²⁸ There is some reason to believe this was a correct application of *Marks*. Justice

produce a range of dissimilar lower court interpretations); Staudt, Modeling Standing, supra note ___, at 659 (finding that judges adhere to clear precedent, but take “an unpredictable approach to decisionmaking” when precedent is unclear).

²²⁴ See Roosevelt, Constitutional Calcification, supra note ___, at 1691 (noting of Supreme Court “subterfuge” that “[i]t is confusing to lower court judges, who must puzzle out how to follow a Court whose words diverge from its practice”).

²²⁵ See The Constitution of Liberty, supra note ___, at 156-57 (“the law tells [each person] what facts he may count on and thereby extends the range within which he can predict the consequences of his actions”).

²²⁶ *Seibert*, 542 U.S. 600 (2004).

²²⁷ *State v. O’Neill*, 388 N.J. Super. 135, 148 (App.Div. 2006).

²²⁸ *Marks*, 430 U.S. 188 (1977). Six circuits regard Justice Kennedy’s concurrence as controlling. See *U.S. v. Naranjo*, 426 F.3d 221, 231–32 (3d Cir. 2005); *U.S. v. Mashburn*, 406 F.3d 303, 308–09 (4th Cir. 2005); *U.S. v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *U.S. v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007); *U.S. v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006); *U.S. v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006).

Kennedy, after all, said that unlike the plurality he would apply his multi-factor analysis only in cases in which the police deliberately question outside *Miranda*.²²⁹ His rule is similar (though not identical) to the plurality rule.²³⁰

Other courts, however, have found “it a strain at best to view [Kennedy’s] concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree.”²³¹ This was the position of the Seventh Circuit in *United States v. Heron*.²³² Why? Because “Justice Kennedy’s intent-based test was rejected by both the plurality’s opinion and the dissent in *Seibert*.”²³³ Even assuming that in his own concurrence Justice Breyer agreed with Justice Kennedy (and “it is hard to be sure,” notes the Seventh Circuit), that still leaves Justice Kennedy’s view governing by a vote of 2-7.²³⁴ Not so good when it comes to making law.

Though some courts facing this confusion have simply punted and analyzed cases under both standards,²³⁵ there is a non-trivial subset of cases in which the outcome rests on determining which test is the law. Justice Souter chose an “objective” test that looks to how a reasonable suspect might see things.²³⁶ The reasonable suspect might be puzzled indeed to have a confession extracted from him, only to be warned not to talk – and then to be questioned further! Justice Kennedy’s test, on the other hand, looks initially to whether the police were engaging in the charade deliberately.²³⁷ So, in cases in which the police were not acting in bad faith – as the applying court understands the concept – yet the suspect was confused nonetheless about the freedom to stay mum after the *Miranda* warnings finally were delivered, the suspect will win under Souter’s test, and lose under Kennedy’s.²³⁸

²²⁹ *Seibert*, 542 U.S. at 621–22 (Kennedy, J. concurring).

²³⁰ Compare *Seibert*, 542 U.S. at 611–12 (plurality) with *Seibert*, 542 U.S. at 621–22 (Kennedy, J., concurring).

²³¹ *Heron*, 564 F.3d at 884. See also *U.S. v. Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., dissenting).

²³² *Heron*, 564 F.3d at 884–85.

²³³ *Heron*, 564 F.3d at 884.

²³⁴ *Heron*, 564 F.3d at 884.

²³⁵ See, e.g., *Pacheco-Lopez*, 531 F.3d at 426–430; *Carrizales-Toledo*, 454 F.3d at 1151–53; *Lucas*, 2009 WL 1798610, at *3.

²³⁶ *Seibert*, 542 U.S. at 611–12.

²³⁷ *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

²³⁸ See, e.g., *Zubiate*, 2009 WL 483199 at * 9 (finding the conduct of ICE agents, who interrogated a suspect for 15 minutes before providing the warnings, would not satisfy the plurality test, but that the statement would satisfy Kennedy’s because the conduct was not “calculated”); *Capers*, 2007 WL 959300 at *15 & *15n.7 (explaining a postal inspector’s lack of “specific intent to evade *Miranda*” would make the statement admissible under Kennedy’s test, even though the absence of such intent “made no difference at all in the

By sending confusing messages, the justices run the risk of losing control over the direction of the law altogether. Take, for example, what the lower courts have done with Justice Kennedy's opinion in *Seibert*. In distinguishing *Elstad* from the conduct in *Seibert*, Justice Kennedy criticized the fact that "[t]he police used a two-step questioning technique based on a deliberate violation of *Miranda*," which he said was done "to obscure both the practical and legal significance of the admonition when finally given."²³⁹ Accordingly, "[i]f the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."²⁴⁰

Justice Kennedy seems plainly to be saying that any time *Miranda* warnings are withheld deliberately before obtaining the first statement, curative measures are required. But lower courts have interpreted that opinion to mean that absent a deliberate, pre-established two-step procedure – effectively some sort of policy in place – then the failure to read the first *Miranda* warnings essentially is ignored altogether when evaluating the second statement. In case after case in which it is impossible to regard the failure to read the warnings as a mistake, courts still overlook this absent a blatant admission by the police that their tactics were deliberate.²⁴¹

impact [of the interrogation] on [the] defendant" who confessed during pre-warning questioning). This decision also affects the standard of review on appeal. Most appellate courts review cases applying Justice Kennedy's deliberateness test for clear error. See, e.g., *Naranjo*, 426 F.3d at 232; *Stewart*, 536 F.3d at 716–17; *Torres-Lona*, 491 F.3d at 758. But see *Street*, 472 F.3d at 1314 (appearing, implicitly, to apply de novo review). However, when confronting Justice Kennedy's test and Justice Souter's test in a single opinion, appeals courts have applied clear error to Kennedy's and, implicitly, de novo review to Souter's. See, e.g., *Heron*, 564 F.3d at 886–87 (using clear error language in applying the Kennedy test and omitting it in finding the statement is admissible under Souter's test). For a heated fight on the applicable standard of review, see *Pacheco-Lopez*, 531 F.3d at 427–29.

