

CONFINING CASES TO THEIR FACTS

*Daniel B. Rice\** and *Jack Boeglin\*\**

*Stare decisis is the mainstay of doctrinal stability. But through the little-known expedient of “confining a case to its facts,” courts can evade the pull of stare decisis by overruling everything a decision stands for except its precise result. This doctrinal workaround has enabled courts to sidestep the formal requirements that attend overruling and quietly undermine precedent without stirring public interest. But confining’s conveniences are offset by its considerable dangers: it cuts courts loose from the constraints of stare decisis; it requires judges to engage in unprincipled, fact-bound adjudication; it dilutes the integrity of the law by enshrining contradictory legal principles; and it conflicts with modern retroactivity doctrine. Remarkably, the law of precedent has failed to account for this unusual practice. Confining and overruling have been deployed interchangeably, with little regard for their distinctive attributes. In this first in-depth treatment of confining, we offer guidelines for its responsible use—ones designed to place the practice on sounder theoretical footing and to end its indiscriminate use across the federal and state court systems.*

INTRODUCTION..... 866

I. DEFINING CONFINING..... 873

*A. The Mechanics of Confining* ..... 874

*B. Repudiation, Confining, and Overruling* ..... 875

*C. The Scope of a Confined Case* ..... 877

*D. Confining by Implication*..... 882

*E. Comparing Confining to Other Means of Treating Precedent*..... 885

II. REASONS COURTS CONFINE..... 888

*A. Protecting Reliance Interests* ..... 888

*B. Skirting Formal Requirements* ..... 891

\* Associate, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center.

\*\* Associate, Covington & Burling LLP, London, UK.

For helpful comments and suggestions, we thank Elizabeth Beske, Randy Kozel, Christopher Lund, Jason Mazzone, Richard Re, Joe Schottenfeld, Adam Steinman, and participants in Georgetown Law’s summer workshop series.

1. <i>The Requirements of Overruling</i> .....	892
2. <i>The Prohibition on Prospectivity</i> .....	894
C. <i>Avoiding Public Scrutiny</i> .....	898
III. DANGERS OF CONFINING.....	900
A. <i>Pragmatic Objections</i> .....	901
B. <i>Loophole Objections</i> .....	904
1. <i>Evading Formal Requirements</i> .....	904
2. <i>Evading Public Scrutiny</i> .....	908
C. <i>Judicial-Authority Objections</i> .....	908
1. <i>Fact-Based Adjudication</i> .....	909
2. <i>Applying Non-Law</i> .....	911
IV. REFINING CONFINING.....	913
A. <i>Why Refine At All?</i> .....	914
B. <i>When to Confine</i> .....	916
C. <i>How to Confine</i> .....	919
D. <i>The Lessons of Confining</i> .....	921
1. <i>The Centrality of Repudiation</i> .....	921
2. <i>Safeguarding Reliance Interests During         Transitional Moments</i> .....	926
CONCLUSION.....	928

#### INTRODUCTION

American law is at an inflection point. On June 27, 2018, Justice Anthony Kennedy announced his retirement from the Supreme Court after a historic three-decade tenure.<sup>1</sup> Kennedy occupied the Court's ideological center for much of his career, casting a decisive fifth vote in dozens of seminal cases. Upon his retirement, courtwatchers began frantically compiling lists of precedents deemed newly vulnerable following the departure of the Court's "Swing Justice."<sup>2</sup>

<sup>1</sup> See Press Release, Supreme Court of the United States, Justice Kennedy Retirement Announcement (June 27, 2018), [https://www.supremecourt.gov/publicinfo/press/pressreleases/-pr\\_06-27-18](https://www.supremecourt.gov/publicinfo/press/pressreleases/-pr_06-27-18) [<https://perma.cc/TK8T-YZDZ>].

<sup>2</sup> Recurring entries on these lists include *Roe v. Wade*, 410 U.S. 113 (1973); *Roper v. Simmons*, 543 U.S. 551 (2005); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); and *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), to name just a few. See, e.g., Erwin Chemerinsky, How Trump's Supreme Court Could Burn Down Kennedy's Biggest Legacies, CNN (June 29, 2018, 11:05 AM), <https://www.cnn.com/2018/06/28/opinions/supreme-court-is-going-to-get-even-more-conservative-chemerinsky/-index.html> [<https://perma.cc/T2HD-USEE>]; Jeffrey Toobin, How Trump's Supreme Court Pick Could Undo Kennedy's Legacy, New Yorker, (July 9, 2018), <https://www.new->

Indeed, the Court's changed composition seems likely to reshape American law in lasting ways. The only question is how. The destabilizing effects of doctrinal change will likely curb any enthusiasm for frequent overrulings. The act of overruling a case, after all, upsets the expectations of those who have relied on its continued validity. Those thwarted expectations can in turn trigger fierce backlash, which—if triggered too often—can imperil public faith in the judiciary.<sup>3</sup> The Roberts Court, ever cognizant of this danger, has tended to move the law in an incremental fashion, rather than to effect seismic doctrinal shifts all at once.<sup>4</sup>

But imagine a world in which the Supreme Court could eviscerate unwanted precedents at will—without feeling encumbered by deep-rooted reliance interests or the stigma of “judicial activism.” Imagine, in other words, a world without *stare decisis*.

Perhaps this hypothetical is not as far-fetched as it seems. Through the little-known practice of “confining a case to its facts,” courts can achieve the near-equivalent of overruling with only a fraction of the trouble. Under our definition, when a court engages in confining, it *repudiates* the legal principle underlying a case, replacing it with a new, “correct” principle.<sup>5</sup> In this respect, confining is very much like overruling. But unlike overruling, confining *preserves* the precedential force of a repudiated principle for future cases presenting the same facts as the one being confined.<sup>6</sup> Confining thus splits a doctrinal area in two. When a confined case's facts recur, the case will continue to be treated as good law. In all other factual scenarios, however, the confined case will be regarded as having been overruled.<sup>7</sup>

---

yorker.com/magazine/2018/07/09/how-trumps-supreme-court-pick-could-undo-kennedys-legacy [https://perma.cc/G8WH-NX5U].

<sup>3</sup> See *infra* notes 138 & 139 and accompanying text.

<sup>4</sup> See generally, e.g., Richard M. Re, *The Doctrine of One Last Chance*, 17 *Green Bag* 2d 173 (2014); Adam Liptak, *Roberts Pulls Supreme Court to the Right Step by Step*, *N.Y. Times* (June 27, 2013), <https://www.nytimes.com/2013/06/28/us/politics/roberts-plays-a-long-game.html> [https://perma.cc/QX99-5A5V].

<sup>5</sup> Here, we use the word “principle” generically to refer to a method of analysis that has been accorded precedential effect. For several examples of repudiation at the Supreme Court level, see *infra* notes 39 & 239; see also Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 *Geo. L.J.* 921, 933 (2016) (noting that courts sometimes “displace[] . . . [a] prior precedential principle”).

<sup>6</sup> Below, we address how a court charged with implementing an act of confining might undertake the troublesome inquiry of ascertaining the “facts” of the confined case. See *infra* Section I.C.

<sup>7</sup> Under our definition, confining is a horizontal phenomenon: it is a means by which a court renders *its own* precedents virtually inoperative. That is because lower courts lack formal

How, one might ask, does creating this doctrinal fissure reduce the costs of overruling? Remember first that courts' desire not to disturb reliance interests ordinarily functions as a brake on legal correction.<sup>8</sup> Confining eases off this brake by enabling certain reasonable expectations—those formed in reliance on the particular facts of the confined case—to remain unaffected by a principle's repudiation. Under certain conditions, then, confining can permit a court to move the law in its preferred direction *and* avoid overly disrupting reliance on an earlier decision.

Of course, respect for reliance interests is not the only reason courts maintain fealty to precedent. The pace of legal change is slowed, too, by the formal constraints courts have imposed on themselves when deciding whether to overrule a case. Confining has found use as an effective mechanism for casting off these constraints. Consider the Supreme Court's avowed commitment to overruling a case only when it can articulate a "special justification" for doing so—one that transcends mere disagreement with the case's reasoning. This requirement has not been understood to apply to confining,<sup>9</sup> even though confining eviscerates everything a case stands for except its precise result.<sup>10</sup> Similarly, although each federal

---

authority to annul the principles announced by their superiors. See *Morse v. S. Union Co.*, 38 F. Supp. 2d 1120, 1124 (W.D. Mo. 1998) ("Defendant asks the court to 'confine' *Throgmorton* . . . 'to its facts.' This is more properly addressed to the Court of Appeals."). Of course, lower courts often strive to cabin the unwanted implications of principles issued from above. See generally *Re*, supra note 5. These efforts may result in localized precedent that is functionally indistinguishable from the law created by a confining court. See *Vaerst v. Tanzman*, 222 Cal. App. 3d 1535, 1544 (1990) (Poché, J., dissenting) ("[W]here does a lower court derive its authority to ignore the Supreme Court's holding, straight-arm the rationale of the decision, and limit the decision to its facts?"). Lower courts may even catalyze the confining process by signaling to their superiors that a binding principle ought to be repudiated. But all such efforts to reshape existing doctrine from below fall outside the scope of our project.

<sup>8</sup> See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) ("Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent."); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (explaining that "reliance on a judicial opinion is a significant reason to adhere to it"); Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2028 (1994) ("[R]eliance interests often tip the balance in favor of retaining a rule of law that might otherwise be overturned.")

<sup>9</sup> See *infra* Subsection II.B.1.

<sup>10</sup> See *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 178 (5th Cir. 2005) (concluding that a confined decision had been "effectively overruled"); *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 575 (7th Cir. 1990) ("[T]hat decision was confined to its facts"—"the polite formula for overruling."); *Comm'n's Inv. Corp. v. FCC*, 641 F.2d 954, 976 (D.C. Cir. 1981) ("[T]o say a case has been confined to its facts is just a polite way to say it has been ignored."); *Pearson v. Fairlakes Village Condo. Ass'n*, Civ. No. 10-1296(SCC), 2012 WL 874835, at \*2 n.5 (D.P.R. Mar. 13, 2012) (asserting that a confined decision had been "implicitly overruled"); *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 214

court of appeals forbids three-judge panels from overruling circuit precedent, panels have frequently gutted earlier decisions through the use of confining.<sup>11</sup> By labeling these deviations from precedent “confining,” in short, courts have successfully skirted the formal requirements of stare decisis.

Confining likewise enables federal courts to sidestep the Supreme Court’s prohibition on “prospective overruling”—i.e., continuing to treat a case as good law only with respect to conduct predating its overruling.<sup>12</sup> During the Warren Court era, prospective overruling was often called upon to soften the blow to reliance interests occasioned by the Court’s doctrinal course-corrections.<sup>13</sup> The Court’s retroactivity doctrine has since made clear, however, that federal courts may not apply new principles selectively in order to accommodate reasonable expectations.<sup>14</sup> But this is precisely what happens with confining.<sup>15</sup> This discrepancy—oddly—appears to have gone unnoted by jurists and scholars alike.

Finally, courts may have engaged in confining precisely because it is so poorly understood. Judge for yourself the more eye-grabbing headline: “Supreme Court Overrules *Smith v. Jones*” or “Supreme Court Confines *Smith v. Jones* to Its Facts.” Confining’s relative lack of name recognition has allowed courts to quietly sweep aside disfavored precedents. A

---

(D.D.C. 2009) (“Defendant would confine *Armstrong II* to its facts, eviscerating its precedential value.”); *Messenger v. Messenger*, 827 P.2d 865, 875 (Okla. 1992) (Wilson, J., dissenting) (“The majority opinion attempts to confine *Nantz* to its facts when in fact, the majority opinion is overruling *Nantz*.”); K.N. Llewelyn, *The Bramble Bush: On Our Law and Its Study* 67 (1951) (“[W]hen you find this said of a past case you know that in effect it has been overruled.”); Memorandum from Justice Blackmun to Conference (Mar. 6, 1978), in Harry A. Blackmun Papers, Library of Cong., Manuscript Div., available at [http://www1.law.umkc.edu/justicepapers/monelldocs/HAB/Blackmun%2004%20Monell%20\(CF%20257-11-%20PDF%20files\)/3-6-78%20Memo%20HAB%20to%20Conf%20HAB257F110020.pdf](http://www1.law.umkc.edu/justicepapers/monelldocs/HAB/Blackmun%2004%20Monell%20(CF%20257-11-%20PDF%20files)/3-6-78%20Memo%20HAB%20to%20Conf%20HAB257F110020.pdf) [<https://perma.cc/7PUA-P5HA>] [hereinafter Blackmun Memorandum] (insisting that “to ‘confine [a case] to its facts’ . . . so often is a euphemism for overruling”).

<sup>11</sup> See *infra* Subsection II.B.1.

<sup>12</sup> See *infra* Subsection II.B.2.

<sup>13</sup> See *infra* note 122 and accompanying text.

<sup>14</sup> See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (clarifying that federal courts may not create exemptions from full retroactivity based on “actual reliance on an old rule and . . . harm from a retroactive application of the new rule”); see also *infra* notes 167–169 and accompanying text.

<sup>15</sup> Indeed, confining goes further than prospective overruling in creating a *permanent* carve-out from a new rule’s application for previously adjudicated fact patterns. See *infra* Subsection II.B.2.

confining judge can say “with a straight face, ‘I didn’t vote to overrule it. I simply limited the earlier decision to its facts.’”<sup>16</sup>

Confining can thus embolden courts to depart from precedent even when overruling might come at too dear a price. But the very features of confining that make it so appealing to judges also pose considerable—and strangely underexplored—threats to a judicial system predicated on principled adjudication. By providing a method for courts to carve out exceptions to generally applicable doctrinal rules, confining encourages judges to decide cases based purely on pragmatic concerns, rather than on principle. By creating an easy workaround to the formal obligations that attend overruling precedent, confining dangerously loosens the constraints of *stare decisis*. And by allowing courts to undermine precedent in a low-visibility manner, confining impairs the public’s ability to oversee the work of the judiciary.

Confining also runs headlong into fundamental concerns about the nature and scope of judicial authority.<sup>17</sup> The practice of confining entails a marked departure from the ordinary judicial role in two key respects. First, it causes courts to decide future cases in a concededly unprincipled manner. Once a case has been confined to its facts, the operative question becomes whether a new case is factually distinguishable from it in *any* respect—even if the cases cannot be distinguished in any *principled* manner. And second, confining requires courts to continue applying principles that they have already held to be invalid. In this way, confining causes incompatible legal principles to coexist with one another, with each regarded as “good law” in some sense. No other method of treating precedent calls upon courts to engage in purely fact-bound adjudication, or to construct a jurisprudence at war with itself.<sup>18</sup>

Remarkably, given the considerable differences between confining and overruling, courts rarely explain their selection of one tool over the other when disposing of unwanted precedent.<sup>19</sup> The choice between them has

---

<sup>16</sup> See Nina Totenberg, *The Roberts Court and the Role of Precedent*, NPR (July 3, 2007, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=11688820> [<https://perma-cc/3TA2-GCEX>] (quoting Professor Pam Karlan).

<sup>17</sup> See *infra* Section III.C.

<sup>18</sup> See *infra* Section I.E.

<sup>19</sup> Courts have occasionally cited reliance interests as a reason for confining rather than overruling. See *infra* Section II.A. We are aware of only two exceptions not involving reliance. See *Citizens United v. FEC*, 558 U.S. 310, 382 (2010) (Roberts, C.J., concurring) (contending that an earlier case should be overruled because it was unusually “difficult to confine to its facts”); *Perez v. Campbell*, 402 U.S. 637, 652 (1971) (“Although it is possible to argue that

largely been treated as discretionary.<sup>20</sup> And the same is true of concurring and dissenting opinions advocating the elimination of disfavored cases.<sup>21</sup> Federal and state courts have engaged in confining time and again despite lacking a shared analytical framework for doing so.

