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(WITH PARTICULAR ATTENTION TO
MIRANDA V. ARIZONA)

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THE WAGES OF STEALTH OVERRULING
(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.
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.\footnote{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).}

Even, on the Supreme Court itself, dissenting and concurring justices united in accusing the authors of the principal decision of acting disingenuously, of overruling \textit{sub silentio} what they would not overturn explicitly.\footnote{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.}

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 \textit{Citizens United v. Federal Election Commission}, a closely-divided Court explicitly overturned where just two Terms earlier they had employed stealth.\footnote{Citizens United v. FEC, No. 08-205 (U.S. Jan. 21, 2010).} Public response to \textit{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 \textit{Miranda v. Arizona},\footnote{384 U.S. 436 (1966).} but quietly, with no explicit overruling – and little notice in the mainstream press of what they are about].\footnote{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.} 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.\footnote{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,} That shortfall is addressed here, with particular
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, 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.

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

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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.\textsuperscript{12} In \textit{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 \textit{Sternberg v. Carhart} just six years earlier.\textsuperscript{13} In \textit{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 \textit{McConnell v. Federal Election Commission}.\textsuperscript{14} \textit{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.”\textsuperscript{15} \textit{Flast v. Cohen} would have suggested the answer was yes; the Court held no, distinguishing executive from legislative action.\textsuperscript{16} In

\begin{itemize}
\item \textsuperscript{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, \textit{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://acsclaw.org/pdf/Schumer%20speech.pdf. See also Metzger, supra note ___ (citing “lack of candor” in \textit{Hein}, United Haulers, and Gonzales); Peters, Under-the-Table Ovrruling, supra note ___, at 1068-71 (noting “underruling” in Gonzales, WRTL, and Parents Involved), Stone, supra note ___, 1538-39 (seeing stealth overruling in Gonzales, WRTL, \textit{Hein}, Morse, and Parents Involved).
\item \textsuperscript{13} Gonzales, 550 U.S. 124; Sternberg, 530 U.S. 914.
\item \textsuperscript{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).
\item \textsuperscript{15} 551 U.S. 587 (2007).
\item \textsuperscript{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. 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.* There were similar claims about *United Haulers*, a dormant commerce case, and *Bowles v. Russell*, involving the time limits for habeas appeals.

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. 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. In this he joined Justice Souter, dissenting, who also saw “no basis” for the plurality’s distinction “in either logic or precedent.” 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 “sleeper 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. 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.”

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.”

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.”

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.*

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.

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.

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

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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.”

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. 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. When they are not, then one begins to see the gap between distinguishing prior precedents, and overruling them. 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. *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.”

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

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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.”

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.”

The drawing of unpersuasive distinctions violates a cardinal principle of the rule of law, that likes must be treated alike. Too much can be made of the imperative: ultimately it all depends on what Frederick Schauer calls “categories of likeness.” 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.* 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.” 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

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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).
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.’”

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.

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.” Justice Souter agreed, saying the test of the principal opinion is “flatly contrary to McConnell,” and “simply inverts what we said in McConnell.”

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. But the series of per curiam decisions striking down segregation elsewhere were nothing but pure fiat, a point made repeatedly in their wake. Apprendi v. New Jersey forbade non-jury fact-
finding that pushed a criminal sentence above the statutory maximum for the offense charged.\textsuperscript{48} Many (including the principal dissent) argued that the reasoning of the opinion was entirely at odds with \textit{McMillan v. Pennsylvania}, which had upheld a similar scheme, but the \textit{Apprendi} court expressly declined to overrule \textit{McMillan}, citing considerations of reliance.\textsuperscript{49} In \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, the Court took on facts remarkably similar to those in \textit{Pennsylvania Coal Co v. Mahon}, a case regarding the threshold for regulatory takings of land – but came to the opposite result, without overruling \textit{Mahon}.\textsuperscript{50} Once again, critics sounded notes similar to those involving the 2006 cases.\textsuperscript{51}

\textbf{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 \textit{sub silentio}. Though the two could be said to be the same, in truth over-ruling \textit{sub silentio} also could imply an accidental or unknowing treading on pre-existing precedents. Precisely because appellate courts face so many precedents,
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 Gerhardt, 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 922-24 (establishing exception to the exclusionary rule where police rely in objective good faith on subsequently invalidated search warrants); but see LaFave, Expeditency, 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”).
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.” 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?” 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