²³⁹ *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring).

²⁴⁰ *Seibert*, 542 U.S. at 622.

²⁴¹ See, e.g., *Jump*, 983 So.2d at 727 (finding failure to Mirandize suspect before eliciting information that drugs belonged to him not deliberate); *Pounds*, 2008 WL 4603273, at *7, (finding no "planned or deliberate" violation after police admitted an initial interrogation violated *Miranda* but sent two new officers to interrogate the suspect again an hour later); *Naranjo*, 223 Fed.Appx. at 169 (emphasizing the court is "distressed by the failure of agents to issue *Miranda* warnings in a timely fashion" yet finding no deliberate disregard of *Miranda* when the agents forced a suspect from his car at gunpoint and repeatedly questioning him without warnings) (for factual background, see *Naranjo*, 426 F.3d at 223–26); *Stevenson*, 2008 WL 4296561, at *1-4 (interrogating a shooting victim known to be in illegal possession of a firearm two times before arresting him and two times after

The problem of disparate interpretation – and of not treating likes alike – is exacerbated given the varying ideologies of the lower courts. As we saw above, almost all federal judges have the message about *Miranda*, and are falling over themselves to admit evidence acquired as a result of the failure to read *Miranda* warnings. But still, there are disparities that may well be explained by the possibility that more liberal or more conservative judges would read *Seibert* differently. Using the political party of the appointing president as a proxy for ideology, for federal Courts of Appeals on which Republican-appointed judges constitute a majority of the appellate panel, evidence is admitted in 88.9% of the cases, whereas it is admitted in only 70.0% of cases decided by majority Democrat-appointed panels.²⁴² The disparity may actually be understated in the data because of panel effects.²⁴³

Note that this problem of mixed signals is *not* confined to cases in which the majority is fractured; it is pervasive when the Court overrules by stealth. Fragmentation exacerbates the problem, of course, but even when fragmentation is absent, confusion results from stealth decision-making. *Dickerson* purported to reaffirm *Miranda*, but it also upheld all the prior cases that seemed inconsistent with it.²⁴⁴ Lower courts were naturally confused (and split) on recognizing any exceptions to *Miranda* beyond those explicitly affirmed in *Dickerson*.²⁴⁵ The same problem was apparent with regard to the 2006 decisions. For example, the principal opinion in *Wisconsin Right to Life* so clearly signaled the death of *McConnell* despite what the justices said, that the Court was quickly forced to confront the question it claimed to have ducked.²⁴⁶ Moreover,

arresting him before providing warnings was not deliberate violation); Phillips, 2009 WL 4571844, at *14–14 (calling the conduct of officers who interrogated an inmate about an assault three times before providing warnings “troubling” but blaming “mis-perceptions about [Miranda’s] contours” and not deliberate evasion). For rare admissions of deliberateness, see, e.g., Knapp, 700 N.W.2d at 903; U.S. v. McBride, 2007 WL 102153, at *3.

²⁴² This data reflects the 28 three- and four-star Courts of Appeals cases citing *Seibert* on Westlaw, and is limited to those decided after Dec. 31, 2005.

²⁴³ See Revesz, *Environmental Regulation*, supra note ____, at 1719–1720 (positing that “judges generally vote consistently with their ideological preferences only when they sit with at least one other judge of the same political party.”); Cross & Tiller, *Judicial Partisanship*, supra note ____, at 2169 (seeing a similar panel effect).

²⁴⁴ *Dickerson*, 530 U.S. at 429.

²⁴⁵ See, e.g., *Patane*, 542 U.S. at 634 (noting the circuit split, after *Dickerson*, on admissibility of physical fruits of unwarned statements); *Ambach*, *Poisoned Fruit*, supra note ____, at 761 (describing the “crux” of the circuit split as lying in “interpretations of the impact of *Miranda*’s warnings and waiver as a constitutional right, and not merely a prophylactic safeguard.”).

²⁴⁶ See *Citizens United v. FEC*, No. 08-205 (U.S. Jan. 9, 2010).

fragmentation itself is a by-product of stealth overruling because, as in the 2006 Term cases, some justices bite the bullet and vote to explicitly overrule, while others do not, inevitably muddying waters. When stealth overruling occurs, confusion – and the likely impact of not treating likes alike – is a common result.²⁴⁷

2. Encouraging defiance and defection

But the problem goes much deeper – to the very roots of respect for the rule of law. In cases like *Seibert* and *Patane*, the Court’s short-term, internecine struggle over policy is trumping its long-term vision of institutional respect. Stealth overruling sends messages not just of confusion, but of a more invidious kind.

Basically the Court has made a game out of compliance with its edicts. *Miranda* plainly said that officers have to read rights to suspects subjected to custodial interrogation.²⁴⁸ Many acknowledged that whatever else one might think of it, *Miranda* provided a bright line rule.²⁴⁹ But this is hardly true today. In a series of decisions, the Justices have effectively encouraged police officers to ignore the Court’s own seminal precedent. The justices cannot bring themselves to overrule *Miranda*, so by winks and *ex post* approval they encourage disobedience. What they can’t do, the police can do for them. The clear signal *everyone* seems to be getting from cases like *Seibert* and *Patane* is “do as we imply, not as we say.”²⁵⁰ And then when the police take the hint, the justices are quick to pat them on the head.

Indeed, a reading of the cases suggests federal Drug Enforcement Agency and Immigration and Customs Enforcement officials are frequent “offenders”.²⁵¹ And why not? In many drug and weapons cases, all that is

²⁴⁷ See *Murray v. Geithner*, 624 F.Supp.2d 667, 673 (E.D. Mich. 2009) (commenting, in taxpayer’s Establishment Clause challenge to the 2008 bailout statute, that “[t]he Supreme Court... suggested that [Flast] is a novelty, effectively collecting dust on a shelf somewhere,” but concluding that Flast, “despite its fragile state, remains the law of the land”).