This inattentiveness to confining's distinctive nature has often led to its irresponsible (and ineffective) use. Courts routinely confine cases simply by declaring them limited to their "facts," without providing guidance as to *which* of those facts a future case must share to be governed by the confined case's repudiated principle.<sup>22</sup> Such bare formulations invariably generate disagreement over a confined case's residual scope; judges who view the repudiated principle favorably tend to advocate for a broader vestigial domain, and vice versa. But efforts to specify a confined case's precise factual legacy have seldom fared much better. No matter the care courts have taken in circumscribing the scope of a confined case, follow-on cases have arisen testing the limits of its residual domain in unexpected (and often challenging) ways.<sup>23</sup>

Courts are not alone in failing to grapple with confining's distinctive attributes; this doctrinal blind spot mirrors an equally curious void in legal scholarship. Notwithstanding confining's frequent use, the practice has largely evaded the watchful eye of the legal academy. So much so, in fact, that no commentator has ever dedicated more than a few paragraphs to examining it.<sup>24</sup> In this first in-depth treatment of confining, we aim to

---

[two discredited decisions] are somehow confined to cases involving either bankruptcy or highway safety, analysis discloses no reason why the States should have broader power to nullify federal law in these fields than in others.").

<sup>20</sup> See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (conflating the alternatives of "overrul[ing]" a prior decision and "narrowly confin[ing] it to its facts"); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 *Geo. Wash. L. Rev.* 68, 99 (1991) (explaining that the Court has historically "weaken[ed] precedents through inconsistent means"); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 *U. Pa. J. Const. L.* 155, 192 (2006) ("Does it make a difference whether we say that a precedent is overruled or confined to its facts? . . . I don't think it matters much . . ."); Blackmun Memorandum, *supra* note 10 (suggesting a willingness either to overrule an earlier decision or to "confine it to its facts").

<sup>21</sup> For several examples of such opinions, see *infra* note 44.

<sup>22</sup> See *infra* note 44.

<sup>23</sup> See *infra* notes 154–158 and accompanying text.

<sup>24</sup> For examples of such limited treatments, see Llewelyn, *supra* note 10, at 66–67; Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 *Minn. L. Rev.* 1173, 1183 (2006); Re, *supra* note 5, at 931; Solum, *supra* note 20, at 192; Jeff Todd, *Undead Precedent: The Curse of a Holding "Limited to Its Facts"*, 40 *Tex. Tech L. Rev.* 67, 81–82 (2007); Chad Flanders, *Comment, Bush v. Gore and the Uses of "Limiting"*, 116 *Yale L.J.* 1159, 1163–65

erase the informational deficit that has enabled the practice's indiscriminate use throughout the federal and state judicial systems.

Part I of this Article describes the mechanics of the confining process. Through the use of concrete examples, we illustrate the unique nature of this practice and explain how it differs from better-known methods of treating precedent. In Part II, we identify three principal reasons why judges might be tempted to engage in confining: (1) to protect reasonable expectations formed in reliance upon earlier decisions, (2) to evade certain doctrinal requirements that currently apply only when courts overrule past decisions, and (3) to fend off the level of public scrutiny that typically attends explicit overrulings. Each of these rationales poses its own set of dangers to the proper functioning of a principles-based judicial system. In Part III, we catalogue these concerns and assess two additional objections to confining grounded in the limitations of judicial authority.

The Article concludes with Part IV. In it, we offer a series of guidelines on *when* confining may be appropriate, as well as *how* it should be employed when the proper circumstances arise. In our view, confining can be justified only as a method of protecting deeply embedded reliance interests. Even then, the tool should not be used unless doing so would protect a substantial share of all reliance interests engendered by a repudiated principle. We expect these conditions to be met exceedingly rarely. When such circumstances do come along, courts should strive to articulate the precise “facts” that a confined case represents. Failing to do so will inevitably generate needless litigation, thereby disserving the very reliance interests that justified the use of confining in the first place.

Part IV continues with a series of practical insights into the understudied relationship between repudiation, confining, and overruling. Because the repudiation of a principle discards everything a precedent stands for except its precise result, courts should cease applying tests that accord talismanic significance to the presence of an “overruling.” We close Part IV by situating confining within an assortment of other jurisprudential tools—both real and hypothesized—designed to safeguard stakeholders' expectations when courts deviate from *stare decisis*. Most notably,

---

(2007); Riley T. Svikhart, Essay, *Dead Precedents*, 93 *Notre Dame L. Rev.* Online 1, 2–4 (2017). Precious few scholarly sources that characterize individual cases as having been “confined” or “limited” to their facts use those terms, as we do, to denote the repudiation and limited preservation of a principle. See Todd, *supra*, at 84 (lamenting the “lack of clarity of what it means to limit a holding to its facts”); see also *infra* notes 26–28 and accompanying text.



modern retroactivity doctrine is plagued by a deep inconsistency between the Court's condemnation of prospective overruling and its repeated use of confining. We contend that these avowedly consequentialist tools should rise or fall together as part of a single reliance-protection toolkit.

### I. DEFINING CONFINING

In this first Part, we take up the task of defining the phenomenon of confining. As we use the phrase, confining a case to its facts entails treating the case as good law should its facts recur, but regarding it as having been overruled in all other contexts. A confined case almost certainly would have come out differently had it been decided today,<sup>25</sup> yet it retains precedential force within a narrow band of future cases—those that share its facts.

Courts have occasionally used confining-like language to describe related, but meaningfully distinct, phenomena. This Article does not concern situations in which courts predict that the relevance of a decisional principle employed in the case at hand will likely be “limited” to the present circumstances.<sup>26</sup> Nor will we discuss courts' practice of clarifying that, on reflection, a still-surviving principle is best understood as “confining” to a factual context distinguishable on principled grounds from that of the case at hand.<sup>27</sup> Finally, we are not concerned with situations in

<sup>25</sup> See, e.g., *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957) (acknowledging that an earlier case would have been decided differently “were we considering the question . . . for the first time upon a clean slate”); *Macias v. Comm'r*, 255 F.2d 23, 26 (7th Cir. 1958) (“If this reasoning had been employed in *Wilcox*, we see no escape from the conclusion that the decision in that case would have been different.”).

<sup>26</sup> See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 575 (1978) (“[W]e confine our holding to the facts of this case.”); *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971) (“Our decision today is based on the specific facts of this case . . . .”); *Allen-Bradley Local No. 1111 v. Wis. Emp't Relations Bd.*, 315 U.S. 740, 747 (1942) (“[W]e confine our discussion to the precise facts of this case . . . .”); *Bates v. Dresser*, 251 U.S. 524, 532 (1920) (“[O]ur decision is confined to the specific facts.”); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 179 (1909) (“[W]e confine ourselves to the particular facts of the case before us . . . .”). The technique of downplaying the precedential significance of one's own rulings has been sharply criticized. See Richard M. Re, On “A Ticket Good for One Day Only”, 16 *Green Bag 2d* 155, 161–63 (2013) (collecting several such critiques).

<sup>27</sup> See, e.g., *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997) (“*Ritchie* is an extraordinary case and we confine it to the precise circumstances the Court there confronted.”); *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 672 (1964) (“The *Columbia Steel* case must be confined to its special facts.”); *United States v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 597 (1941) (“What was said in the *Cress* case must be confined to the facts there disclosed.”); *ICC v. New York, New Haven & Hartford R.R. Co.*, 287 U.S. 178,

which courts “limit” an earlier case by subsuming its reasoning under a new methodology.<sup>28</sup> This Article instead focuses only on the phenomenon of a court disavowing the principle of an earlier case, but nevertheless announcing its intention to continue applying that principle to future cases presenting the same facts as the confined case.

After defining the concept of confining, Part I explores several notable issues raised by this unusual practice—namely, its relationship to the better-known device of overruling; the difficulties courts face in discerning the residual precedential scope of a confined case; and the ways in which courts can achieve the functional equivalent of confining without explicitly acknowledging as much. Equipped with a better understanding of the distinctive nature of confining, we conclude Part I by examining how it differs from other means of treating precedent.

### A. *The Mechanics of Confining*

The first step in confining a case to its facts is *repudiating* one of the legal principles upon which the case relies. Repudiation occurs when a court not only opines that a particular principle is flawed, but indicates that it must not be applied (at least as a general matter) going forward. The act of repudiation effectuates drastic legal change *now*, rather than merely signaling a willingness to do so at a later time. Of course, courts’ appraisals of their past decisions exist along a spectrum; some express only mild skepticism, while others purport to identify grave error. But repudiation functions as an on/off switch: a principle has been repudiated only if it has been displaced as a matter of doctrine. No matter how much doubt has been cast on it, an unrepudiated principle continues to enjoy

---

204 (1932) (“The ruling in that suit has been explained in later cases, and confined to its peculiar facts.”); *United States v. Eaton*, 169 U.S. 331, 348 (1898) (“[T]his general language must be confined to the precise state of facts with reference to which it was used . . . .”); *Kruger v. Apfel*, 214 F.3d 784, 787 (7th Cir. 2000) (“*Johnson* is distinguishable and should be confined to its facts.”). This practice can be understood as a backward-looking analogue to the type of prospective limiting described in the previous footnote.

<sup>28</sup> To take one example, *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964), held that the Sixth Amendment right to the assistance of counsel could attach before the initiation of adversary proceedings, at least in certain circumstances. The Court has since “expressly disavowed” *Escobedo*’s methodology, *Moran v. Burbine*, 475 U.S. 412, 430 (1986), treating the issue of pre-indictment custodial interrogation under the rubric of self-incrimination jurisprudence. See *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966). As a result, the Court has “limited the holding of *Escobedo* to its own facts.” *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

vertical and horizontal precedential force—however short its expected life span.<sup>29</sup>

The second step in the confining process occurs when a court expressly *preserves* the precedential force of a repudiated principle for future cases presenting the same facts as the case being confined. A confining court thus consciously creates a fissure in the affected doctrinal area. If a future case falls within the confined decision’s factual domain, it will be governed by its repudiated principle. The vast remainder of factual scenarios, however, are to be resolved under a newly controlling, “correct” legal principle. Confining thus introduces arbitrary doctrinal distinctions, calling upon judges to ascertain whether two cases are distinguishable on their *facts*, rather than whether they are distinguishable on *principle*. A mere difference in underlying circumstances—without a showing that those differences are somehow salient—will thereby defeat a proposed application of the repudiated principle.<sup>30</sup>

### *B. Repudiation, Confining, and Overruling*

If confining did not exist, repudiating a principle would be tantamount to overruling each case decided in reliance upon it. But although repudiation is often conflated with overruling, the two concepts are meaningfully distinct. This is because repudiation need not terminate in overruling; it can also serve as a prelude to confining.<sup>31</sup> In other words, repudiating a principle need not annul the outcomes of any previously adjudicated cases, because the repudiated principle could continue to govern those cases’ facts. Repudiation thus sets a court down a forking path that eventually culminates in either confining or overruling.

Courts often clarify which path they intend to take when repudiating a principle. But they sometimes postpone making that announcement until presented with a case so factually similar to the repudiated one as to be

---

<sup>29</sup> Of course, courts often suggest that they would not have adopted a particular legal principle as a matter of first impression, while explicitly declining to repudiate the principle in light of reliance interests. This is *stare decisis* at work.

<sup>30</sup> See *United States v. Damra*, 621 F.3d 474, 507 (6th Cir. 2010) (“Whether *Minarik* is controlling . . . turns on the degree to which the facts of this case mimic the circumstances found in *Minarik*.”); *United States v. McGuire*, 347 F.2d 99, 102 (6th Cir. 1965) (“A factual comparison, then, must be had.”).

<sup>31</sup> See *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, 239 U.S. 156, 166 (1915) (opting to “confine[] to [its] exact facts” an 1888 case whose central premise had been abandoned in an 1894 decision).

squarely governed by its holding.<sup>32</sup> Here, too, repudiating courts can speak with greater or lesser clarity. They can specify that lower courts remain obliged—at least for now—to apply the repudiated principle on the facts of earlier-decided cases. Or they can say nothing on the matter. In the latter scenario, jurists and commentators will be left to wonder whether a decision embodying a repudiated principle has been overruled *sub silentio*, or whether it remains good law should its facts recur.<sup>33</sup>

For a notable example of repudiation unaccompanied by an explicit overruling or confining, consider the Supreme Court’s jurisprudence on taxpayer standing. In *Flast v. Cohen* (1968), the Court permitted a taxpayer to bring an Establishment Clause challenge to a congressional appropriation.<sup>34</sup> The Court has since repudiated the reasoning of *Flast*, firmly insisting on a “rule against taxpayer standing” in all other contexts.<sup>35</sup> For now, then, *Flast* has essentially been “confined to its facts,”<sup>36</sup> with its reasoning cabined to “an outer boundary drawn by the *results* in *Flast*.”<sup>37</sup> The case might eventually be overruled, as some Justices have

<sup>32</sup> See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 614 (2007) (plurality opinion) (“[T]he present case does not require us to reconsider that precedent.”); *Dretke v. Haley*, 541 U.S. 386, 395–96 (2004) (declining to consider whether a thoroughly devitalized precedent should be overruled). This sort of deferred decisionmaking is *not* a form of incrementalism: all possible applications of a repudiated principle are foreclosed, except those corresponding to the facts of previously decided cases.

<sup>33</sup> See, e.g., *People v. Barbosa*, 228 Cal. App. 3d 1619, 1627 n.12 (1991) (“In view of the obvious conflict between *Fuentes* and the subsequent Supreme Court opinions . . . we can only conclude that either [a later decision] overruled *Fuentes* sub silentio or that *Fuentes* must be limited to its facts.”); *Bowdle v. Hanks*, 182 A.2d 790, 791 (Md. 1962) (expressing uncertainty about whether an earlier decision had been “overruled by . . . later cases” or “confined to its facts”); *Alsip v. Klosterman Baking Co.*, 680 N.E.2d 1320, 1324 (Ohio Ct. App. 1996) (concluding that a particular precedent “is either limited to its facts . . . or has been overruled *sub silentio*”); *Dixie Ohio Exp. Co. v. Butler*, 166 S.W.2d 614, 616 (Tenn. 1942) (stating that a previous case had been “practically overruled, [or] at least confined to its facts”).

<sup>34</sup> 392 U.S. 83, 105–06 (1968).

<sup>35</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 138 (2011); see also *id.* at 136 (“[C]laims of taxpayer standing rest on unjustifiable economic and political speculation.”); *Hein*, 551 U.S. at 593 (“[I]t is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.”); *id.* at 600 (“[T]he interests of the taxpayer are, in essence, the interests of the public at large . . . .”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 477 (1982) (“[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing . . . .”).

<sup>36</sup> *Hein*, 551 U.S. at 609.

<sup>37</sup> *Id.* at 610 (quoting *United States v. Richardson*, 418 U.S. 166, 196 (1974) (Powell, J., concurring)); see also *Winn*, 563 U.S. at 138 (“*Flast*’s holding provides a ‘narrow exception’ to ‘the general rule against taxpayer standing’” (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988))); *Valley Forge*, 454 U.S. at 481 (alluding to “the rigor with which the *Flast*

urged,<sup>38</sup> or it might instead be confined, with its narrow holding grandfathered in to an antithetical standing jurisprudence. But it appears that the Court will not resolve *Flast*'s fate until it grants a petition for certiorari asking that *Flast* be overruled. This same uncertainty afflicts any principle repudiated in a drive-by fashion.<sup>39</sup>

### C. *The Scope of a Confined Case*

When a court professes to confine a case to its facts, it typically characterizes the reach of the repudiated principle in one of two ways. It will either (1) attempt to clarify the precise facts the principle continues to govern or (2) simply declare that an earlier decision embodying the principle is to be confined to its "facts" or "circumstances." The choice between these two alternatives greatly affects the degree of discretion that judges thereafter enjoy in administering the doctrinal backwaters inhabited by repudiated principles.