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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=MTE0NjQyNTUzMTg3NDBIYTMyZTU1ZTY1NzQ1MzF1Mjk= (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 Grutter 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.\textsuperscript{65} There was evidence – deeply troubling – about the interrogation techniques some were using.\textsuperscript{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.\textsuperscript{67} Faced with these difficulties, the Court appeared to be considering – in \textit{Escobedo v. Illinois} – requiring the presence of counsel as a safeguard.\textsuperscript{68} But in \textit{Miranda} (and its companion cases) the Court took a different tack.

In order to assess whether \textit{Miranda} has been stealth overruled, it is important to focus on both its rule and the rationale upon which the rule is based. The \textit{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.”\textsuperscript{69} The safeguards to which the Court adverted, of course, were the now-ubiquitous \textit{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, \textit{no evidence obtained as a result of interrogation} can be used against him.”\textsuperscript{70} The dissenting justices acknowledged that the rule applied not only to statements but fruits as well.\textsuperscript{71}
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

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

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

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. The statute had lain dormant, because no one at the Department of Justice was anxious to test its constitutionality. 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.

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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. None other than Chief Justice Rehnquist wrote for the Court majority. 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.” 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.” 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.” “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.”

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.

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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* warning.”

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\(^{105}\) 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).
These curative measures included such items as “a substantial break in time and circumstances” or “an additional warning.” 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. The issue in *Patane* was that ducked in *Tucker* years earlier: whether fruits of an un-Mirandized statement are admissible. 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.

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.” 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.”

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. “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.” Here, exclusion could not be justified by “a deterrence rationale sensitive to both law enforcement...

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

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,

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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.”)
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. On the other hand, there is the problem of being stuck with
wrong decisions if the justices do not displace them.

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.

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.

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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, reliability, 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,
510 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 overruling *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, to extract a second statement after reading *Miranda* warnings, or to obtain physical evidence condemning the defendant. 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. And though some confessions undoubtedly are lost because of *Miranda*, the data here show it is a relatively small number. 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

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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. 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. Today interrogators take advantage of the low waiver threshold by “conditioning” suspects to talk despite the warnings, by de-emphasizing warnings in the telling, or by supplementing warnings with the reasons that talking is a good idea, or that asking for a lawyer is a bad one. As a result, when read their rights most defendants choose to waive them, and spill the beans.

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. The effect is that a decision designed to protect suspects has become in many cases a safe harbor for police officers. 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. 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.”

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

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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 affulent 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.\textsuperscript{142} Adrian Vermeule, sometimes co-authoring with Sunstein, argues that there are decision costs judges can avoid by being minimalists.\textsuperscript{143} Judges see only a piece of a puzzle, and may lack all the information they need to resolve a matter.\textsuperscript{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.\textsuperscript{145}

Minimalism may seem particularly appropriate when it comes to precedents like \textit{Miranda}, which were so very maximalist in the first place. That, for example, was the argument Justice Alito looked to make in \textit{Hein}, declining to “extend” \textit{Flast} given “serious separation-of-powers concerns.”\textsuperscript{146} A respect for \textit{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.\textsuperscript{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.\textsuperscript{148} This led to understandable

\begin{itemize}
  \item \textsuperscript{142} See One Case at a Time, supra note ___.
  \item \textsuperscript{143} See Vermeule, Judging Under Uncertainty, supra note ___, at 259-261 (discussing decision costs).
  \item \textsuperscript{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”).
  \item \textsuperscript{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”).
  \item \textsuperscript{146} See Hein, 551 U.S. at 611.
  \item \textsuperscript{148} On Roberts, see Joan Biskupic, Roberts, Rehnquist Compel Comparisons: Close Relationship Undercuts 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”).
\end{itemize}
concern on the left about a sudden rightward turn on the Court, especially with regard to contentious social issues.\textsuperscript{149} Perhaps for this reason, in their confirmation hearings both Roberts and Alito gave assurances about adherence to \textit{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 \textit{stare decisis} “a fundamental part of our legal system,” citing its virtues.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Hein} over an interpretation of \textit{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 \textit{Seibert}, \textit{Patane} and some of the 2006 stealth cases are not in fact minimalist. While minimalism leaves

\textsuperscript{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”).