²⁴⁸ *Miranda*, 384 U.S. at 478–79.

²⁴⁹ See *Elstad*, 470 U.S. at 307 n.1 (noting a *Miranda* violation is entitled to “a bright-line legal presumption of coercion”); *Roberson*, 486 U.S. at 681 (“We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*.”).

²⁵⁰ See, e.g., Kamisar, *Postscript*, *supra* note _____, at 105. (“Doesn’t the Court care that when the prosecution is allowed to use the physical fruits of police failures to comply with the *Miranda* rules, they “invite” the police to turn their backs on *Miranda*?”).

²⁵¹ See, e.g., *Reyes*, 2007 WL 419636, at *3 (gaining evidence after telling a suspect he was under arrest, handcuffing him, and surrounding him with armed agents but not *Mirandizing* him, despite later admitting a “specific investigative purpose” in the

needed to convict is the contraband itself. Finding out where it is located does the trick, so the result in *Patane* encourages foregoing *Miranda* warnings entirely. And if there is need to connect the suspect with the goods, Justices Souter's and Kennedy's opinions in *Seibert* explain how to "question-first" successfully.

The justices in *Seibert* seemed surprised that *Elstad* would become a prescription for questioning outside *Miranda*.²⁵² But they are unavoidably complicit. Apparently everyone but the justices understands that judicial decisions create *ex ante* rules for behavior.²⁵³ Following *Seibert*, police seem to be increasing their use of "softening up" techniques to elicit statements after *Miranda* warnings are read.²⁵⁴ Courts split on the validity of the technique,²⁵⁵ but it is difficult to believe this is what the *Miranda* Court intended – or even the *Seibert* plurality, with its emphasis on the effectiveness of the *Miranda* warnings.

One feels compelled to make the obvious point: that criminals are bad, and locking them up is good. Vehicular homicide, widespread drug dealing, not to speak of murder, rape, and convicted felons possessing firearms: all these are terrible things, and society is unequivocally better off without them. It is easy to see why courts strain to lock these folks up.

Still, the game being played here is deeply troubling, if one cares at all about the rule of law. *Miranda* is on the books. The very opinions that admit these statements purport to be following it. Yet, for anyone with a rudimentary understanding of the constitutional law of confessions, the subterfuge is apparent. Not just the police and government agents, but, sadly, the entire judiciary is participating in one giant sham. Cops ignore *Miranda*. Courts then ignore the failure to adhere to *Miranda*.

questioning); Carrasco-Ruiz, 587 F.Supp.2d at 1094 (interrogating the suspect for three minutes, when he made incriminating statements, before Mirandizing him); Villa-Gonzalez, 2009 WL 703862, at *3 (testifying that despite interviewing three suspects an ICE agent "never Mirandized anyone" but that he "ordinarily" would if any suspects admitted to being deported in the past).

²⁵² *Seibert*, 542 U.S. at 609 (plurality); *id.* at 620–21 (Kennedy, J., concurring).

²⁵³ See Bone, Process, *supra* note ___, at 949 (discussing prospective effects of the common law); Kornhauser, Economic Perspective, *supra* note ___, at 63 (observing that, in economic theory, people obey legal rules solely because of their legal consequences); Shannon, Retroactive, *supra* note ___, at 833–36 (describing the rise of prospective understandings of court decisions).

²⁵⁴ See *United States v. Fry*, 2009 WL 1687958, at *14 (D. Idaho) (detailing practice and providing citations to other cases).

²⁵⁵ Compare *Fry*, 2009 WL 1687958, at *16 (excluding statement) with *U.S. v. Opong*, 165 Fed.Appx. at 160 and *U.S. v. Vallar*, 2006 WL 1156739, at *3–4 (admitting statements).

This is a dangerous game for the nation's highest court to be playing. Back in the days of the Warren Court, political scientists engaged in "compliance" studies to see if what was pronounced as law – in areas involving school desegregation, or prayer in schools – had any bite on the ground.²⁵⁶ Their point was that the Court lacked the power and authority – the supremacy, if one will – commonly attributed to it. Indeed, one reason the deeply unpopular school prayer decisions seemed to go down relatively easily was that they were not followed in many parts of the country.²⁵⁷ It is difficult to believe the Court wants to encourage this sort of response to its decisions.

Although assessing the long-term costs of encouraging defiance is unavoidably speculative, the Court is seemingly oblivious about the extent to which it is undermining itself. Winking breeds contempt: contempt for the law, and for the court's own pronouncements. The lesson law enforcement learns is that it is fine to ignore the precedents and to follow hints that those precedents are disliked. The justices who dislike *Miranda* are winning this round on the merits, but at what cost? One is reminded of the story about the boy who cried wolf. One day the Court majority will mean what it says, and will be surprised when its audience decides to follow the dissents instead.

C. *Public Participation in the Endeavor of Constitutional Law*

Despite the foregoing costs, perhaps the normative case for stealth overruling is compelling nonetheless. One can imagine arguments to justify the practice (it doesn't get much explicit defense), but ultimately this Section concludes they are flawed. At bottom, the legitimacy of judicial review rests in its transparency, so that the public can assess what the Court is doing and engage it in the endeavor of determining constitutional meaning. Absent this engagement, it is very difficult to justify leaving the shifting meaning of the Constitution in the judges' hands alone.

²⁵⁶ See, e.g. Blaustein, Avoidance, Evasion, and Delay, *supra* note ___, at 100 (noting the proliferation of measures taken by Southern state governments to circumvent the mandate of *Brown*); Levine, Constitutional Law and Obscene Literature, *supra* note ___, at 130 (reporting that the obscenity case *Ginzburg v. United States*, 383 U.S. 463 (1966) had had "miniscule" impact on the practices of booksellers).