For a textbook example of the former approach, consider the Supreme Court's case law on maritime tort recovery. In *Sea-Land Services, Inc. v. Gaudet* (1974), the widow of a longshoreman who had suffered a fatal injury in territorial waters brought a wrongful-death suit for loss of society.<sup>40</sup> The majority in *Gaudet* held that federal maritime law permitted

---

exception . . . ought to be applied"); *Laskowski v. Spellings*, 546 F.3d 822, 827 (7th Cir. 2008) ("[T]he reach of *Flast* is now strictly confined to the *result* in *Flast*.").

<sup>38</sup> See *Hein*, 551 U.S. at 637 (Scalia, J., concurring in the judgment) ("It is time—it is past time—to call an end. *Flast* should be overruled.").

<sup>39</sup> For example, a plurality of the Court once observed that the approach outlined in *In re Ross*, 140 U.S. 453 (1891), had been "directly repudiated" by later cases. *Reid v. Covert*, 354 U.S. 1, 12 (1957) (plurality opinion). But those Justices punted on the decision's fate: "At best, the *Ross* case should be left as a relic from a different era." *Id.* (emphasis added); see also *Apprendi v. New Jersey*, 530 U.S. 466, 487, 490 (2000) (declining to revisit *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which the Court described as "at best an exceptional departure" from the "otherwise uniform course of decision during the entire history of our jurisprudence" (emphasis added)); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–05 (1999) (stating that the Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), "rested on a false premise" that had been "consistently rejected over the years"); *Hudson v. United States*, 522 U.S. 93, 96 (1997) (explaining that the Court was "disavow[ing] the method of analysis used" in one of its Double Jeopardy decisions, without specifying whether the repudiated principle would continue to govern any specific fact patterns); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) ("Without questioning the holding in *LaRue*, we now disavow its reasoning . . ."); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) ("Whatever the validity of *Coffey* on its facts, its ambiguous reasoning . . . is hereby disapproved.").

<sup>40</sup> *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 574, 585 (1974).

such suits.<sup>41</sup> But the Court charted a new course in *Miles v. Apex Marine Corp.* (1990), declaring that “there is no recovery for loss of society in a general maritime action for . . . wrongful death.”<sup>42</sup> Rather than overruling *Gaudet*, however, the Court retained its repudiated principle for a limited class of future suits: “The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen.”<sup>43</sup>

Unfortunately, confining courts rarely specify the exact factual realm a repudiated principle will continue to govern. Far more often, they simply cabin a prior decision “to its facts.” Some variation on this bare formulation has appeared ad infinitum in majority, concurring, and dissenting

---

<sup>41</sup> *Id.* at 587–88.

<sup>42</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990).

<sup>43</sup> *Id.* at 31; see also *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 634 (3d Cir. 1994) (“[T]he Court, disapproving of [*Gaudet*] but reluctant to overrule it directly, has narrowed the case to its facts so that the decision may be, for all intents and purposes, a dead letter.”); *Randall v. Chevron USA, Inc.*, 13 F.3d 888, 903 (5th Cir. 1994) (observing both that “*Gaudet* remains good law” and that “[t]he Court limited *Gaudet* to its precise facts” (citing *Miles*, 498 U.S. at 31)), overruled on other grounds by *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 909 (5th Cir. 1999); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1458 (6th Cir. 1993) (“Although *Gaudet* has never been overruled, its holding has been limited over the years to the point that it is virtually meaningless.”).

opinions across the federal<sup>44</sup> and state<sup>45</sup> court systems. Despite the ostensible clarity of such phrases, however, it cannot be true that a future case

<sup>44</sup> For several examples at the Supreme Court level alone, see *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397 n.18, 401 n.30 (1968) (“limit[ing] to its own facts” a decision deemed “questionable”); see also *Perry v. New Hampshire*, 565 U.S. 228, 249 (2012) (Thomas, J., concurring) (“I would limit the Court’s suggestive eyewitness identification cases to the precise circumstances that they involved.”); *Shafer v. South Carolina*, 532 U.S. 36, 55 (2001) (Scalia, J., dissenting) (“I would limit *Simmons* to its facts.”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 141 (1996) (Thomas, J., dissenting) (“*Mayer* was an unjustified extension that should be limited to its facts, if not overruled.”); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring in the judgment) (declaring an intention to “honor[] the holdings of our past [Dormant Commerce Clause] decisions” while “declin[ing] to extend the rationale that produced those decisions any further”); *Reed v. Collyer*, 487 U.S. 1225, 1225–26 (1988) (Scalia, J., dissenting from denial of certiorari) (deeming it “necessary” to “limit[] . . . to its facts” a decision from the previous term); *Bd. of Pardons v. Allen*, 482 U.S. 369, 385 (1987) (O’Connor, J., dissenting) (“*Greenholtz* is thus an aberration and should be reexamined and limited strictly to its facts.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 165 (1975) (Blackmun, J., concurring in the result) (urging that *Fortnightly* “be limited to its facts,” given his “disagreement with [its] reasoning”); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 415 (1974) (Blackmun, J., dissenting in part) (“With *Fortnightly* on the books, I . . . would confine it ‘to its precise facts . . .’” (quoting *id.* at 422 (Douglas, J., dissenting))); *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (“[I]t is our judgment that neither the cases nor their reasoning should be given any further expansion.”); *Cleveland v. United States*, 329 U.S. 14, 21 (1946) (Black, J., dissenting) (“[T]he correctness of that rule is so dubious that it should at least be restricted to its particular facts.”). Justices Scalia and Thomas have also used concurring opinions to recast majority opinions as having confined earlier decisions to their “facts.” See *Cooper v. Harris*, 137 S. Ct. 1455, 1486 (2017) (Thomas, J., concurring) (“Today’s decision does not repeat *Cromartie II*’s error, and indeed it confines that case to its particular facts.”); *Hodel v. Irving*, 481 U.S. 704, 719 (1987) (Scalia, J., concurring) (“[I]n finding today our decision effectively limits *Allard* to its facts.”). Courts also tend to refer to the “facts” of an earlier case when assuming the existence of confining as a valid technique. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 382 (2010) (Roberts, C.J., concurring) (“Because *Austin* is so difficult to confine to its facts . . . the costs of giving it *stare decisis* effect are unusually high.”); *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (“The analysis in *Rakas* must be respected . . . unless that precedent is to be overruled or so limited to its facts that its underlying principle is, in the end, repudiated.”); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (“[W]e must overrule *Hanover Shoe* (or at least narrowly confine it to its facts) . . .”); *United States v. Reidel*, 402 U.S. 351, 358 (1971) (Harlan, J., concurring) (“*Stanley*, far from overruling *Roth*, did not even purport to limit that case to its facts . . .”); *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 43 n.15 (1st Cir. 2002) (suggesting that when two cases “cannot be fully reconciled, . . . one must be limited to its facts”).

<sup>45</sup> See, e.g., *City of Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032, 1037 n.11 (Colo. 1983) (en banc) (finding a particular case to have been “limit[ed] . . . to its facts” rather than “expressly overrul[ed]”); *State v. Grotton*, 429 A.2d 871, 873 (Conn. 1980) (“To the extent that [an earlier] decision . . . indicates [otherwise], we hereby confine that decision to its facts.”); *Darrah v. Des Moines Gen. Hosp.*, 436 N.W.2d 53, 55 (Iowa 1989) (“We do not overrule *Franzen*, but merely limit it to its facts.”); *Nester v. Mich. Land & Iron Co.*, 37 N.W. 278, 280 (Mich. 1888) (“[T]he rule applied in that case can never be resorted to except in a

must be factually indistinguishable from a confined case to fall within its ambit. Such a rigid understanding of a confined case's "facts" would render overruling and confining interchangeable, as no two cases are ever truly *identical*.<sup>46</sup> There can be little doubt, then, that a future case need only share some subset of the confined case's operative facts to be governed by its repudiated principle.

Courts presently lack a shared framework for differentiating between the pertinent and immaterial facts of a confined case, however. In *Still v. Norfolk & Western Railway Co.* (1961), for instance, the Court repudiated the reasoning of its decision in *Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock* (1929),<sup>47</sup> declaring the case "limited to its precise facts."<sup>48</sup> The Court failed to specify *which* of *Rock*'s facts represented the case's surviving holding, however. Writing separately, Justice Frankfurter pithily observed that the majority must have been referring to "the facts *relevant* to the result in that case; it does not mean that the plaintiff must be named *Rock*."<sup>49</sup> For Frankfurter, then, the Court's unadorned

---

case where all the facts and circumstances are precisely the same as in that."); *Fries v. Bray*, 107 N.Y.S.2d 425, 427 (N.Y. App. Div. 1951) (concluding that an earlier decision "d[id] not overrule the Ponsrok case, but simply confine[d] it to its facts"); *Burnham v. Cleveland Clinic*, 89 N.E.3d 536, 539 (Ohio 2016) (opting to "limit [a decision] solely to its facts" rather than to "overrule the case altogether"); *Gressman v. McClain*, 533 N.E.2d 732, 735 (Ohio 1988) ("It is appropriate at this time to confine *Settemyer* to its facts."); *Commonwealth v. Short*, 420 A.2d 694, 698 (Pa. Super. Ct. 1980) ("While *Rimmel* has never been overruled, it was criticized and confined to its facts . . ."); *Harris v. Beasley*, 133 S.W. 1110, 1111 (Tenn. 1911) ("While it is not necessary to overrule this case, we think it should be confined to its exact facts."); *Fleming v. Wallace*, 91 S.W. 47, 48 (Tenn. 1905) ("The authority of that case must, therefore, be limited to its precise facts . . ."); *State v. Clark*, 563 P.2d 1253, 1257 (Wash. 1977) (choosing to "confine [a case] to its facts" because its "reasons are today questionable"); *Pino v. Szuch*, 408 S.E.2d 55, 59 (W. Va. 1991) ("We limit *Shaw* to its precise facts because its reasoning runs counter to the principles explained today . . ."); *Lurye v. State*, 265 N.W. 221, 224 (Wis. 1936) ("It is not necessary for us to overrule *John v. State* . . . It should, however, be confined strictly to its facts."); *Michels v. State*, 90 N.W. 1096, 1097 (Wis. 1902) ("The *Scanlan Case* not having been overruled, but limited to its own exact facts . . .").

<sup>46</sup> See *Comm'ns Inv. Corp v. FCC*, 641 F.2d 954, 976 (D.C. Cir. 1981) ("[F]inding factual variations from case to case is a trivial task . . ."); Glanville Williams, *Learning the Law* 93 (A.T.H. Smith ed., 14th ed. 2010) ("We know that in the flux of life all the facts of a case will never recur . . ."); Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 20 (1989) ("[T]here will always be some factual distinctions between the precedent case and all other cases."); Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 *Cardozo L. Rev.* 969, 971 (2011) ("It is always possible to find distinctions between the existing case and the new situation: At the very least, the names, places, dates, and so on will be different . . .").

<sup>47</sup> 279 U.S. 410 (1929).

<sup>48</sup> *Still v. Norfolk & W. Ry. Co.*, 368 U.S. 35, 44 (1961).

<sup>49</sup> *Id.* at 47 (Frankfurter, J., concurring in the judgment) (emphasis added).



reference to the confined decision's "facts" implicitly delegated to future courts the task of figuring out which of *Rock*'s facts were the "relevant" ones—that is, the facts a future case must share for *Rock*'s repudiated principle to apply.

But identifying *the* "facts" of a confined case is easier said than done.<sup>50</sup> In large part, this is because the sorting mechanism cannot readily be reduced to principled analysis. Confining a case to its facts directs later courts to make unprincipled distinctions: instead of asking whether a decisional principle would sensibly apply to the fact pattern at hand, those courts are tasked with determining whether the present facts "mimic" those of the confined case.<sup>51</sup> Without recourse to a principle that justifies distinguishing the general rule from its exceptions, courts are often left with little but their intuition to go on in deciding which facts of a confined case matter. Indeed, *Rock* itself—as confined—has proven exceedingly difficult to apply.<sup>52</sup>

In theory, the confined case's residual domain could be exceedingly narrow. In the memorable phrasing of legal philosopher Karl Llewelyn, the rule of a confined case could hold "only of redheaded Walpoles in pale magenta Buick cars."<sup>53</sup> Llewelyn's playful example (however hyperbolic) illustrates an important truth about confining: mere use of the vocabulary of confining permits later courts, if they are so inclined, to characterize the confined case's "facts" so precisely as to erase any distinction between confining and overruling.

Despite their superficial specificity, then, references to the "facts" or "circumstances" of a confined case can lead to considerable confusion.<sup>54</sup> Judges who view a confined case with disfavor can adopt a stringent understanding of its salient "facts"—one that effectively treats the confined decision as having been overruled. Judges more sympathetic to the principle of a confined case can contend (entirely plausibly) that the "facts" for which the case stands cannot so neatly be isolated from its underlying

---

<sup>50</sup> See *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 862 (D.C. Cir. 1972) ("[T]hat *Edwards* should be 'limited to its facts' . . . only begs the question of *which* facts should set the principled limits on the *Edwards* doctrine.").

<sup>51</sup> *United States v. Damra*, 621 F.3d 474, 507 (6th Cir. 2010).

<sup>52</sup> See *Harkrider v. Posey*, 24 P.3d 821, 826 n.14 (Okla. 2000) ("Lower courts struggled for years thereafter with the question of which [facts] were within the *Rock* doctrine . . .").

<sup>53</sup> Llewelyn, *supra* note 10, at 66–67.

<sup>54</sup> For one especially glaring example at the Supreme Court level, see *infra* notes 144–152 and accompanying text; see also Todd, *supra* note 24, at 84 (demonstrating that "absurd distinctions" can result from "the lack of clarity of what it means to limit a holding to its facts").

legal principles. Such confusion is less likely to occur where, as in *Gaudet*, the confining court specifies the facts to which a repudiated principle is being confined. Whether confining a case to its facts will have any practical effect, therefore, turns primarily on the scope of future fact patterns to which its repudiated principle is limited.

#### D. Confining by Implication

Even if a court does not use any magic words indicative of confining—e.g., that a case is “limited to its facts”—it can still achieve the functional equivalent of confining by satisfying the twin conditions of repudiation and preservation. This can be accomplished through announcing an abnormally restrictive doctrinal test that nominally keeps a principle alive, but that leaves virtually no room for operation in new factual settings.<sup>55</sup>

The *Bivens* line of cases arguably exemplifies this phenomenon. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), the Supreme Court held that persons subjected to unreasonable searches and seizures in violation of the Fourth Amendment may sue federal officials for money damages, despite the absence of a statutory cause of action.<sup>56</sup> The Court soon recognized implied causes of action to sue for damages under the Fifth Amendment’s Due Process Clause in *Davis v. Passman* (1979),<sup>57</sup> and under the Eighth Amendment’s Cruel and Unusual Punishments Clause in *Carlson v. Green* (1980).<sup>58</sup> As of 1980, the Court understood *Bivens* to stand for the general principle that “the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court.”<sup>59</sup>

Over the next two decades, however, the Court severely curtailed its willingness to entertain *Bivens* claims. “Since *Carlson*,” the Court observed in 2001, “we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.”<sup>60</sup> Justice Scalia would have ratcheted up this reticence even further: “I would limit *Bivens* and

---

<sup>55</sup> As Justice Kennedy once reflected, a precedent may be “so limited to its facts that its underlying principle is, in the end, repudiated.” *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

<sup>56</sup> 403 U.S. 388, 397 (1971).

<sup>57</sup> 442 U.S. 228, 230, 244 (1979).

<sup>58</sup> 446 U.S. 14, 19–20 (1980).

<sup>59</sup> *Id.* at 18; see also *id.* at 25 (“A federal official contemplating unconstitutional conduct . . . must be prepared to face the prospect of a *Bivens* action.”).