\textsuperscript{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).

\textsuperscript{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).
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.\textsuperscript{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.”\textsuperscript{159} In a justifiably well-regarded article, Frank Easterbrook criticizes the way scholars criticize the Supreme Court.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{164}

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

\begin{footnotesize}
\begin{enumerate}
  \item 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).
  \item 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.
  \item Easterbrook, Ways of Criticizing, supra note ___.
  \item 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”).
  \item See Easterbrook, Ways of Criticizing, supra note ___, at 814-823 (discussing cycling, path dependence, and strategic voting within the Court).
  \item 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).
  \item Easterbrook, Ways of Criticizing, supra note ___, at 803.
\end{enumerate}
\end{footnotesize}
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. 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. 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.” 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. 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. Public support

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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

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\(^{171}\) Lerman, Accused, supra note _____, at 51.

\(^{172}\) Dickerson, 530 U.S. at 430.


\(^{174}\) 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.
knew his rights and didn’t need them read. Some stories noted the “mixed message” of the decisions, but this was deep into the story. Only the Court-and law-savvy SCOTUSblog saw Patane as the big story, which assuredly it was.

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. 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. 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 incriminating 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.

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185 A search of the major newspaper databases 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 hullaballoo 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*.

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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).
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.\textsuperscript{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.\textsuperscript{195} Polls show overwhelming dissatisfaction on both sides of the ideological line, and Congress is considering action in response.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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,

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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 the 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 \textit{WRTL} with the prior \textit{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.”\textsuperscript{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?\textsuperscript{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 \textit{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.”\textsuperscript{209} Yet, as she

\textsuperscript{207} Dan-Cohen, Acoustic Separation, supra note ___.
\textsuperscript{208} Dan Cohen, Acoustic Separation, supra note ___, at 646.
\textsuperscript{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. Precisely the same is true here. As we have seen, the public supports *Miranda* and appears to believe it is alive and well. 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, *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*. Officers take a suspect into custody and confront him with illegal drugs, asking whose they are. No *Mirandas*. Or, *Miranda* warnings are read and suspects assert their rights, only to have them ignored. People ask for lawyers, and agents plow on. Particularly in *Patane* “fruits” cases, lawyers for the government readily concede the *Miranda* violation. 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. 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*.” 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.

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%. *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

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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 unalike. 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. 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.

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. 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.”

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. 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”).


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. His rule is similar (though not identical) to the plurality rule.

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.” This was the position of the Seventh Circuit in United States v. Heron. Why? Because “Justice Kennedy’s intent-based test was rejected by both the plurality’s opinion and the dissent in Seibert.”

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. Not so good when it comes to making law.

Though some courts facing this confusion have simply punted and analyzed cases under both standards, 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. 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. 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.

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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.” 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.”

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.

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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. The disparity may actually be understated in the data because of panel effects.

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. Lower courts were naturally confused (and split) on recognizing any exceptions to *Miranda* beyond those explicitly affirmed in *Dickerson*. 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. 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


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*. But they are unavoidably complicit. Apparently everyone but the justices understands that judicial decisions create *ex ante* rules for behavior. Following *Seibert*, police seem to be increasing their use of “softening up” techniques to elicit statements after *Miranda* warnings are read. Courts split on the validity of the technique, 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*.

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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).

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. 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. 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.

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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

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\(^{258}\) 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." 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. 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. The argument also assumes that having an autonomous Court is of independent value. 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.\textsuperscript{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 \textit{Dred Scott} or \textit{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.\textsuperscript{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.\textsuperscript{268} Even so, it is difficult to find any commentator who justifies stealth overruling.\textsuperscript{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

\textsuperscript{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”).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{277}

But even as judicial review evolved, so too did popular democracy. As judicial supremacy grew, the franchise expanded, almost in tandem.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{275} See Friedman, Will of the People, at 24; Kramer, The People Themselves, supra note ___, at 50.

\textsuperscript{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”).

\textsuperscript{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.

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

\textsuperscript{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. 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.

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. The choices seem then to be

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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

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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

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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.
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. The term in which *Seibert* and *Patane* were decided was a relatively quiet one. *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. 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. 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. 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*).
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.