²⁵⁷ See Kenneth M. Dolbeare and Phillip E. Hammond, "Inertia in Midway: Supreme Court Decisions and Local Responses," 23 J. Leg. Educ. 28, 32 (1970) (noting that the South reduced the practice of homeroom prayers by only 26% following the decisions, and the Midwest by 45%).

1. The case for stealth overruling, and its premises

There are two arguments that stealth overruling might be appropriate, at least in the realm of constitutional decision-making. They are symbiotic, and might work best in tandem, but nonetheless are distinct. These arguments are refreshingly realistic in their understanding that extra-judicial forces can influence judicial interpretations. Many theories that express a preference for constitutional lawmaking to be held aloof from popular opinion see an independent judiciary as the means for doing so.²⁵⁸ But stealth overruling cannot rest on this assumption of judicial insulation, for then it would not matter what the public knew or understood about the Court's decisions. If the justices felt that they were indeed impervious to public challenge, they would have no need to obscure what they were doing to avoid publicity. The case for stealth overruling, or at least the motivation for it, thus is quite cognizant of the fact that the Court is accountable at one remove or another to the popular will.

The first argument in favor of stealth overruling, then, is that it serves to protect the Constitution from the passing whim of popular majorities.²⁵⁹ As Christopher Peters has said, "The central worry here is that the question of how the Court should decide cases ought not to turn on how the public thinks the Court should decide cases."²⁶⁰ If one conceives of constitutional law as autonomous from influences such as public opinion, then the Court might do well to decide constitutional cases in a way that immunizes them from any sort of public reaction. There are plainly those who view this sort of insulation as important.²⁶¹ For example, in *Planned Parenthood v. Casey*, Justice Scalia expressed regret about "the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens . . . think

²⁵⁸ See Carpenter, *Judicial Supremacy*, supra note ___, at 425 (presenting as a virtue of judicial supremacy that the Court is more likely than the President to reach principled but unpopular results). See also Friedman, *Will of the People*, supra note ___, at 173 (discussing the interest among Gilded Age and Lochner Era conservatives in judicial review as a bulwark against popular agitation).

²⁵⁹ See Roosevelt, *Constitutional Calcification*, supra note ___, at 1691 (noting with disapproval that judicial subterfuge "suggests a lack of faith in either the lower courts or the unannounced rule, or perhaps a belief that society will not accept it").

²⁶⁰ Peters, supra note ___, at 1081.

²⁶¹ See Chisom, 510 U.S. at 400 (explaining that "ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment"); Rehnquist, *The Supreme Court*, supra note ___, at 210 (noting "we want our federal courts, and particularly the Supreme Court, to be independent of popular opinion," while praising ideology-driven presidential selection of justices, as a vehicle for popular control of constitutional interpretation).

that we Justices should properly take into account their views, as though we are engaged not in ascertaining an objective law but in determining some kind of social consensus.”²⁶² Certain strands of legal theory about the Court’s role in interpreting the Constitution also lend support to this sort of argument. An example is Footnote 4 of *Carolene Products*, which calls upon the Court to protect minority rights in the face of majoritarian prejudice.²⁶³ It is easy to see how responsiveness to public opinion could alter the Court’s ability to perform its sometime countermajoritarian task.

The difficulty with this argument is that it proves too much, obviating *any* need for candor when deciding constitutional cases. Rather, the justices should say anything to make a constitutional decision go down easily with the public – or to obscure it from public view. It is difficult to find (or imagine) the commentator who would take this strong position. The argument also rests on a notion that the justices – whatever their interpretive methodology – have an inspired knowledge of the Constitution’s “true” meaning.

But stealth overruling as a special case is even more problematic to defend, because the contest in stealth overruling cases is not between the justices’ vision of the Constitution and that of an aroused public. Rather, it is between justices at one time, and their successors at another. To justify stealth overruling, one must assume that the justices sitting on the Court at a later period of time always have better access to true constitutional meaning than had their predecessors. Otherwise, one would presume some value in exposing the later justices’ arguments for why their predecessors (and not the general public) had it wrong.

The other argument for stealth overruling goes more generally to the institutional security of the Supreme Court. This argument assumes that the public expects a certain doctrinal continuity from the Court, and that public expectations would be undermined if the Court explicitly overruled too many decisions – or any particularly salient one.²⁶⁴ The argument also assumes that having an autonomous Court is of independent value.²⁶⁵ One merit of this argument is that it does not rest on the justices

²⁶² Casey, 505 U.S. at 999-1000 (Scalia, J., dissenting).

²⁶³ United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). See also John Hart Ely, Democracy and Distrust, 135-181 (1980); David Strauss, Modernizing Mission, supra note ___, at 900-906 (warning that courts overeager to update and “modernize” old law may too readily yield to the political process).

²⁶⁴ See Geyh, Straddling the Fence, supra note ___, at 448 (discussing public confidence in the rule of law); Idleman, A Prudential Theory of Judicial Candor, at 1392-94 (discussing continuity as an aspect of judicial legitimacy); Shapiro, Against Judicial Candor, supra note ___, at 739-42 (discussing continuity).

²⁶⁵ See Geyh, Straddling the Fence, supra note ___, at 446-48 (discussing the values served by judicial independence).

having any special access to true constitutional meaning; rather, it simply values having an insulated court, and sanctions disingenuous treatment of precedent if that is necessary to preserve autonomy.²⁶⁶

The difficulty here is that the Court's independence is valued entirely without regard to the separate merit of its decisions. To put a point on it, autonomy from public suasion is treasured whether the Court is deciding *Dred Scott* or *Brown v. Board of Education*. The claim is hard to maintain. While any given decision might be excused and institutional independence justified, the argument becomes a tough one in the face of widespread discontent.²⁶⁷

Perhaps the sum of the whole is stronger than the individual parts. Although each version of the argument for stealth overruling runs into trouble, as a visceral matter there seems to be something to the notion that constitutional law – and the justices who pronounce it – should not be overly accountable to immediate public preferences.²⁶⁸ Even so, it is difficult to find any commentator who justifies stealth overruling.²⁶⁹

2. The case for popular engagement with constitutional lawmaking

On the other hand, there is a strong normative argument in favor of a more candid process of constitutional decisionmaking. It rests in a very different understanding of constitutionalism, one that acknowledges and in many ways welcomes public participation in constitutional meaning. Many people have in various guises advocated for such public participation in recent years, including the movement for “popular

²⁶⁶ See Geyh, *Straddling the Fence*, supra note ___, at 448 (exploring the idea that the rule of law might be “an important myth that preserves public confidence in the courts and thereby ensures acquiescence in the orderly administration of justice”).