<sup>60</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

its two follow-on cases to the precise circumstances that they involved.”<sup>61</sup> Justice Thomas, too, has repeatedly invited the Court to confine *Bivens* and its progeny to their facts.<sup>62</sup>

The Court all but accepted this invitation in *Ziglar v. Abbasi* (2017).<sup>63</sup> Justice Kennedy’s majority opinion—which Justice Thomas joined in relevant part—explained that *Bivens*, *Davis*, and *Carlson* were decided under an “*ancien regime*”<sup>64</sup> in which the Court “followed a different approach to recognizing implied causes of action than it follows now.”<sup>65</sup> The result has been a “notable change” in the Court’s interpretive framework, one that emphasizes structural limitations on judicial authority.<sup>66</sup> Without question, victims of constitutional violations no longer enjoy anything resembling a general “right to recover damages”<sup>67</sup> against wayward federal officials.

These stark disavowals bear the hallmarks of repudiation. But rather than directly prohibiting lower courts from applying *Bivens* in previously unrecognized contexts,<sup>68</sup> the *Abbasi* Court adopted a test that achieves a virtually identical result. *Abbasi* reaffirmed that *Bivens* actions will not be recognized in “new context[s]”<sup>69</sup> whenever “there are ‘special factors counselling hesitation’”<sup>70</sup> in doing so. The Court’s description of this two-step process reveals just how thoroughly *Bivens* has been devitalized.

First, the Court declared that “even a modest extension” of the holdings of *Bivens*, *Davis*, and *Carlson* “is still an extension,” and thus presents a “new *Bivens* context.”<sup>71</sup> This inquiry is indistinguishable from what confining requires. Step one therefore instructs courts to determine whether the Supreme Court has, as a matter of historical accident, already decided a *Bivens* case presenting the same facts. If not, courts proceed to step two,

<sup>61</sup> *Id.* at 75 (Scalia, J., concurring) (citations omitted); see also *Minneeci v. Pollard*, 565 U.S. 118, 131–32 (2012) (Scalia, J., concurring).

<sup>62</sup> See *Hernandez v. Mesa*, 137 S. Ct. 2003, 2008 (2017) (Thomas, J., dissenting); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring); *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring).

<sup>63</sup> 137 S. Ct. 1843 (2017).

<sup>64</sup> *Id.* at 1855 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1857.

<sup>67</sup> *Carlson v. Green*, 446 U.S. 14, 18 (1980).

<sup>68</sup> Of course, the Court’s characterization of early *Bivens* cases as an “*ancien regime*” will surely color how lower courts apply *Abbasi*’s operative doctrinal language. See *Abbasi*, 137 S. Ct. at 1855 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

<sup>69</sup> *Id.* at 1859.

<sup>70</sup> *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18).

<sup>71</sup> *Id.* at 1859, 1864.

where they ask whether there is reason to believe that Congress would be “in the better position” to decide whether to impose monetary liability on federal officers as a matter of social policy.<sup>72</sup> It is unclear how judges could *ever* be thought to enjoy this sort of comparative institutional advantage in light of *Abbasi*’s admonition that, “[w]hen an issue ‘involves a host of considerations that must be weighed and appraised,’ it should be committed to ‘those who write the laws’ rather than ‘those who interpret them.’”<sup>73</sup>

Given the restrictive contours of *Abbasi*’s two-part test, *Bivens* and its two follow-on cases<sup>74</sup> may have effectively been confined to their facts<sup>75</sup>—just as Justice Scalia urged.<sup>76</sup> The Court has “grandfathered them in as ‘old contexts,’ legacy exceptions to the general rule.”<sup>77</sup> In the remainder of this Article, references to “confining” should be understood to refer to the tool’s paradigmatic form—open repudiation and preservation—rather than what we have termed “confining by implication.” But it is important to remember that courts can also functionally confine by indirection, thereby emulating a process that itself serves as a less visible substitute for overruling.

---

<sup>72</sup> *Id.* at 1857.

<sup>73</sup> *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)); see also *id.* at 1858 (defining a “special factor” as any consideration that “cause[s] a court to hesitate” before allowing damages against federal officials).

<sup>74</sup> See *id.* at 1864 (explicitly preserving the holdings of “previous *Bivens* cases decided by this Court”).

<sup>75</sup> See Leading Case, *Bivens* Actions—*Ziglar v. Abbasi*, 131 Harv. L. Rev. 313, 318 (2017) (concluding that *Abbasi* came “close to limiting the *Bivens* cause of action to the circumstances of *Bivens*, *Davis*, and *Carlson*, as it will be very difficult for any case not presenting those facts to survive *Abbasi*’s [test]”); Stephen I. Vladeck, Implied Constitutional Remedies After *Abbasi*, 2017 Am. Const. Soc’y Sup. Ct. Rev. 179, 179 (“[T]he *Abbasi* Court all but shut the door on *Bivens* remedies . . .”). Even Justice Breyer, who vigorously dissented in *Abbasi*, remarked at oral argument the next term that “the Court has held we’re not creating new *Bivens* actions.” Compare *Abbasi*, 137 S. Ct. at 1881 (Breyer, J., dissenting), with Transcript of Oral Argument at 17, *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018) (No. 17-312). A diagnosis of de facto repudiation, if accurate, would represent a fate even more moribund than an advanced state of narrowing. For an expression of the latter view, see Richard M. Re, *The Nine Lives of Bivens*, PrawfsBlawg (June 22, 2017), <https://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-nine-lives-of-bivens.html> [<https://perma.cc/M-236-RPA4>].

<sup>76</sup> See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

<sup>77</sup> Leading Case, *supra* note 75, at 320.

*E. Comparing Confining to Other Means of Treating Precedent*

Now that we have explained what confining entails, we are equipped to compare the practice to several other well-known modes of treating precedent. Doing so yields fresh insights into the unique nature of confining, emphasizing the ways in which it represents a sharp break from standard jurisprudential practice.

Conventional wisdom holds that a court can either “retain or overrule” its precedents.<sup>78</sup> If the former path is chosen, a court can operate within existing precedent in four distinct ways—by following, distinguishing, extending, or narrowing it. A court that *follows* precedent applies the principle of an earlier case when it is best understood to apply. A court that *distinguishes* precedent declines to apply the principle of an earlier case when that principle is best understood not to apply; that is, the court offers a persuasive explanation as to why the principle does not govern the present circumstances. A court that *extends* precedent applies the principle of an earlier case even when it is best understood not to reach the present fact pattern. And a court that *narrows* precedent declines to apply the principle of an earlier case even when it is properly regarded as controlling. Extending and narrowing are the inverse of one another; each subtly reformulates the original principle, either broadening or diminishing its scope, such that the modified principle either governs or fails to govern the present circumstances.<sup>79</sup>

Confining differs from these common modes of treating precedent in multiple respects. Each of the above methods calls upon courts to resolve cases according to generally applicable principles. Fidelity to *stare decisis* requires courts to apply the principle announced in an earlier case to a

---

<sup>78</sup> Randy J. Kozel, *Precedent and Reliance*, 62 *Emory L.J.* 1459, 1498 (2013); see also Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 *J. Contemp. Legal Issues* 93, 96 (2003) (alluding to “the choice between overruling and incremental legal change”); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 *Mich. L. Rev.* 1, 44 (2011) (hypothesizing a scenario in which the Court “must decide whether to follow or overrule” an earlier decision); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 *B.C. L. Rev.* 81, 86 (2000) (“‘Binding’ precedent . . . must either be followed, distinguished, or overruled.”); Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 594 & n.47 (1987) (asserting that prior decisions must be “followed,” “distinguished,” or “overruled”); Alexander Lazaro Mills, Note, *Reliance by Whom? The False Promise of Societal Reliance in Stare Decisis Analysis*, 92 *N.Y.U. L. Rev.* 2094, 2100 (2017) (referencing the Supreme Court’s choice of whether to “uphold or overturn its precedents”).

<sup>79</sup> These descriptions are largely adapted from Professor Richard Re’s helpful typology. See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 *Colum. L. Rev.* 1861, 1869 (2014).

future case, not just if the two cases share the same facts, but also if the factual differences between the cases are insufficient to distinguish them on principled grounds.<sup>80</sup> By calling upon courts to draw purely factual distinctions between cases, confining flouts this foundational precept of legal reasoning. And confining alone entails the perpetuation of contradictory principles within the same doctrinal area. A repudiated principle, though formally adjudged to be bad law, will still be treated as authoritative within a limited range of factual scenarios.<sup>81</sup>

Unlike confining, moreover, the various modes of adhering to *stare decisis* preserve doctrinal flexibility by “leaving open the possibility of reassessment based on new information at a future time.”<sup>82</sup> In *Miranda v. Arizona* (1966), for instance, the Court famously declared that individuals undergoing custodial interrogation must be informed of their constitutional rights to remain silent and obtain counsel.<sup>83</sup> In subsequent decisions, the Court has steadily chipped away at *Miranda*’s protections, to the point where Professor Barry Friedman deems *Miranda* to have been “stealth overruled”—i.e., narrowed so extensively that its underlying principle has been severely debilitated.<sup>84</sup> But because the principle of

<sup>80</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (“[T]he principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explanations of the governing rules of law.” (quoting *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted))); Ken Kress, Legal Indeterminacy, 77 Calif. L. Rev. 283, 300 (1989) (observing that “distinguishing a precedent . . . when your client happily is not a red-head or else prefers green Pontiacs should not persuade a judge,” since such facts are “irrelevant to the application of any legal rule”); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1177 (1989) (explaining that “when the Supreme Court . . . decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed”).

<sup>81</sup> But see Richard H. Fallon, Jr., *Marbury* and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension, 91 Calif. L. Rev. 1, 6 (2003) (“If competing doctrinal formulations contradict one another, both cannot supply premises for valid legal arguments because contradictory premises cannot both be true.”).

<sup>82</sup> Re, *supra* note 79, at 1876; see also Jason Mazzone, Subprecedents, 33 Const. Comment. 389, 405 (2018) (“[L]imiting a case, even severely so, does not necessarily spell its end.”); Re, *supra* note 79, at 1878 (explaining that “the Court itself can more easily reverse course after narrowing”); *id.* at 1879 (“[A]n act of narrowing can catalyze new research, reflection, and creativity in the affected jurisprudential area, while enhancing the Court’s own flexibility to act.”).

<sup>83</sup> 384 U.S. 436, 444–45 (1966).

<sup>84</sup> See generally Barry Friedman, The Wages of Stealth Overruling (With Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1 (2010).

*Miranda* has never been repudiated,<sup>85</sup> its destiny has not been set in stone; a differently composed Supreme Court could straight-facedly begin revitalizing *Miranda* through the very sort of judicial craftsmanship that has propelled its steady decline. Confining, however, locks in a doctrinal position in a most un-stealthy manner: it accords stare decisis effect to both the repudiation of a case's underlying principle and the preservation of that principle within a limited factual domain.<sup>86</sup> For related reasons, confining cannot serve as a natural prelude to overruling, because the act of confining should express a court's conscious choice not to overrule what it has come to view as a deeply mistaken decision.<sup>87</sup> The very factors that might persuade a later court to overrule a case, after all, will generally have been known to the court when it opted instead to confine.<sup>88</sup>

\* \* \*

A court confines a case to its facts when it repudiates a principle underlying the case, but nonetheless preserves the case's precedential force for future cases sharing its facts. Confining thus ensures the continued vitality of a repudiated principle (albeit within a narrow factual domain) and requires future courts to draw unprincipled factual distinctions to determine whether that repudiated principle governs the case under review. These features distinguish confining from every conventional method of adhering to precedent. Given the peculiarity of this practice, it is natural to wonder why courts would engage in it at all. It is to this question that we turn in Part II.

---

<sup>85</sup> See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011) (alluding to “the procedural safeguards that *Miranda* guarantees”). By contrast, the Court *has* squarely repudiated *Flast*'s theoretical underpinnings—and to an extent far beyond any limitations contained within *Flast* itself. See *supra* note 35 and accompanying text. We therefore disagree with Professor Re's view that the Court's treatment of *Flast* represents a prime example of narrowing. See Re, *supra* note 79, at 1889–95.

<sup>86</sup> That both repudiation and preservation occur in an undisguised fashion says little about whether confining tends to stir as much public concern as the far more familiar practice of overruling precedent. See *infra* Section II.C.

<sup>87</sup> Cf. Re, *supra* note 79, at 1903 (“[N]arrowing and overruling naturally go hand in hand to form a continuous method of gradually eradicating erroneous decisions.”). Instead, confining is a subset of what Professor Re has termed “partial overruling,” which is triggered by a court's decision to “establish[] a new legal rule” (i.e., to repudiate a prior principle). See Re, *supra* note 5, at 926; see also *id.* at 932 (“[N]arrowing and partial overruling are qualitatively different activities.”).

<sup>88</sup> At least assuming that reliance interests have not significantly dissipated in the interim, thereby eliminating any perceived need to confine.

## II. REASONS COURTS CONFINE

Surprisingly, given the regularity with which cases have been confined to their facts, judges have rarely justified their choices to confine, rather than overrule, cases with which they disagree. Not even a barrage of criticism from their colleagues<sup>89</sup> has prompted any meaningful defense of the practice. As a practical matter, the selection between confining and overruling has been treated as falling squarely within the discretion of the majority coalition.<sup>90</sup> But the fact that courts rarely explain their decisions to confine does not mean that those decisions are in fact unexplainable. There must be *some* reason for employing this curious technique; it would be nonsensical to continue applying repudiated principles in the absence of a perceived necessity for doing so.

In this Part, we offer three primary reasons why judges might confine cases to their facts.<sup>91</sup> Specifically, confining permits courts to repudiate disfavored principles without (a) disturbing the full set of reliance interests that would be upset by an overruling, (b) satisfying the formal requirements that attend overruling, and (c) subjecting themselves to the same level of public scrutiny that often accompanies a decision to overrule. The following discussion of these three reasons for confining cases to their facts represents the first sustained analysis of the incentives driving courts to engage in a jurisprudential practice that bears little resemblance to standard legal reasoning.

*A. Protecting Reliance Interests*

On the rare occasions when courts *have* explained their choice to confine an earlier case to its facts, they have done so by pointing to the reliance interests bound up in the case. The prospect of disturbing the expectations of those who have reasonably relied on past decisions normally functions as a brake on legal correction;<sup>92</sup> confining eases off this brake by enabling courts to disavow perceived mistakes without upsetting the full array of reliance interests that would be disturbed by an outright overruling. It does so by permitting repudiated principles to continue operating

---

<sup>89</sup> See *infra* notes 186, 188–192 and accompanying text.

<sup>90</sup> See *supra* note 20.

<sup>91</sup> We do not, however, analyze why a court might decide to reverse course in the first place by repudiating the principle of an earlier case. For present purposes, we assume that this decision has already been made.

<sup>92</sup> See *supra* note 8.



within the narrow factual circumstances of previously adjudicated cases. Unsurprisingly, then, confining is best equipped to protect reliance interests when the individuals who have reasonably relied upon a wrongly decided case have predominantly done so in reliance on its particular facts, even though the principle might logically extend to manifold other contexts.

To make this point more concrete, consider perhaps the best-known example of confining: professional baseball's unique exemption from antitrust scrutiny. In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* (1922), the Supreme Court held that the core operations of Major League Baseball were exempt from Sherman Act liability.<sup>93</sup> As the Court explained, the "character of the business" was one of giving local "exhibitions," even though the sport's competitors and equipment were transported across state lines.<sup>94</sup> In the ensuing years, however, the Court concluded that professional boxing,<sup>95</sup> theatrical attractions,<sup>96</sup> and the display of motion pictures<sup>97</sup>—all of which involved intrastate exhibitions—were sufficiently suffused with interstate commerce to fall within the purview of the Sherman Act.

When asked to revisit its *Federal Baseball Club* holding in light of these later, contrary decisions, the Court frankly acknowledged that Major League Baseball implicates interstate commerce.<sup>98</sup> But rather than overruling *Federal Baseball Club*, the Court in *Radovich v. National Football League* (1957) "specifically limit[ed] the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball."<sup>99</sup> It did so in light of the "enormous capital [that] had been invested in reliance on [the] permanence" of an anticompetitive contracting

---

<sup>93</sup> See *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922) (holding that Major League Baseball did not implicate "commerce among the States").

<sup>94</sup> *Id.* at 208–09.

<sup>95</sup> *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 242 (1955).

<sup>96</sup> *United States v. Shubert*, 348 U.S. 222, 227 (1955); see also *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 273–74 (1923).

<sup>97</sup> *United States v. Griffith*, 334 U.S. 100, 108 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 180 (1944).

<sup>98</sup> See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("Professional baseball . . . is engaged in interstate commerce."); *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957) ("[W]ere we considering the question of baseball for the first time upon a clean slate we would have no doubts.").

<sup>99</sup> *Radovich*, 352 U.S. at 451.

framework.<sup>100</sup> In other words, the Court refused to countenance the “injustices of retroactivity and surprise”—a potentially league-destroying outcome—that would attend correcting its own mistake.<sup>101</sup> The Court reiterated this concern fifteen years later in *Flood v. Kuhn* (1972),<sup>102</sup> which reaffirmed *Federal Baseball Club*’s status as “an aberration confined to baseball.”<sup>103</sup>

Because subsequent decisions had clarified that other professional sporting leagues were subject to antitrust law, the Court could plausibly maintain that the reliance interests engendered by *Federal Baseball Club* were closely tied to the business of professional baseball; by the time of *Radovich* and *Flood*, other sporting leagues could not have reasonably concluded that they, too, were exempt from antitrust scrutiny.<sup>104</sup> Confining *Federal Baseball Club* to its facts thus permitted a salutary change in the law, while ensuring the continued survival of an industry that had been structured in reliance on it. Notwithstanding the withering criticism *Radovich* and *Flood* have endured,<sup>105</sup> then, those decisions can be understood as prototypes for sensible confining.<sup>106</sup>

---

<sup>100</sup> Id. at 450.

<sup>101</sup> Id. at 452. Secondarily, the Court surmised that Congress had “acquiesce[d]” in professional baseball’s aberrant status by “cho[osing] to make no change.” Id. at 450–51.

<sup>102</sup> See *Flood*, 407 U.S. at 283 (“The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*.”).

<sup>103</sup> Id. at 282; see also Bryan A. Garner et al., *The Law of Judicial Precedent* 100 (2016) (“Sometimes (as with baseball) courts decline to overrule the original decision because of the reliance interests that have developed around it, but cordon off its holding and prevent it from spreading anywhere else.”).

<sup>104</sup> See *Flood*, 407 U.S. at 282–83 (stating that “[o]ther professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt” (footnote omitted)).

<sup>105</sup> Dissenting Justices, for instance, excoriated their colleagues for perpetuating a swiss-cheese-like interpretive framework. See id. at 286 (Douglas, J., dissenting); id. at 291–92 (Marshall, J., dissenting); *Radovich*, 352 U.S. at 455 (Frankfurter, J., dissenting); id. at 456 (Harlan, J., dissenting); *United States v. Int’l Boxing Club of N.Y.*, 348 U.S. 236, 248–50 (1955) (Frankfurter, J., dissenting); see also Stuart Banner, *The Baseball Trust: A History of Baseball’s Antitrust Exemption* xi (2013) (“Scarcely anyone believes that baseball’s exemption makes any sense.”); Philip B. Kurland, *The Supreme Court and the Attrition of State Power*, 10 *Stan. L. Rev.* 274, 279 (1958) (concluding that a baseball-specific antitrust exemption “borders on the absurd”).

<sup>106</sup> We take no position on the wisdom of the Court’s opinion in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam), a one-page decision reaffirming *Federal Baseball Club* that was issued *before* the Court clarified that other sports were subject to the Sherman Act. And of course, it is possible that the Court overestimated the institutional hardship that would have resulted from subjecting MLB’s reserve system to antitrust scrutiny.

By acting as a low-cost alternative to overruling, confining also doubles as an inducement for courts not to follow *stare decisis*. This inducement is particularly powerful where—as in *Federal Baseball Club*—the reliance interests created by a wrongly decided case are tightly intertwined with its particular facts. In such circumstances, confining can facilitate fine-grained accommodations of reliance interests in a way that the standard bimodal framework of either retaining or overruling precedent cannot.

Of course, many confined cases cannot plausibly be understood to have generated any reliance interests worth protecting. This is true, for instance, of the taxpayer-standing rule in *Flast*, which Justice Scalia astutely criticized the Court for not overruling in light of its thoroughly repudiated underlying principle. As he rightly observed, “[*Flast*] has engendered no reliance interests,” given that “one does not arrange his affairs with an eye to standing.”<sup>107</sup> But although the preservation of reliance interests cannot explain—and certainly cannot justify—every past use of confining, it may nonetheless at times be a compelling reason to engage in the practice.

### *B. Skirting Formal Requirements*

The second reason a court might confine a case to its facts is to evade certain doctrinal strictures on effecting legal change. Below, we discuss how confining has been used as a workaround (1) to the formal obligations that attend overruling precedent and (2) to the Supreme Court’s prohibition on prospective overruling. Although similar requirements exist in various states’ law,<sup>108</sup> we focus particularly on federal doctrines for purposes of this Article.

---

<sup>107</sup> *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 637 (2007) (Scalia, J., concurring in the judgment); see also *id.* (“I can think of few cases less warranting of *stare decisis* respect. It is time—it is past time—to call an end. *Flast* should be overruled.”).

<sup>108</sup> At least as to the first requirement. See, e.g., *Chi. Bar Ass’n v. Ill. State Bd. of Elections*, 641 N.E.2d 525, 529 (Ill. 1994) (requiring a “special justification for this court to depart from [its] holdings[s]”); *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 717 N.W.2d 216, 223 (Wis. 2006) (“Any departure from the doctrine of *stare decisis*, however, demands special justification.”). The Supreme Court held long ago that the U.S. Constitution does not require state courts to apply state law retroactively. See *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364–66 (1932).

### 1. *The Requirements of Overruling*

Both the Supreme Court and the federal courts of appeals attach certain formal obligations to the act of overruling precedent. These requirements have *not* been understood to apply to confining, however, even though that practice—like overruling—entails a sharp break from a prior doctrinal approach. Because confining does not at present technically “count” as overruling, it has permitted courts to rectify perceived errors in the law while bypassing the formal obligations that attend overruling.

Consider first the Supreme Court’s self-imposed prohibition on overruling one of its prior cases absent a “special justification” for doing so<sup>109</sup>—i.e., one that transcends the mere “belief ‘that the precedent was wrongly decided.’”<sup>110</sup> In accordance with this doctrine, the Justices have endeavored to articulate a special justification for overruling earlier decisions;<sup>111</sup> they have cited the absence of a special justification as a reason for adhering to precedent;<sup>112</sup> and dissenting Justices have decried overrulings that they deemed unsupported by an adequate special justification.<sup>113</sup>

Remarkably, however, we have found no example of a Justice claiming that a special justification is also required when confining a case to its facts. Instead, the Court will occasionally confine a decision for no reason other than that its reasoning seems faulty.<sup>114</sup> Justice Scalia, for example, maintained that a decision “deserves to be limited to the facts that begot

<sup>109</sup> *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); see also Fisch, *supra* note 78, at 97–98 (explaining that “[t]he doctrine of stare decisis constrains [the act of] overruling”); Randy J. Kozel, *Special Justifications*, 33 *Const. Comment.* 471, 473 (2018) (“The Supreme Court frequently reminds us that overrulings should not occur in the absence of a special justification.”).

<sup>110</sup> *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)); see also *id.* (“[A]n argument that we got something wrong—even a good argument to that effect—cannot by itself justify scraping settled precedent.”).

<sup>111</sup> See, e.g., *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015); *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Pearson v. Callahan*, 555 U.S. 223, 235 (2009); *State Oil Co. v. Khan*, 522 U.S. 3, 21–22 (1997).

<sup>112</sup> See, e.g., *Kimble*, 135 S. Ct. at 2415; *Halliburton*, 134 S. Ct. at 2407; *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803–04 (2014); *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion); *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494–95 (1987).

<sup>113</sup> See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting); *United States v. Dixon*, 509 U.S. 688, 759 (1993) (Souter, J., concurring in the judgment in part and dissenting in part); *Payne v. Tennessee*, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 559 (1985) (Powell, J., dissenting).

<sup>114</sup> See *Rutkin v. United States*, 343 U.S. 130, 137–39 (1952).

it” if “its logic is fundamentally flawed.”<sup>115</sup> The practice of confining has thus allowed the Justices to effect legal change (or proclaim an aspiration to do so) without satisfying the additional layer of formal constraint that attends overruling. For a Justice who abhors the reasoning of a past decision, but who cannot credibly articulate a special justification for departing from it, confining can be a particularly tempting option.<sup>116</sup>

Similarly, each federal court of appeals abides by the rule that one three-judge panel may not overrule the decision of another; absent supervening authority binding on the court—such as a decision of the Supreme Court or an act of Congress—only the en banc court may overrule a prior panel’s decision.<sup>117</sup> As with the Supreme Court’s special-justification doctrine, this rule has traditionally been triggered only by the prospect of an overruling.<sup>118</sup> Full en banc treatment has not been thought necessary as long as a prior panel’s holding would remain formally undisturbed. In the words of D.C. Circuit Judge David Tatel, “[l]imiting a case to its facts may well be appropriate when applying our own precedents.”<sup>119</sup> And Fifth Circuit Judge Patrick Higginbotham has gone so far as to claim that a later panel may “strip content from principle” by “confin[ing] the [earlier] case to its facts.”<sup>120</sup> As a result, three-judge panels often repudiate principles

<sup>115</sup> *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 628–29 (2007) (Scalia, J., concurring in the judgment).

<sup>116</sup> Justice Scalia, for instance, once advocated the confining of a decision that had been issued only *twelve days* earlier. See *Reed v. Collyer*, 487 U.S. 1225, 1226 (1988) (Scalia, J., dissenting from denial of certiorari).

<sup>117</sup> See *United States v. Lewko*, 269 F.3d 64, 66 (1st Cir. 2001); *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010); *Joyce v. Maersk Line Ltd.*, 876 F.3d 502, 508 (3d Cir. 2017); *McMellon v. United States*, 387 F.3d 329, 332–33 (4th Cir. 2004); *United States v. Carlile*, 884 F.3d 554, 559–60 (5th Cir. 2018); *Theile v. Michigan*, 891 F.3d 240, 245 (6th Cir. 2018); *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002); *Jackson v. Ault*, 452 F.3d 734, 736 (8th Cir. 2006); *Naruto v. Slater*, 888 F.3d 418, 435 (9th Cir. 2018); *United States v. Gutierrez*, 859 F.3d 1261, 1266–67 (10th Cir. 2017); *Scott v. United States*, 890 F.3d 1239, 1257 (11th Cir. 2018); *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc); *Kam-Almaz v. United States*, 682 F.3d 1364, 1371 (Fed. Cir. 2012). Some circuit courts also permit the overruling of precedent outside the en banc process in a manner that ensures input from each active judge. See, e.g., *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 (D.C. Cir. 2013) (describing the D.C. Circuit’s “*Irons* footnote” procedure). The Supreme Court, which in essence is always sitting en banc, has no need for such requirements.

<sup>118</sup> See *United States v. Moore*, 203 F. Supp. 3d 854, 859 (N.D. Ohio 2016) (“A subsequent panel may, of course, constrain or hold a prior opinion to its facts . . . , but it cannot overrule an earlier opinion.”).

<sup>119</sup> *Ellis v. District of Columbia*, 84 F.3d 1413, 1429 (D.C. Cir. 1996) (Tatel, J., concurring in part and dissenting in part).

<sup>120</sup> *Bhandari v. First Nat’l Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring); see also *United States v. Essex*, 734 F.2d 832, 847 n.1 (D.C. Cir.

articulated by earlier panels and confine those principles to the facts that gave rise to them.<sup>121</sup> In this way, confining has enabled federal circuit judges to transform doctrine without initiating the cumbersome machinery of en banc review.

## 2. *The Prohibition on Prospectivity*

In the early 1960s, the Supreme Court began experimenting with a jurisprudential technique intended to dampen the jolt of adjudicative change: prospective overruling. That tool came in two varieties. Courts

---

1984) (Wilkey, J., dissenting) (“I hope that this as a precedent is confined to its facts: *i.e.*, the precise stipulation entered into here, a defendant named Essex, a lawyer named Goodbread, the offense of heroin possession, etc.”).

<sup>121</sup> See, e.g., *United States v. Damra*, 621 F.3d 474, 506 (6th Cir. 2010) (“[T]he Sixth Circuit, while never overruling the holding, has nevertheless, confined the decision to its facts.”); *Brown v. United States*, 462 F.3d 609, 615 (6th Cir. 2006) (“We thus conclude that the holding in *Irvin*, eroded by the decisions in subsequent cases, should be confined to its facts . . . .”); *George v. LeBeau*, 455 F.3d 92, 95 (2d Cir. 2006) (declaring that a particular outlier decision “should be limited to its facts”); *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 575 (7th Cir. 1990) (“[T]hat decision was confined to its facts”—“the polite formula for overruling.”); *United States v. Wilson*, 904 F.2d 656, 659 (11th Cir. 1990) (stating that the court had “limited [a] case to its particular facts” rather than “explicitly overrul[ing] it”); *Legros v. Panther Servs. Grp.*, 863 F.2d 345, 349 (5th Cir. 1988) (“We do not overrule *Pizzitolo* but we do refuse to extend it beyond its holding . . . .”); *In re Kaiser*, 791 F.2d 73, 76 (7th Cir. 1986) (“[W]e criticized the reasoning in *Palmer* and confined the case to its facts.”); *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (explaining that, although a prior decision had allowed relief “for the very reason here requested,” it had since been “limited to its particular facts”); *S.A. Mineracao Da Trindade-Samitri v. Utah Int’l, Inc.*, 745 F.2d 190, 194 (2d Cir. 1984) (“We decline to overrule *In re Kinoshita* . . . . We see no reason, however, why we may not confine *Kinoshita* to its precise facts.”); *L’Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1342 (9th Cir. 1980) (“We conclude that *Lantz* should be confined to its facts . . . .”); *Lopes v. S.S. Ocean Daphne*, 337 F.2d 777, 780 (4th Cir. 1964) (deeming a certain principle to be “in error,” and “welcom[ing] the opportunity to limit that decision to its facts”); *United States v. Lesoine*, 203 F.2d 123, 127 (9th Cir. 1953) (explaining that the principle of an earlier case had “met with disapproval” and “was limited strictly to its facts”). This is not to say that en banc courts always elect to overrule decisions they find mistaken. See *United States v. Floresca*, 38 F.3d 706, 711 (4th Cir. 1994) (en banc) (“limit[ing] [a case] to its facts” rather than “overrul[ing] it as circuit precedent”); *Gordon v. Robinson*, 210 F.2d 192, 197 & n.9 (3d Cir. 1954) (en banc) (resolving the problem of precedents “somewhat at variance with each other” by “confin[ing] [one] to its particular facts”). Concurring and dissenting judges have separately advocated confining, as well. See *West v. Atkins*, 815 F.2d 993, 997 (4th Cir. 1987) (Winter, C.J., concurring in part and dissenting in part) (concluding that a particular decision was “an aberration” that should, at a minimum, “be confined to its facts”); *Lyons v. Brierley*, 435 F.2d 1214, 1217 (3d Cir. 1970) (McLaughlin, J., dissenting) (insisting that a case must be “confined to its facts . . . to prevent palpable injustice”); *Minichiello v. Rosenberg*, 410 F.2d 106, 122 (2d Cir. 1968) (Anderson, J., dissenting) (“[T]he rule of that case should be confined to its facts . . . .”).

employing “pure” prospectivity announced their intention to begin applying a new, “correct” rule to future cases, while continuing to apply the old rule to conduct predating the announcement of the new rule. And the kindred device of “selective” prospectivity involved applying a new rule to the case in which it was announced, but according it prospective-only effect in all other scenarios. These forms of nonretroactivity “quickly became the Warren Court’s preferred method for addressing the disruption caused by law-changing decisions.”<sup>122</sup>

The Court’s experiment in nonretroactivity proved to be short-lived. Prospective overruling was instantly maligned as a deviation from Article III’s limited conception of the judicial role. Justice Harlan, for one, decried the practice of disregarding “our best understanding of governing constitutional principles . . . in adjudicating cases before us.”<sup>123</sup> As he saw it, announcing a new rule while delaying its implementation partook “not . . . of adjudication but in effect of legislation.”<sup>124</sup> Many observers also criticized pure prospectivity’s central feature—the issuance of

<sup>122</sup> Toby J. Heytens, *The Framework(s) of Legal Change*, 97 *Cornell L. Rev.* 595, 605 (2012); see also *Solem v. Stumes*, 465 U.S. 638, 642 (1984) (explaining that “‘the interest of justice’ . . . may argue against imposing a new constitutional decision retroactively” (quoting *Linkletter v. Walker*, 381 U.S. 618, 628 (1965))); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion) (“We hold . . . that our decision today shall apply only prospectively.”); *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 722–23 (1978) (holding that, because “[r]etroactive liability could be devastating for a pension fund,” “it was error to grant such relief”); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07, 109 (1971) (articulating a general test for retroactivity in the civil context, and holding that “a weighing of the equities requires nonretroactive application of the state statute of limitations here”); *Linkletter*, 381 U.S. at 628 (“[T]he accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective.”); *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 25 (1964) (suggesting that the “equities . . . [c]ould warrant only prospective” relief on remand); *Mosser v. Darrow*, 341 U.S. 267, 276 (1951) (Black, J., dissenting) (“[T]here is no reason why the [new] rule should be retroactively applied to this respondent when to do so is grossly unfair.”); Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 *Hastings L.J.* 533, 542 (1977) (“[P]rospective overruling enables courts to . . . chang[e] bad law without upsetting the reasonable expectations of those who relied on it.”).