²⁶⁷ See Peters, supra note ___, at 1085 (if the Court “persistently makes decisions with which a large majority of the public disagrees. The Court may then lose the support of that majority....”); Pimentel, *Reframing*, supra note ___, at 7-9 (noting that judicial independence is merely a means to the end of fair and impartial decisionmaking).

²⁶⁸ See, e.g., *The Federalist No. 78* (Alexander Hamilton) (praising ability of insulated courts to prevent majoritarian oppression of minorities and resist shortsighted attempts to change the structure of government); 1 Bruce A. Ackerman, *We the People: Foundations* 3-33 (1991) (extolling two-track democracy, in which judicial review serves to separate constitutional meaning from ordinary politics); Friedman, *The Will of the People*, 372-73 (discussing normative arguments for the Court's independence from popular will); Post, *Foreword*, supra note ___, at 110 (describing the Court's history, when its authority is challenged, of proclaiming law's separation from politics).

²⁶⁹ See Dorf, *Dicta*, supra note ___, at 2064 (surveying arguments for “continuity” and finding no support for judges' disregarding controlling precedent by labeling precedential holdings as dicta).

constitutionalism.”²⁷⁰ But it is important to note at the outset that one *need not* accept the most tendentious aspects of that movement, including limitations it would impose on judicial supremacy or its call for outright judicial deference to congressional lawmaking,²⁷¹ to buy into the simple idea that constitutional law will in fact be improved by engagement with popular views. And that over time the Constitution will – and should – bear some relationship to popular understandings regarding fundamental American values.

The origins of this alternative understanding of constitutionalism actually predate the more familiar idea of the aloof, obdurate constitution.²⁷² American constitutionalism was built on the foundations of British common law constitutionalism. The “ancient constitution” found its root not in one single document, but in seminal tracts such as Magna Charta, common law decisions, and the longstanding customs and practices of the British people. Constitutional meaning was forged in a tradition that stretched to “time immemorial.”²⁷³

The reigning assumption of early American constitutionalism was that adherence to constitutional government would be secured by the people keeping a watchful eye on their public servants. A key purpose of

²⁷⁰ See, e.g., Griffin, *Judicial Supremacy*, supra note ___ (arguing that the political branches are better than the courts at protecting minority rights); Kramer, *The People Themselves*, supra note ___; Post, *Foreword*, supra note ___, at 8 (describing the relationship of mutual influence between culture and constitutional law); Siegel and Post, *Legislative Constitutionalism*, supra note ___, at 1981 (critiquing the Rehnquist Court’s use of the enforcement model on the grounds that it “is misguided to believe that constitutional law can or should be hermetically insulated from constitutional politics”); Mark Tushnet, *Taking the Constitution Away From the Courts* (2000) (arguing that the people, not the courts, are the most effective and legitimate expositors and guarantors of constitutional law); Balkin, *Canons of Constitutional Law*, supra note ___, at 1003 (criticizing the court-centrism of American conceptions of constitutional law).

²⁷¹ Both Reva Siegel and Robert Post seem to have themselves backed away from the strongest claims, in later work identifying more with a version of popular constitutionalism that depends on the slow change of constitutional law over time in accord with the victories and persuasiveness of social movements. See Post, *Foreword*, supra note ___, at 104-110 (describing the dialectical relationship between law and culture); Siegel, *She The People*, supra note ___ (proposing a sociohistorically informed reading of the Fourteenth and Nineteen amendments that accounts for the (judicially erased) history of the suffrage movement). See also Friedman, *Mediated*, supra note ___, at 2599 (sketching the indirect mechanism by which popular will influences judicial interpretations of the Constitution over time).

²⁷² See Kramer, *The People Themselves*, supra note ___, at 9-34 (discussing the notion of a customary constitution); Reid, *Constitutional History*, supra note ___, at 65-70 (discussing the sources of rights in British legal theory); Friedman, *Will of the People*, ch. 1. The argument that follows draws upon these and other sources.

²⁷³ See Kramer, *The People Themselves*, supra note ___, at 12.

bills of rights, for example, was to make the liberties of the people apparent. If officials violated those liberties, they could expect to be brought to heel at the next election.²⁷⁴

Over time the ideal of popular enforcement of a constitution gave way to more formal mechanisms, most notably judicial review. It emerged early on that elected officials were all-too-eager to do the public's bidding, at times in a manner flatly contrary to constitutional guarantees.²⁷⁵ This is why bills of rights were criticized as "parchment barriers." As Madison was one of the first to recognize, the problem was the people, not their governors.²⁷⁶ This realization fed explicit constitutional reforms such as bicameral legislatures and independent judiciaries that remain with us today. And it was one of the prominent reasons for the emergence of judicial review in the form we today can recognize.²⁷⁷

But even as judicial review evolved, so too did popular democracy. As judicial supremacy grew, the franchise expanded, almost in tandem.²⁷⁸ The power of the popular will became an important check and influence upon judicial decisions. And the justices learned that they frustrated the popular way at their peril. If nothing else, this was the lesson of the near-success of Franklin Roosevelt's Court-packing plan in 1937.²⁷⁹

At least since 1937, there has been a symbiotic relationship between public opinion and Supreme Court constitutional decisions. Although it may have taken commentators some time to perceive this

²⁷⁴ See Friedman, *Will of the People*, supra note ___, at 23; Tarr, *Understanding State Constitutions*, at 73 (discussing the popular character of state constitutional enforcement in the early Republic); Kramer, *The People Themselves*, at 44-45 (making a similar point).