<sup>123</sup> *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment).

<sup>124</sup> *Id.*; see also *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring in the judgment) (“Unlike a legislature, we do not promulgate new rules to ‘be applied prospectively only’ . . . .” (quoting *id.* at 550 (O’Connor, J., dissenting))); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 *Harv. L. Rev.* 56, 65 (1965) (arguing that “the conscious confrontation of the question of an effective date . . . smacks of the legislative process”).

forward-looking pronouncements—as an illicit deviation from Article III’s “case or controversy” requirement.<sup>125</sup>

Following Justice Harlan’s lead, the Court has decisively soured on nonretroactive application as a means of lowering the costs of doctrinal change. Purely prospective overruling is no longer permissible in criminal cases on direct review,<sup>126</sup> and although the Court has never explicitly forbidden its use in civil cases, the practice seems irreconcilable with language contained in numerous recent decisions.<sup>127</sup> The Supreme Court has also categorically foreclosed the use of so-called “selective prospectivity” in both the criminal<sup>128</sup> and civil<sup>129</sup> contexts due to its unequal treatment of similarly situated litigants.

Confining flouts the full-retroactivity principle by exempting the factual circumstances of confined cases from the reach of new legal rules. In this way, confining can serve as a convenient substitute for the forbidden practice of prospective overruling. *Fortnightly Corp. v. United Artists*

<sup>125</sup> See Candler S. Rogers, Perspectives on Prospective Overruling, 36 UMKC L. Rev. 35, 46 (1968) (“Article III . . . prohibits the overruling of an earlier decision purely prospectively . . . .”); Kermit Roosevelt III, A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity, 31 Conn. L. Rev. 1075, 1111 (1999) (“[A] prospective decision . . . is a paradigmatic advisory opinion.”); Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 932 (1962) (advocating “a view of the case and controversy requirements of Article III” that “conflict[ed] . . . with the rationale underlying prospective overruling”).

<sup>126</sup> See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (“[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”).

<sup>127</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 279 n.32 (1994) (“While it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity.”); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311 (1994) (explaining that “statutes operate only prospectively, while judicial decisions operate retrospectively” (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982)) (internal quotation marks omitted)); *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 94 (1993) (alluding to “the fundamental rule of ‘retrospective operation’ that has governed ‘judicial decisions . . . for near a thousand years’” (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting))); *id.* at 95 (claiming that “‘the nature of judicial review’ strips us of the quintessentially ‘legislative’ prerogative to make rules of law retroactive or prospective as we see fit” (quoting *Griffith*, 479 U.S. at 322)); Fisch, *supra* note 78, at 111 (“The Court has . . . determined that its decisions should be applied retroactively and that it should avoid providing transition relief through prospective overruling.”); Pamela J. Stephens, The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis, 48 Syracuse L. Rev. 1515, 1530 (1998) (explaining that the Court has “essentially dismantled the civil retroactivity doctrine”).

<sup>128</sup> See *Griffith*, 479 U.S. at 322–23.

<sup>129</sup> See *Harper*, 509 U.S. at 87, 90.



*Television, Inc.* (1968)<sup>130</sup>—though decided during the heyday of nonretroactive adjudication—illustrates how this workaround can be achieved. In that case, the Court considered whether to apply an outmoded interpretation of the Copyright Act that it had adopted decades before. Over a dissent urging adherence to *stare decisis*, the majority opted to confine the case that had espoused that principle “to its own facts.”<sup>131</sup> The Court therefore moved the law in its preferred direction while avoiding the imposition of “copyright liability where it ha[d] never been acknowledged to exist before.”<sup>132</sup> In *Fortnightly*, then, the Court used confining to avoid disrupting reasonable expectations in much the same way it might have done with prospective overruling.

Oddly, no court or commentator appears to have noted this kinship between confining and prospective overruling. Of course, while the practices are closely related—jurisprudential cousins, so to speak—they differ both in the scope of factual scenarios for which they protect reliance interests and in the timeframe during which they operate. The purpose of prospective overruling is to protect *past* forms of reliance; it assumes that people can fairly be expected to conform their behavior to a newly announced rule. That technique also protects *all* forms of reliance on the repudiated principle, regardless of which specific facts were involved in earlier adjudications conducted pursuant to the old rule. Confining, however, protects both *past and future* reliance on a repudiated principle, albeit within a narrower factual domain—the particular facts of the confined case. Confining is thus particularly well suited to dealing with existing arrangements that are so deeply embedded in the current legal landscape that it would be unwise to require the affected stakeholders to transition to a new rule. Notwithstanding the differences between confining and prospective overruling, however, the two techniques are sufficiently similar that confining can in certain circumstances operate as a workaround to that forbidden practice.

\* \* \*

In short, confining enables courts to evade the myriad formal requirements they have imposed on themselves when changing course in a

---

<sup>130</sup> 392 U.S. 390 (1968).

<sup>131</sup> *Id.* at 397 n.18. It did so because “in actual practice [the interpretation] ha[d] not been applied outside its own factual context.” *Id.* at 401 n.30.

<sup>132</sup> *Id.* at 401 n.30.

doctrinal area—namely, the special-justification doctrine, the prior-panel rule, and the wholesale retroactive application of new legal principles.

### C. Avoiding Public Scrutiny

The third reason a court might confine a case to its facts is that doing so may invite less public scrutiny than would simply overruling the case. While courts are, by design, the branch of government least responsive to public opinion, they can hardly afford to wall themselves off from it entirely. Courts are powerless to command assent to their judgments; their practical authority stems from the willingness of governmental actors, litigants, and the public at large to regard judicial rulings—even ones they find deeply objectionable—as legitimate. In its most introspective moments, the Supreme Court has openly pondered how best to preserve the foundations of its own legitimacy.<sup>133</sup> These ruminations have led the Court to place a premium on ensuring that its decisions are perceived as “grounded truly in principle,” rather than in the fluctuating strengths of warring coalitions.<sup>134</sup> An avowed commitment to *stare decisis* plays a key role in enhancing popular perceptions of adjudication as a fundamentally neutral enterprise.<sup>135</sup>

Against this background, confining might commend itself as a relatively unobtrusive engine of legal change. There is reason to believe that the concept of overruling registers in the public mind as a uniquely transformative act in a way that confining simply does not. For instance, prominent politicians routinely identify decisions that they wish to see “overturned.”<sup>136</sup> Likewise, the Court has dwelled on the “terrible price [that] would be paid for overruling” certain types of decisions.<sup>137</sup> As the Court

---

<sup>133</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“[I]t is necessary to understand the source of this Court’s authority [and] the conditions necessary for its preservation . . .”).

<sup>134</sup> *Id.*

<sup>135</sup> See Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* 42 (2017) (“Fidelity to precedent ensures that the law is not reduced to the preferences and personalities of a particular group of justices assembled at a particular moment in time.”).

<sup>136</sup> See, e.g., Campaign Finance Reform, Office of Hillary Rodham Clinton, <https://www.hillaryclinton.com/issues/campaign-finance-reform/> [<https://perma.cc/AD9D-2FWB>] (last accessed Aug. 5, 2018) (promising that, “[a]s president, Hillary will . . . [o]verturn *Citizens United*”); Values, Mitt Romney for President, <https://web.archive.org/web/2012103-1162515/https://www.mittromney.com/issues/values> [<https://perma.cc/Y57X-5JM5>] (archived as of Oct. 31, 2012) (“Mitt Romney . . . believes that the right next step is for the Supreme Court to overturn *Roe v. Wade* . . .”).

<sup>137</sup> *Casey*, 505 U.S. at 864.

has observed, “frequent overruling” would threaten to “overtax the country’s belief in the Court’s good faith.”<sup>138</sup> Yet even though the confining process brings about similarly drastic doctrinal shifts, we have found no instances of politicians advocating that particular decisions be confined, or of the Supreme Court fretting that too-frequent confining could doom its public legitimacy. Confining’s relative obscurity might therefore be the source of its utility, enabling courts to achieve significant change while sidestepping the level of scrutiny that normally accompanies overruling.<sup>139</sup>

To be sure, this hypothesis rests on an untested, though intuitively plausible, empirical proposition: that confining cases to their facts causes less public consternation than does overruling them outright. Yet for confining to work as intended, the repudiation of a principle must be clear enough to bring about the desired doctrinal shift. Such clear deviations from past practice are unlikely to go entirely unnoticed by courtwatchers. And because people generally rely on the principles of past decisions, rather than on the durability of specific applications of those principles, the very fact of repudiation seems likely to generate at least *some* public uproar. These realities might well limit confining’s practical usefulness as a low-cost alternative to overruling.

As a historical matter, moreover, it is unclear whether courts have engaged in confining principally to stave off public clamor. It is true that confining rarely rears its head in politically divisive cases; it has, on the other hand, facilitated doctrinal reversals in the less-than-riveting realms of maritime tort recovery,<sup>140</sup> federal taxation,<sup>141</sup> and the Federal

---

<sup>138</sup> *Id.* at 866; see also Deborah Hellman, *The Importance of Appearing Principled*, 37 *Ariz. L. Rev.* 1107, 1111 (1995) (“The more overruling there is, the less confidence the public may have in the correctness of current decisions.”); Christopher J. Peters, *Under-the-Table Overruling*, 54 *Wayne L. Rev.* 1067, 1081 (2008) (“Frequent overruling of constitutional precedent . . . creates the impression that the Court is deciding based on something other than principle.”); Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 *Yale L.J.* 493, 506 (2003) (“Every time the Court engages in . . . overruling, it threatens the very legitimacy that gives it the power to rule.”).

<sup>139</sup> As Professor Michael Gerhardt has explained, “[t]he Justices may be sensitive to the social disruption and political backlash that explicit overrulings might produce, and consequently opt for something less than an outright overruling of a precedent with which they disagree.” Gerhardt, *supra* note 20, at 103; see also Friedman, *supra* note 84, at 39 (surmising that the Court occasionally seeks to duck “the sort of publicity explicit overruling of important precedents can engender”); Peters, *supra* note 138, at 1090 (identifying “an incentive for the Court to overrule precedents it believes to be wrong without being seen to do so”).

<sup>140</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990).

<sup>141</sup> *Rutkin v. United States*, 343 U.S. 130, 138 (1952).

Employers' Liability Act.<sup>142</sup> But confining may have been employed in unglamorous areas of the law precisely because disfavored precedents can be more quietly discredited in those areas. Confining's continued obscurity suggests that it has been strikingly successful in this regard.<sup>143</sup>

To be sure, there may simply be no means of quietly discarding high-profile decisions without inciting public furor. But as long as confining remains poorly understood, it will be a tempting option for courts eager to eviscerate unwanted precedents without sacrificing precious institutional capital.

\* \* \*

Confining allows courts to remedy perceived doctrinal errors while (1) protecting reliance interests, (2) evading formal requirements, and (3) avoiding (or at least reducing) public scrutiny. Given the considerable advantages confining provides to courts, it should be unsurprising that they have turned to the practice time and again when repudiating flawed legal principles. But confining also poses substantial dangers to the integrity and efficiency of our judicial system as a whole. We explore those dangers—and what they mean for the propriety of engaging in confining—in Part III.

### III. DANGERS OF CONFINING

As detailed in Part II, there can be powerful incentives for judges to confine cases to their facts. But confining's most attractive features also pose considerable dangers to a judicial system that runs on (or at least purports to run on) principled adjudication. Confining to protect reliance interests encourages courts to decide cases based on pragmatic, rather than principled, concerns. Confining to exploit formal loopholes loosens the constraints that normally attach to departures from precedent. And confining to avoid public scrutiny reduces the public's ability to attain a thorough understanding of, and meaningfully oversee, the courts' work.

In this Part, we explore the pitfalls of each motivation for confining cases to their facts. We also identify two jurisprudential objections to confining that cast doubt on *every* use of the practice, no matter a court's

---

<sup>142</sup> *Still v. Norfolk & W. Ry. Co.*, 368 U.S. 35, 44–45 (1961).

<sup>143</sup> But note that this obscurity is historically contingent; if the practice becomes better known and better understood—objectives this Article endeavors to further—its comparative advantage in this regard will dissipate.

motivation for employing it. Ultimately, we conclude that only the preservation of reliance interests can plausibly justify courts' use of confining, and even then only in rare circumstances.

#### *A. Pragmatic Objections*

Engaging in confining for the purpose of protecting reliance interests rests on the premise that confining would, as a practical matter, lead to better consequences than would following or overruling a disfavored precedent. But there are at least three reasons to believe that a regularized practice of confining would result in more real-world harm than good.

*First*, the decision to confine a case to its “facts” often results in needless (and expensive) follow-on litigation. Consider the Supreme Court’s case law on the taxability of unlawful gains. In *Commissioner v. Wilcox* (1946), the Court held that money a bookkeeper had embezzled from his employer was not federally taxable, because the bookkeeper had no “bona fide claim of right” to it.<sup>144</sup> But only six years later, in *Rutkin v. United States* (1952), the Court rejected the “claim of right” test announced in *Wilcox*: “[W]here unlawful gains are secured by the fraud of the taxpayer,” as in the case of extortion, “they *are* taxable.”<sup>145</sup> The *Rutkin* Court expressly declined to overrule *Wilcox*, however, instead “limit[ing] that case to its facts.”<sup>146</sup> Unfortunately, the *Rutkin* Court failed to specify *which* of *Wilcox*’s facts were to serve as the basis for comparison. The result was that “lower Federal courts made every attempt to avoid the effect of *Wilcox* by endeavoring to find some distinguishing characteristic.”<sup>147</sup>

The year after *Rutkin*, for example, the Third Circuit was called upon to decide whether two brothers who had embezzled a massive sum from their family business were required to pay taxes on their spoils. Despite the presence of embezzlement, a divided court held that the *Rutkin* rule governed, insisting that “the present [facts] differ[ed] in several pertinent

<sup>144</sup> *Comm’r v. Wilcox*, 327 U.S. 404, 408 (1946).

<sup>145</sup> *Rutkin v. United States*, 343 U.S. 130, 138 (1952) (emphasis added); see also *United States v. Bruswitz*, 219 F.2d 59, 61 (2d Cir. 1955) (“[T]he whole approach of [*Rutkin*] . . . is diametrically opposed to the ‘claim of right’ criterion of [*Wilcox*].”).