²⁷⁵ See Friedman, *Will of the People*, at 24; Kramer, *The People Themselves*, supra note ___, at 50.

²⁷⁶ 1 James Madison, "Vices of the Political System of the United States," in *Letters and Other Writings of James Madison, Fourth President of the United States*, at 325 (1867); see also Rakove, *Origins*, at 1056 (discussing Madison's views); Kramer, *The People Themselves*, at 45-47 (arguing that Madison took popular constitutionalism "for granted").

²⁷⁷ See Friedman, *Will of the People*, supra note ___, at 24-31 (discussing the early emergence of judicial review); Kramer *The People Themselves*, 62-72.

²⁷⁸ See Friedman, *Dialogue and Judicial Review*, supra note ___, at 620-25 (chronicling parallel expansion of the franchise and rise of judicial supremacy).

²⁷⁹ See Friedman, *Will of the People*, supra note ___, at 195-236. See also *United States v. Lopez*, 514 U.S. 549, 604-08 (1995) (Souter, J., dissenting) (suggesting that stricter patrol of Congress's interstate commerce jurisdiction is just the kind of "untenably expansive conception of judicial review" that led to the Court's chastening after *Lochner*).

relationship properly, many today make note of the relationship.²⁸⁰ In countless areas – abortion, the death penalty, gay rights, federalism, and affirmative action – the Court seems to have responded to social forces and social movements in fashioning constitutional rules.²⁸¹ There are reasonable debates about which segment of the public influences the Court, for example whether elite views hold special sway.²⁸² On the other hand, there is little doubt about the general phenomenon.

Just because this is what happens does not mean it is what should.

It is useful to distinguish the descriptive from the normative. There is always reason to be concerned about public passions unduly influencing constitutional decisions.²⁸³ Still, if the phenomenon is in fact common, it bears wondering how successfully constitutional lawmaking can be obscured from public scrutiny. And if the accountability of constitutional law to public views has not brought American constitutionalism to its knees – and by any account it seems to be flourishing – then one wonders whether how legitimate are the worries.

Concerns about popular pressure on the courts can be easily overstated. It is true that the justices operate under the public eye, and events such as 1937 surely demonstrate that the Court can be held

²⁸⁰ See, e.g., Balkin, *Understanding*, supra note ___, at 1066 (coining the term “partisan entrenchment” to describe the process by which political parties bring the Court into line with popular will); Devins, *Majoritarian Rehnquist Court*, supra note ___ (arguing that the Court was attuned and responsive to signals from Congress and the people); Klarman, *Jim Crow to Civil Rights*, supra note ___, at 5-6 (noting that “the values of judges tend to reflect broader social mores”); Post, *Popular Constitutionalism*, supra note ___, at 1041 (describing process of the Courts’ reaching equilibrium with popular opinion); Post, *Foreword*, supra note ___, at 8 (discussing the “dialogic” relationship between constitutional law and culture); Friedman, *Will of the People*, supra note ___, at 374-76 (discussing alignment between the Court and public opinion). In recent years, news commentators have remarked on the relationship at well. Former Clinton prosecutor Kenneth Starr told Wolf Blitzer that the Court in *Lawrence v. Texas* was “reflecting cultural shifts.” *Late Edition with Wolf Blitzer*, CNN, June 29, 2003. And Cokie Roberts, the congressional correspondent for NPR, explained Lopez by remarking that “the court reflects what people are thinking and, in fact, when it gets out of synch with where people are, it switches.” *This Week with David Brinkley*, ABC, Apr. 30, 1995.

²⁸¹ See Friedman, *The Will of the People*, supra note ___, chs. 9, 10; Devins, *Majoritarian Rehnquist Court*, supra note ___ (showing alignment between Court decisions and popular/legislative will).

²⁸² See, e.g., Baum and Devins, *Elites*, supra note ___ (arguing that “Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion”).

²⁸³ See Friedman, *Will of the People*, supra note ___, at 372-73; L.A. Powe, Jr., *Are “The People” Missing in Action (and Should Anyone Care?)*, 83 *Tex. L. Rev.* 855, 866-84 (describing seven problematic instances in which the public seemed to control the direction of constitutional law).

accountable. In most instances in which any serious threat of this has occurred, however, the justices have gone on a binge of unpopular lawmaking.²⁸⁴ Single decisions – even widely condemned ones like *Dred Scott* – have rarely engendered opposition hostile enough to remotely threaten the Court.

On the other hand, it is hard to see the normative appeal of a case for stealth overruling built solely on the insularity of the justices. As we have seen, defending stealth overruling to avoid public interaction with Supreme Court decisions requires buying into some deeply problematic premises, notably that the justices have some special purchase on the true meaning of the Constitution, or that we should accept the insulation of the Court no matter what the merit of its decisions. It is precisely these sorts of assumptions that lead to the most common complaint about the Supreme Court, that it is countermajoritarian and insufficiently accountable.²⁸⁵

It is both inevitable and appropriate that our constitution be one that reflects the values of the American people. Not immediate passing fancy, but their long-standing and considered views. The Constitution must get its meaning from somewhere. There is no conceivable argument that the constitution under which we live bears any reasonable relationship to the original constitution. The administrative state, the scope of Congress' commerce power, gender equality; all these and more are serious departures from the original understandings that no one credible seriously thinks should be reeled back.²⁸⁶ The choices seem then to be

²⁸⁴ Friedman, *Will of the People*, supra note ___, at 200-205 (describing string of decisions striking down popular New Deal legislation); id. at 252-54 (describing a nearly-successful congressional attack on the Court following twelve successive rulings against the government in civil liberties cases involving Communists).

²⁸⁵ See, e.g., Bickel, *Least Dangerous Branch* 16-23 (coining the term “countermajoritarian difficulty” and calling judicial review “a deviant institution in the American democracy”); Eisgruber, *Constitutional Self-Government* 46-78 (arguing that judicial review is democratically legitimate); Calabresi, *Textualism*, supra note ___, at 1375 (arguing that aggressive judicial enforcement of federalism and separation-of-powers doctrines “helps to ameliorate the countermajoritarian difficulty”); Sherry, *Issue Manipulation*, supra note ___, at 613 (“[W]hen the Court invalidates a statute, it is overturning the decision of a popularly elected body; in essence, it is enforcing its own will over that of the electorate”); Winter, *Indeterminacy*, supra note ___, at 1521 (discussing “mid-century obsession with the countermajoritarian difficulty”).

²⁸⁶ See, e.g., Robert Bork, *The Tempting of America*, 216 (1990) (conceding that, since the New Deal, “[T]he consolidation of all power at the federal level is too firmly entrenched and woven into our governmental practices and private lives to be undone”); Siegel, *She the People*, supra note ___, at 966-68 (proposing that the Nineteenth Amendment should inform modern interpretations of the Equal Protection Clause); cf. Douglas H. Ginsburg, *On Constitutionalism*, 2002-2003 *Cato Sup. Ct. Rev.* 7 (criticizing

that the Constitution should mean what the judges feel it should, entirely remote from public views, or that there should be some involvement with popular views, and that over time the Constitution should come to reflect the deeper values of the American people. In this choice set, it is hard to justify the complete insulation of constitutional lawmaking by an unaccountable judiciary.

To the extent that a dialogic understanding of formulating constitutional meaning has normative appeal, stealth overruling is profoundly problematic. Its very purpose is to obscure constitutional interpretations of the Supreme Court, to lead the people to believe one thing is the case, when in fact quite another is. Stealth overruling suppresses public dialogue about constitutional meaning.²⁸⁷

Although the public has greater awareness of Supreme Court rulings than some commentators suppose, still that knowledge is extraordinarily thin. Studies have shown that at most two or three cases in a Term really permeate the public consciousness.²⁸⁸ Which those happen to be often turns on the vagaries of politics, and media coverage. For example, the Supreme Court's decisions in the flag-burning cases looked soon to drift off the public radar till George Bush (pere) made an issue out of them.²⁸⁹

As the discussion of media attention to *Seibert* and *Patane* demonstrates, stealth overruling successfully obscures what the Court is really about. It excuses the justices from having to justify their actions. Readers of the media coverage of *Seibert* and *Patane* have the impression the Court was faithful to *Miranda*, and coming down hard on cops who make an end run around it.²⁹⁰ What really happened, however, is the

the Court's expansive reading of the Commerce Clause and urging the revival of the nondelegation doctrine); Jeffrey Rosen, Justice Thomas's Other Controversy, N.Y. Times, Apr. 17, 2005, at E44 (quoting Constitution in Exile defender Michael Greve: "I think what is really needed here is a fundamental intellectual assault on the entire New Deal edifice").

²⁸⁷ See Peters, supra note ___, at 1093 ("underruling poses a significant threat to the efficacy of political participation in constitutional adjudication."); Roosevelt, Constitutional Calcification, supra note ___, at 1691 ("a Court that engages in subterfuge rather than explaining itself denies the rest of us the opportunity to evaluate that judgment.").

²⁸⁸ See Franklin, Media (finding that only a small fraction of Supreme Court decisions are likely to reach the public consciousness); Hetherington, Issue Preferences, supra note ___, at 45-50 (analyzing newspaper stories and finding that "even the elite media provide little information about recent Court outputs, focusing instead on prominent past decisions"); see also Steiker, supra note ___, at 2471 (explaining why complicated rulings are not covered fully in the media).

²⁸⁹ See Friedman, Mediated, supra note ___, at 2623.

²⁹⁰ See supra notes __-__ and accompanying text.

Court deeply undermined *Miranda* and encouraged police to do the same – without explaining why.

At the least, it seems difficult to countenance failing to give some set of persuasive reasons for what the Court is doing. Doing so would foster useful conversation as to those reasons. After all, what if the Court is simply misguided? Take *Miranda*. It's clear the justices don't like *Miranda*, but we don't know exactly why. We *did* know why the *Miranda* dissenters disliked the rule – and why the majority in that case preferred it nonetheless. They laid bare their reasoning, which rested firmly in the costs and benefits of providing warnings to criminal suspects.²⁹¹ Since then, though, the entire merits discussion regarding *Miranda* has gone underground. Despite years of learning, and the existence of data on the subject that is widely accepted, there is virtually no discussion among the justices of when custodial interrogation proves problematic, or any recognition of how easy compliance with *Miranda* has been, let alone whether the costs of *Miranda* in lost convictions are appropriate. Rather, as the tortured opinions in *Seibert* and *Patane* make clear, the justices prefer to rest on bald pronouncements about what the Fifth Amendment does or does not require, and uncomfortable distinctions of prior precedents.

The problem, as Peter Smith points out in his discussion of New Legal Fictions, is that in cases such as these the justices' very factual premises are going unexamined, when daylight might show those premises to be simply false.²⁹² It is difficult, for example, to accept broad statements about how barring admission of a suspect's statement in the prosecution's case in chief provides sufficient deterrence for *Miranda* violations, when basic economic analysis would suggest just the opposite. This is particularly the case when reading lower court decisions serves to confirm what economics teaches.