<sup>146</sup> *Rutkin*, 343 U.S. at 138; see also *Macias v. Comm’r*, 255 F.2d 23, 26–27 (7th Cir. 1958) (concluding that “*Rutkin* emasculated *Wilcox*,” leaving “nothing . . . but the shell”).

<sup>147</sup> *Nordstrom v. United States*, 360 F.2d 734, 736 (8th Cir. 1966); see also *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (“After *Rutkin*, courts of appeals made close distinctions to avoid following *Wilcox*.”).

respects from the facts in *Wilcox*.”<sup>148</sup> The dissenting judge protested that the allegedly “pertinent” differences between the present case and *Wilcox* were “utterly irrelevant,” “distinctions without a difference,” and the product of “an amazing dexterity in judicial legerdemain.”<sup>149</sup> But he (and every other circuit judge to argue that the repudiated principle of *Wilcox* governed a post-*Rutkin* case) made those arguments in vain; the *Rutkin* rule was found to apply in every such case.<sup>150</sup> Despite this uniformity of outcomes, *Rutkin* generated intense bewilderment among lower courts.<sup>151</sup> *Wilcox* limped along in this hobbled state—engendering wasteful litigation while having little practical effect—until the Supreme Court cut its losses and overruled the case entirely in *James v. United States* (1961).<sup>152</sup>

*Second*, even when courts *do* endeavor to specify the zone of facts to which a case is being confined, they rarely achieve complete precision. Courts are accustomed to constraining their successors by announcing generally applicable principles that extend to all other factual scenarios not distinguishable on principle. The precise circumstances to which a general rule applies therefore need not be itemized beforehand; the rule’s applicability can be ascertained as concrete cases present themselves. But confining calls upon courts to abandon the enterprise of applying principles wherever their logic naturally extends. A confining court must

<sup>148</sup> *Kann v. Comm’r*, 210 F.2d 247, 250 (3d Cir. 1953).

<sup>149</sup> *Id.* at 253–54 (Kalodner, J., dissenting). Consider also *Briggs v. United States*, 214 F.2d 699, 703 (4th Cir. 1954), whose facts the court deemed to be governed by *Rutkin* even though the defendant had misused his employer’s assets. “When the *Wilcox* case is limited to the facts,” the court held, “it clearly has no application here.” *Id.* at 702.

<sup>150</sup> A Second Circuit panel protested that lower courts’ method of implementing *Rutkin* “in effect does what the Supreme Court purported not to do; it overrules the *Wilcox* case.” *Bruswitz*, 219 F.2d at 61.

<sup>151</sup> See *Macias*, 255 F.2d at 26 (lamenting that “much confusion has been engendered by the [*Rutkin*] decision”); *Marienfeld v. United States*, 214 F.2d 632, 639 (8th Cir. 1954) (Johnsen, J., concurring) (“I don’t think anyone can be absolutely sure, on the basis of [*Rutkin* and *Wilcox*], just what the law objectively is on the general question that is here involved.”). One concurring judge insisted that any methodology “used merely to make artificial refinements in fact situations” would “not [be] capable of any practicable application or workability.” *Marienfeld*, 214 F.2d at 640 (Johnsen, J., concurring); see also *Linville v. City of Janesville*, 497 N.W.2d 465, 475 (Wis. Ct. App. 1993) (Dykman, J., dissenting) (“When we distinguish cases based upon irrelevant factors . . . we foster uncertainty in the law and make it difficult for attorneys to give definitive advice to their clients. This encourages litigation, which may result in more opinions which further unsettle the law.”); Sherry, *supra* note 46, at 981 (“It is difficult for lower courts to respond to two apparently identical cases that produce different results; unable to perceive any common principle underlying the cases, they will likely divide among themselves as to the appropriate outcome in future cases.”).

<sup>152</sup> 366 U.S. 213, 222 (1961).

instead prophesy—in advance of actual litigation—a fixed set of factual circumstances to which an otherwise-supplanted legal principle ought to continue applying. It should not be surprising that courts often struggle to perform this unfamiliar task.

For instance, the Supreme Court likely foresaw little follow-on litigation when, in *Flood* and *Radovich*, it specifically confined *Federal Baseball Club*—and its outmoded understanding of the Sherman Act—to “the business of organized professional baseball.”<sup>153</sup> Yet courts have been called upon to answer difficult questions concerning whether particular activities are sufficiently “integral [to] the business of baseball”<sup>154</sup> to fall within *Federal Baseball Club*’s ambit, or whether they instead “touch on the baseball industry” in insufficiently direct ways.<sup>155</sup> How is a court to know, for example, whether the Sherman Act exemption enjoyed by “professional baseball” applies only to Major League Baseball, or instead extends to other, unaffiliated baseball leagues?<sup>156</sup> Must MLB teams comply with the Act when negotiating radio-broadcasting contracts<sup>157</sup> or employing scouts?<sup>158</sup> The Court’s decisions in *Radovich* and *Flood* offer almost no guidance on such questions. Importantly, then, confining can invite persistent and unexpected litigation even when it is carried out with seeming specificity.

*Third*, although confining allows for relatively tailored management of reliance interests, there is still a sense in which it is a blunt instrument. Confining’s utility is limited by the nature of the reliance interests it is equipped to protect—those formed in reliance upon the *specific facts* of the case being confined. Yet it stands to reason that people generally rely on the broader decisional principle embodied in a case, not just the

---

<sup>153</sup> *Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957).

<sup>154</sup> *Prof’l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982).

<sup>155</sup> *City of San Jose v. Office of the Comm’r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015); see also *id.* (explaining that existing case law “doesn’t necessarily mean . . . that MLB or its franchises are immune from antitrust suit”); *Major League Baseball v. Crist*, 331 F.3d 1177, 1179 (11th Cir. 2003) (“The scope of this exemption . . . has been the subject of extensive litigation over the years.”).

<sup>156</sup> See *Prof’l Baseball Sch. & Clubs*, 693 F.2d at 1085–86 (holding that certain operations of the Carolina League of Professional Baseball Clubs were exempt from the Sherman Act).

<sup>157</sup> See *Henderson Broad. Corp. v. Houston Sports Ass’n*, 541 F. Supp. 263, 265 (S.D. Tex. 1982) (holding that such actions “are not exempt from the antitrust laws,” on the theory that “broadcasting is not central enough to baseball to be encompassed in the . . . exemption”).

<sup>158</sup> See *Wyckoff v. Office of the Comm’r of Baseball*, 705 F. App’x 26, 29 (2d Cir. 2017) (holding that the exemption applied, given that “scouts are involved in the business of baseball”).

individualized application of that principle to the circumstances in which it arose. As a result, the reliance interests generated by the specific fact pattern of a case will often be a small, arbitrary subset of all reliance interests worth protecting.<sup>159</sup> This is especially true in light of the (often random) factors that cause only certain issues and certain litigants to receive full merits determinations at particular moments in history.<sup>160</sup>

### B. Loophole Objections

Above, we hypothesized two additional reasons why a court inclined to engage in doctrinal course-correction might call upon confining: (1) to avoid certain formal obligations and prohibitions associated with overruling and (2) to mask the magnitude of the court's departure from *stare decisis*. Here, we critique the use of confining as a loophole to serve these ends.

#### 1. Evading Formal Requirements

The dangers posed by using confining to slough off the formal burdens that attend overruling cases should be readily apparent. Although confining does not disturb specific factual applications of a repudiated principle, it otherwise excises that principle entirely from doctrine. The Supreme Court's "special-justification doctrine"<sup>161</sup> and federal circuit courts' "prior-panel rule"<sup>162</sup> are premised on the idea that precedent should not be departed from except in extraordinary circumstances. Allowing courts to confine cases with which they disagree—without having to identify compelling circumstances or superseding authorities that justify doing so—provides too easy a workaround to these rules.<sup>163</sup> For observers who insist that *stare decisis* impermissibly hinders courts' ability to purify the

---

<sup>159</sup> For a concrete example, see *infra* notes 211–217 and accompanying text.

<sup>160</sup> The Supreme Court's sphinx-like cert-granting practices are one variable, as are the wealth of losing parties and the presence of any jurisdictional obstacles.

<sup>161</sup> See *supra* notes 109–113 and accompanying text.

<sup>162</sup> See *supra* note 117 and accompanying text.

<sup>163</sup> See *Harris v. Capital Growth Inv'rs XIV*, 805 P.2d 873, 895 (Cal. 1991) (en banc) (Broussard, J., dissenting) ("In spite of the fact that the majority do not expressly overrule our holding in *In re Cox*, they still run afoul of the doctrine of *stare decisis* by limiting *Cox* to its facts." (citation omitted)), superseded by statute, Cal. Civ. Code § 51 (Deering 2005), as recognized in *Munson v. Del Taco, Inc.*, 208 P.3d 623 (Cal. 2009).



law,<sup>164</sup> confining may serve as a welcome shortcut. But for those who believe (as we do) that a relatively stable body of precedent is essential to the health of the American legal system, the use of confining to evade these formal hurdles should be deeply concerning.

Nor are these the only doctrinal bedrocks endangered—confining also cannot be squared with modern retroactivity jurisprudence. When the Court began to sour on prospective overruling, it emphasized that reliance-based nonretroactivity unduly liberated courts from the constraints of *stare decisis*. Several Justices powerfully expressed the view that non-retroactive application “tends to cut th[e] Court loose from the force of precedent, allowing [it] to restructure artificially those expectations legitimately created by extant law.”<sup>165</sup> Critically for present purposes, a majority of the Court concluded in *Harper v. Virginia Department of Taxation* (1993)<sup>166</sup> that new principles cannot be applied selectively to accommodate even reasonable reliance interests. After *Harper*, the legal principle applicable to a case can no longer turn on “‘whether litigants actually relied on an old rule or how they would suffer from retroactive application’ of a new one.”<sup>167</sup> Any individualized transition costs—however steep—are simply one of the many factors that influence the decision

<sup>164</sup> See generally, e.g., Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const. Comment. 289 (2005).

<sup>165</sup> *Mackey v. United States*, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in the judgment); see also *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (Souter, J.) (plurality opinion) (observing that prospectivity “tends to relax the force of precedent, by minimizing the costs of overruling”); *id.* at 548 (Blackmun, J., concurring in the judgment) (“By announcing new rules prospectively . . . a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents.”); *id.* at 549 (Scalia, J., concurring in the judgment) (claiming that the disruptions incident to overruling “are one of the understood checks upon judicial lawmaking”); *James v. United States*, 366 U.S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part) (“[O]ne of the great inherent restraints upon this Court’s departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application.”). As Professor Richard Kay has observed, “[t]he very capacity of a prospective ruling to accommodate justified reliance may remove one of the greatest incentives to adhere to precedent.” Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 Am. J. Comp. L. (Special Issue) 37, 63 (2014).

<sup>166</sup> 509 U.S. 86 (1993).

<sup>167</sup> *Id.* at 95 n.9 (alterations omitted) (quoting *Beam*, 501 U.S. at 543); see *id.* at 97 (“[W]e can scarcely permit ‘the substantive law to shift and spring’ according to ‘the particular equities of individual parties’ claims’ of actual reliance on an old rule and of harm from a retroactive application of the new rule.” (alterations omitted) (quoting *Beam*, 501 U.S. at 543)).

whether to abide by *stare decisis*.<sup>168</sup> When adopting a new rule, therefore, the Court will no longer consider carve-outs based on “actual reliance on an old rule and . . . harm from a retroactive application of the new rule.”<sup>169</sup>

Except that it often does precisely this when confining. Unexplored discrepancies in the jurisprudence of Justice Scalia—at once the Supreme Court’s fiercest opponent of prospective overruling and its most enthusiastic confiner—exemplify this tension. Justice Scalia disparaged prospective overruling as “the handmaid of judicial activism,” “the born enemy of *stare decisis*,”<sup>170</sup> and a fundamentally nonjudicial device that enabled the Court to scrap its precedents “with an unceremonious ‘heave-ho.’”<sup>171</sup> Yet his embrace of confining enabled him to endorse drastic doctrinal revisions with little regard for precedent. The year after *Harper*, Justice Scalia urged the Court to revamp its Dormant Commerce Clause doctrine and confine (rather than overrule) earlier decisions in light of the “considerable reliance interests” those decisions had engendered.<sup>172</sup> And he often advocated the use of confining without providing any justification for doing so,<sup>173</sup> arguing that a case “deserves to be limited to the facts that begot it” if “its logic is fundamentally flawed.”<sup>174</sup>

<sup>168</sup> See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 Harv. J.L. & Pub. Pol’y 811, 856 (2003) (“[A] proposed rule of law that . . . would seriously upset the reasonable reliance interests of one or more of the parties . . . should simply be rejected as bad law.”).

<sup>169</sup> *Harper*, 509 U.S. at 97. Two years after *Harper*, the Court reiterated that a showing of “reasonabl[e] reli[ance]” is “insufficient to deny retroactive application of a new legal rule.” *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753 (1995).

<sup>170</sup> *Harper*, 509 U.S. at 105 (Scalia, J., concurring).

<sup>171</sup> *Id.* at 107–09.

<sup>172</sup> *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 209 (1994) (Scalia, J., concurring in the judgment); see also *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (insisting that the doctrine “not . . . be expanded beyond its existing domain”); *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (“It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.”).

<sup>173</sup> See, e.g., *Minneeci v. Pollard*, 565 U.S. 118, 131–32 (2012) (Scalia, J., concurring); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *Shafer v. South Carolina*, 532 U.S. 36, 55 (2001) (Scalia, J., dissenting); *Reed v. Collyer*, 487 U.S. 1225, 1226 (1988) (Scalia, J., dissenting from denial of certiorari).

<sup>174</sup> *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 628–29 (2007) (Scalia, J., concurring in the judgment); see also *id.* at 629 (“[T]he plurality is also unwilling to acknowledge that the logic of *Flast* . . . is simply wrong, and for that reason should not be extended to other cases.”); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2696 (2015) (Scalia, J., dissenting) (claiming that the Court could distinguish a decision that “stands out like a sore thumb from the rest of our jurisprudence” simply by

Justice Scalia never attempted to reconcile these seemingly incompatible views. Yet he was hardly alone: to our knowledge, no court or commentator has pointed out the contradiction between forbidding prospective overruling and permitting confining. On the surface, confining does not seem to violate the norm of full retroactivity; the same principle governs regardless of whether the facts of any given case occurred before or after the confining took place. But a confined principle inevitably results from a court's decision not to accord the new principle retroactive effect for previously adjudicated sets of facts (i.e., the circumstances of confined cases). In this way, a confining court creates an "ad hoc exemption"<sup>175</sup> from the new principle's backward-looking reach.<sup>176</sup>

Moreover, confining often occurs in order to avoid disruption to stakeholders' reasonable expectations. This sort of equitable restructuring—making the "federal law applicable to a particular case" turn on individualized considerations of reliance—is flatly forbidden by modern retroactivity doctrine.<sup>177</sup> The Supreme Court has already rejected one creative effort to avoid the prohibition laid out in *Harper*.<sup>178</sup> Reliance-based confining, which has not yet been challenged in this way, is simply another means of exempting parties from a new rule's coverage because "they would suffer from retroactive application" of that rule.<sup>179</sup> The availability

---

drawing an "accurate-in-fact (but inconsequential-in-principle) distinction"). These would seem to be prototypical examples of "limiting [a precedent] in a manner that is irrational." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

<sup>175</sup> *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995).

<sup>176</sup> It is irrelevant that the facts of a confined case are also *prospectively* exempted from the new rule's coverage. What matters is that confining cannot be squared with a jurisprudence that requires new rules to be applied retroactively in all of their logical applications. This sort of nonretroactivity is most evident when earlier, contrary holdings are preserved *after* a principle has been repudiated and replaced with a new rule. See *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, 239 U.S. 156, 166 (1915) (opting to "confine[] to [its] exact facts" an 1888 case whose central premise had been repudiated twenty-one years earlier).