The failure to discuss the underlying merits of police conduct is particularly disappointing in light of the fact that *Miranda* now seems to supplant any meaningful examination in decided cases of the voluntariness of confessions.²⁹³ Perhaps (as one account would go) police forces have

²⁹¹ See *Miranda*, 384 U.S. at 479-90 (acknowledging and rebutting opposing arguments, and observing that “there... ha[s] been no marked detrimental effect on criminal law enforcement” in jurisdictions with *Miranda*-like safeguards); *id.* at 514-20 (Harlan, J., dissenting) (giving policy considerations that counsel against the rule).

²⁹² See Smith, *New Legal Fictions*, *supra* note ___, at 1489 (noting that “[i]n most cases involving new legal fictions... the Court does not acknowledge that it is relying on a faulty factual premise,” thus making two normative choices: “not only to advance the (unstated) goal but also to privilege it over the interest in candor.”)

²⁹³ As Justice Souter said in *Seibert*: “giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility.” *Seibert*, 542 U.S. at 608–09. See

professionalized and in the vast majority of cases suspects are treated in a perfectly acceptable fashion, one that properly balances the needs of society and the rights of suspect. Or, perhaps police engage in deception and apply pressure in ways that are troubling, including denying people lawyers when they ask for them. No clear answer may emerge from a debate about where the line properly is drawn. But this is the right debate to have.

Imagine, on the other extreme, that the Court *had* overruled *Miranda*. It is hard to see how that would have been anything other than Very Big News. Polls show broad awareness of the decision, and broad support for it.²⁹⁴ The term in which *Seibert* and *Patane* were decided was a relatively quiet one.²⁹⁵ *Miranda*'s overruling would have been a top story.

Although it is impossible to say where a dialogue about *Miranda*'s overruling would have taken the country as a policy matter, it is hard to imagine it would have led to a less favorable state of affairs.²⁹⁶ It is precisely when the public expresses discontent that meaningful policy change becomes possible. Perhaps the Court would have been driven to recant. Perhaps statutory versions of *Miranda* would have been adopted.²⁹⁷ More hopefully, alternatives to *Miranda* would have been considered, such as the video-taping of confessions. Virtually all experts seem to agree videotaping is a good thing.²⁹⁸ Yet, with the façade of

also White, *Miranda's Failure*, supra note ____, at 10 n.54 (finding only nine cases in two years where either federal or state courts held a suspect's post-waiver statement involuntary).

²⁹⁴ See supra notes ___-___ and accompanying text.

²⁹⁵ See, e.g., Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. Times, July 5, 2004, at A1 (treating the Guantanamo detainee cases as the most high-profile of the term, and listing others); Joan Biskupic, *High court protected liberties by limiting presidential power*, USA Today, July 2, 2004, at 4A (noting "public attention has focused on the terrorism disputes").

²⁹⁶ See Steiker, supra note ____, at 2549-50 (explaining how public policy can be affected by a public misled as to what the Supreme Court's decision rules are).

²⁹⁷ For one possible statute, see Johnson, *Statutory Replacement*, supra note ____ (proposing a statutory version of *Miranda*).

²⁹⁸ See Stuntz, *Miranda's Mistake*, supra note ____, at 981 n. 19 ("The need for video- and audiotaping is the one proposition that wins universal agreement in the *Miranda* literature"). See, e.g., Cassell, *Social Costs*, supra note ____, at 391; Kamisar, *Fortieth Anniversary*, supra note ____, at 188-92; Lewis, *Rethinking Miranda*, supra note ____, at 200; Leo, *Impact*, supra note ____, at 682-89; Zalman & Smith, *Attitudes*, supra note ____, at 921 tbl.8).

Miranda in place, it has been understandably difficult for videotaping to become the accepted norm.²⁹⁹

At the very least, if the Court proceeded candidly, it's hard to imagine that we'd have ended up in the odd, and somewhat troubling, place that we are. Stealth may have helped the Court retain its public image. But in the long run, at what cost?

CONCLUSION

Stealth overruling is an elusive concept. The very nature of the common law method makes fine indeed the line between the distinguishing of an existing precedent and its overruling. Nonetheless, there is a line. Even if it possesses a sort of "know it when you see it" sort of quality, the line is there and those following closely can perceive when it has been crossed.

Yet, stealth overruling serves an instrumental purpose. It allows the justices to alter the direction of constitutional law without being perceived as having done so. The Court is able to have its will followed by officials and the lower courts. At the same time, stealth overruling has proven an effective public relations ploy on the part of the Court majority.

However, stealth overruling imposes its own costs. The least of these, though certainly of substance, is that it confuses the law, eliminating the traditional virtues of transparency and predictability. Somewhat more grave is the blow taken to the Court's long-term authority as officials and lower courts are taught to treat precedents casually once given the wink from above. It is somewhat surprising the justices cannot see this long-term threat to their authority.

Most seriously, stealth overruling obscures the path of constitutional law from public view, allowing the Court to alter constitutional meaning without public supervision. There is a theory by which this makes sense, one that rests deeply in judicial supremacy, and recognizes that the justices are vulnerable to public reprobation. But this theory is neither descriptively accurate nor normatively desirable. Although the Court should not respond to every passing public fancy, ultimately the Constitution is the people's, and the people are its guardian. Stealth overruling raises the specter of the countermajoritarian difficulty, a

²⁹⁹ On jurisdictions that have adopted it, see, e.g., Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 4 (Northwestern Univ. Sch. of Law, Ctr. on Wrongful Convictions, 2004) (finding at least 238 law enforcement agencies in 38 states record custodial interviews of suspects in felony investigations); *People v Combest*, 4 N.Y.3d 341, 350 n.5 (2005) (naming Alaska, Illinois, Maine, Minnesota, Texas and the District of Columbia as mandating recording of at least some interrogations).

danger undercut by more dialogic understandings of constitutional development.

Miranda underscores this. The public (within limits, one supposes) supports *Miranda*, which is indeed embedded in the national culture. Yet, the Court tunnels under the rule without admitting what it is doing. Perhaps *Miranda* should be overruled. Certainly there are justices that believe this. But if that is the case, then they should do that overtly, and allow a national discussion to begin.