<sup>177</sup> *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 95 n.9 (1993). Unless, that is, a "well-established, independent rule of law" such as qualified immunity is implicated. *Reynoldsville Casket*, 514 U.S. at 758. For an authoritative overview of such "independent" doctrines, see Elizabeth Earle Beske, *Backdoor Balancing and the Consequences of Legal Change*, 94 Wash. L. Rev. (forthcoming 2019).

<sup>178</sup> See *Reynoldsville Casket*, 514 U.S. at 754 ("If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial [of retroactivity] simply because it is characterized as a denial based on 'remedy' rather than 'nonretroactivity'?").

<sup>179</sup> *Harper*, 509 U.S. at 95 n.9 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (plurality opinion)) (internal quotation marks omitted).

of confining also “remove[s] one of the greatest incentives to adhere to precedent”<sup>180</sup>—a key failing that the Court’s shift to retroactivity was designed to correct.

In short, while confining has frequently permitted courts to sidestep certain formal constraints on effecting doctrinal change, such evasiveness should be rejected as a justification for engaging in the practice going forward.

## 2. *Evading Public Scrutiny*

Courts also act improperly when they engage in confining for the sake of avoiding public scrutiny. A court that confines for this reason deliberately engages in a form of implied deception: it opts to confine, rather than overrule, a disfavored precedent for the sole purpose of concealing information relevant to an assessment of the court’s work. Even for those who wish to insulate judicial decisionmaking from the vagaries of public opinion,<sup>181</sup> this sort of dissembling should find no favor. If a court were concerned that public awareness of a shift in the law could impair its perceived legitimacy, the proper course would be simply to leave the law as it stands.

Again, we cannot prove that courts have actually engaged in confining for the purpose of obscuring the ramifications of their actions.<sup>182</sup> Direct evidence of this sort would be exceedingly hard to come by. But a court’s desire to withhold critical information about its treatment of precedent should be firmly rejected as a justification for confining. We hope that this temptation will recede as public understanding of the practice of confining increases—a goal this Article endeavors to further.

## C. *Judicial-Authority Objections*

Finally, we identify two jurisprudential objections to confining that apply no matter the reason a court engages in the practice. In requiring judges (1) to draw unprincipled, fact-bound distinctions and (2) to do so in service of applying what has been held to be *not* the law, confining

---

<sup>180</sup> Kay, *supra* note 165, at 63.

<sup>181</sup> Justice Scalia, for one, was “distressed” by “the marches, the mail, the protests aimed at inducing us to change our opinions.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>182</sup> See *supra* Section II.C.

might be a categorically impermissible exercise of the judicial power. We address each objection in turn below.

### *1. Fact-Based Adjudication*

The use of general principles that transcend the circumstances of any individual case is widely understood to be “an essential component of the judicial process.”<sup>183</sup> Confining discards this foundational precept of legal reasoning. Unlike the familiar practices of following, extending, distinguishing, narrowing, and overruling precedent, confining requires judges to resolve cases simply by determining whether the present facts mirror those of a previously decided case.<sup>184</sup>

As a general rule, it is manifestly improper for a court to decide cases on the basis of purely factual distinctions untethered to principle. Imagine if the Supreme Court invented a new principle to resolve a case, while in the same breath instructing future courts not to apply that principle going forward.<sup>185</sup> Or imagine instead that the Court declined to apply the plainly applicable principle of an earlier case in order to avoid a result it found troubling in the case at hand, but made clear that the principle nevertheless remained good law for future cases. Such feats would be roundly (and justly) decried as abuses of judicial authority.

In much the same way, confining resolves a case according to a principle that extends no further than the case itself. By definition, confining entails the drawing of factual distinctions that make no sense under ordinary norms of legal reasoning. This seemingly arbitrary practice has

---

<sup>183</sup> Scalia, *supra* note 80, at 1185; see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 537–38 (2010) (Breyer, J., dissenting) (“A judicial holding by its very nature is not ‘a restricted railroad ticket, good for’ one ‘day and train only.’” (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting))); Neal Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 Fla. St. U. L. Rev. 323, 326 (2005) (“A court cannot very well announce ‘the plaintiff wins’ without providing some rationale . . . appl[icable] beyond the case at hand . . . .”); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 Mich. L. Rev. 1, 20 (2012) (insisting that the rule of law obligates judges to “derive [their] particular decisions from an identified and articulated general norm”); *supra* note 80 and accompanying text.

<sup>184</sup> See *supra* Section I.E.

<sup>185</sup> Some commentators believe that this occurred in *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*). See, e.g., Flanders, *supra* note 24, at 1161. This view is mistaken; *Bush v. Gore*’s clarification that “[o]ur consideration is limited to the present circumstances,” 531 U.S. at 109, did not purport to forbid future courts from relying on any principles embodied within the majority’s decision.

endured scathing criticism from jurists<sup>186</sup> (and passing criticism from scholars).<sup>187</sup> Justice Scalia, for example, chastised his colleagues for “beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive.”<sup>188</sup> Elsewhere, he wryly suggested that *Marbury v. Madison* (1803) might equally be understood as authorizing judicial review “of only those statutes that . . . pertain to the jurisdiction of the courts.”<sup>189</sup> And professional baseball’s antitrust exemption was characterized—by its own authors—as “unrealistic, inconsistent, [and] illogical.”<sup>190</sup> Their dissenting colleagues offered an even more blistering

<sup>186</sup> See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 169 (1975) (Burger, C.J., dissenting) (criticizing “this dubious process of limitation”); *Still v. Norfolk & W. Ry. Co.*, 368 U.S. 35, 48 (1961) (Whittaker, J., dissenting) (“I am unable to agree to what I think is the Court’s gratuitous and erroneous restriction of the *Rock* case ‘to its precise facts,’ and so I dissent.”); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 555 (1949) (Black, J., dissenting) (“The[] interment [of certain decisions] is tactfully accomplished, without ceremony, eulogy, or report of their demise. The ground beneath them has been deftly excavated by a soothing process which limits them to their facts, their precise facts, their ‘plain requirements.’”); *Haddock v. Haddock*, 201 U.S. 562, 631 (1906) (Holmes, J., dissenting) (“I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished.”); *Comm’ns Inv. Corp. v. FCC*, 641 F.2d 954, 976 (D.C. Cir. 1981) (“Distinguishing cases on the basis of principled differentiations is one thing; consciously setting out to ‘confine each case to its own facts,’ another—one which would virtually eliminate all precedent.”); *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 862 (D.C. Cir. 1972) (“[T]he question before us is not whether there exists *any* difference between *Edwards* and our case; it is, rather, whether a *relevant* difference exists.”); *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶ 219 (Lanzinger, J., concurring in part) (criticizing the majority for “limit[ing] a decision] to its facts” rather than “forthrightly overruling [it]”); *Messenger v. Messenger*, 827 P.2d 865, 875 (Okla. 1992) (Wilson, J., dissenting) (“The majority opinion attempts to confine *Nantz* to its facts when in fact, the majority opinion is overruling *Nantz*.”); *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 58, 416 P.3d 663 (Utah 2017) (“[R]espect for our precedent require[s] more than a bare, technical refusal to overrule.”).

<sup>187</sup> See Alexander, *supra* note 46, at 20 (“[R]estricting a rule to the facts of the precedent case is inconsistent with constraint by precedent.”); Farber, *supra* note 24, at 1183 (“Bedrock rulings cannot be ‘limited to their facts’ if the legal system is to have any claim to integrity . . .”).

<sup>188</sup> *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 636 (2007) (Scalia, J., concurring in the judgment); see also *id.* at 618 (decrying “the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently”).

<sup>189</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>190</sup> *Radovich v. Nat’l Football League*, 352 U.S. 445, 452 (1957).

assessment, denouncing the exemption as a “discriminatory fiat in favor of baseball,”<sup>191</sup> one that “baffle[s] the subtlest ingenuity.”<sup>192</sup>

Purely fact-bound adjudication is thus anathema to the ordinary judicial role. It is hard to imagine how a system of precedent could function if cases could be distinguished “on any factual grounds whatsoever.”<sup>193</sup> We think this objection should be dispositive when no justification is offered for confining. But the objection loses some of its force when a court invokes situation-specific reliance interests as the reason for engaging in the practice. In that scenario, unprincipled decisionmaking occurs in service of a larger principle—namely, a desire to mitigate harm that the court itself caused by announcing a prior incorrect rule. We are not prepared to condemn this breed of confining, in which principle is pursued at one level of remove.

## 2. *Applying Non-Law*

Confining might be regarded as lying outside judicial authority for yet another reason: it causes courts to treat as law something that has been held *not* to be the law. To understand this objection, consider first that federal courts are not directly empowered to “make law” in the way that Congress is. They add to the law’s development only incidentally, by interpreting positive sources of law in the course of resolving concrete legal disputes. So when a court repudiates a prior legal interpretation, one might argue, there is a formal sense in which the *law itself* did not change, but only the *court’s perception* of what the law is (and always was). This idea is popularly associated with the English jurist William Blackstone: “For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*.”<sup>194</sup>

---

<sup>191</sup> *Id.* at 456 (Harlan, J., dissenting); see also *id.* (“find[ing] no basis for attributing to Congress a purpose to put baseball in a class by itself”).

<sup>192</sup> *United States v. Int’l Boxing Club of N.Y., Inc.* 348 U.S. 236, 248 (1955) (Frankfurter, J., dissenting); see also *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (labeling the exemption “a derelict in the stream of the law”); *Int’l Boxing Club of N.Y.*, 348 U.S. at 250 (Frankfurter, J., dissenting) (refusing to read “into the Sherman [Act] an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it”).

<sup>193</sup> Alexander, *supra* note 46, at 20.

<sup>194</sup> 1 William Blackstone, *Commentaries* \*70; see also *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (subscribing to a “perception of the judicial role” that “sprang . . . from the jurisprudence of Blackstone”). For trenchant critiques of this oracular conception of judging, see *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 546 (1991) (White, J., concurring in the judgment); Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1, 2–6 (1960).

Under the Blackstonian view, therefore, confining amounts to an explicit acknowledgment that a principle is not (and has never been) law, accompanied by an announcement that the court will continue treating it as if it were.

Against this jarring incongruity, a powerful argument can be made in confining's defense. Courts are expected to apply legal principles with which they disagree in one other context—when following *stare decisis* despite their considered view that a case was wrongly decided. In this respect, confining might simply be regarded as a lesser-included version of *stare decisis*. Although courts must generally decide cases according to their best understanding of what the law requires, the argument goes, they may decline to overrule a wrongly decided case in order to reduce the practical harm that would befall those who had reasonably relied on it.<sup>195</sup> And whereas confining preserves a repudiated principle for only a limited subset of cases, following *stare decisis* allows an incorrect principle to remain in full operation. Confining may therefore be a permissible middle ground between following and overruling a case.

Still, there is a material difference between (1) declining to revisit a doubtful decision and (2) revisiting the decision, announcing that it was wrongly decided, according that repudiation binding precedential effect, and nonetheless continuing to apply its underlying principle in certain factual circumstances. And, again, this objection would cast doubt on *every* instance of confining. Accordingly, under the Blackstonian conception of judging—one that may yet find favor among the Court's formalists<sup>196</sup>—it is far from clear that confining can *ever* be properly employed. And enshrining warring legal principles should sit uneasily even with those less inclined to formalist conceptions of the judicial role. For jurists of all stripes, that deeply aberrational practice should be employed parsimoniously, if at all.

\* \* \*

Confining poses a variety of dangers to our system of principled adjudication. Only the protection of reliance interests can ever plausibly justify the use of this unorthodox jurisprudential tool. And if one subscribes

---

<sup>195</sup> See, e.g., *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting) (electing to follow a precedent perceived to be “wrongly decided” in light of substantial economic reliance interests).

<sup>196</sup> See Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 *UCLA L. Rev.* 808, 836 n.166 (2018).



to certain views about the origins and scope of judicial authority, confining is *never* permissible, no matter the reason it is employed. In Part IV, we provide guidance to courts on how to identify the rare occasions in which confining might be appropriate, as well as how to effectively confine cases to their facts on those occasions.

#### IV. REFINING CONFINING

Confining represents an extraordinary departure from standard judicial practice. Unless accompanied by a situation-specific justification, confining is theoretically indefensible. Courts have no business deciding cases in the unprincipled fashion confining requires of them—at least unless doing so vindicates some larger principle. Yet confining courts seldom explain their decisions to permit ad hoc factual exceptions to otherwise generally applicable legal principles. Nor, in most instances, can any satisfying justification readily be discerned.

As explained in Part III, two of the three key incentives to engage in confining—evading formal strictures and minimizing public scrutiny—are contingent upon widespread ignorance of the practice (an unfamiliarity this Article has sought to remedy).<sup>197</sup> We do not believe confining for either of those reasons to be legitimate.

We instead conclude that the protection of reliance interests is the *only* acceptable justification for confining cases to their facts, and even then only in extremely limited circumstances. To be sure, we sympathize with the judicial impulse to avoid visiting massive hardship on those who have reasonably relied on existing understandings of applicable law.<sup>198</sup> But those sorts of accommodations should occur in a transparent, principled fashion that does not create unnecessary doctrinal fissures. Would-be confiners should strive to appreciate the tool's practical limitations and ensure that any uses are carefully tethered to its underlying justifications.

In this final Part, we provide guidelines on *when* courts may appropriately confine cases to their facts, as well as *how* that process should unfold. We then conclude with a discussion of what confining teaches us about other important jurisprudential practices.

---

<sup>197</sup> See *supra* Sections I.B–C.

<sup>198</sup> See Heytens, *supra* note 122, at 609 (“[I]t is both inevitable and desirable for the Supreme Court to find some way of limiting the retrospectively disruptive effects of legal change . . .”).

*A. Why Refine At All?*

In light of confining's checkered history, one might ask why we do not advocate the tool's outright abolition. And indeed, we are sympathetic to the view that permitting confining to persist may be more trouble than it is worth. But we are ultimately optimistic that our suggested reforms would curtail the most objectionable features of confining—namely, its use as a workaround to the formal and informal constraints of stare decisis.

What our proposal cannot eliminate is the difficulty of assessing reliance interests in a value-neutral manner. At present, there is no agreed-upon framework for determining when reliance interests warrant the retention of flawed principles. “[C]ases involving property and contract rights” do enjoy special solicitude;<sup>199</sup> in those areas of the law, to borrow a phrase from Justice Brandeis, “it is more important that the applicable rule of law be settled than that it be settled right.”<sup>200</sup> But courts have also justified their adherence to stare decisis across far-reaching doctrinal areas by making strikingly broad (and often factually unsupported) assertions about society's reliance on particular principles of law.<sup>201</sup> At times, that is, courts have deployed the concept of reliance not as an empirical inquiry into people's *actual* expectations, but as a rhetorical make-weight.<sup>202</sup>

Even when courts do attempt to discern the actual scope of reliance interests engendered by a particular principle, it is unclear whether they are equipped to do so with any precision; one might fairly doubt “whether assessing the disruptive impacts of adjudicative change is even within the

<sup>199</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

<sup>200</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

<sup>201</sup> See generally Mills, *supra* note 78; see also Hillel Y. Levin, A Reliance Approach to Precedent, 47 Ga. L. Rev. 1035, 1082 (2013) (“[I]t is difficult to precisely identify the point at which public understanding gains sufficient legitimacy to constrain courts.”).

<sup>202</sup> The Court's recent decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), powerfully illustrates this problem. *Abbasi*'s cursory gesture toward “reliance upon [*Bivens*] as a fixed principle in the law,” *id.* at 1857, fell far short of justifying the Court's retention of its holding. People do not structure their lives around the prospect of being able to sue federal officials for damages, and those officials could hardly complain about being freed from the specter of monetary liability. See Leading Case, *supra* note 75, at 322 n.92 (“[W]hatever reliance *Bivens* has engendered is not the same as that typically meant in the stare decisis sense.”). Such empty assertions of reliance interests cannot justify the use of confining.

competence of the courts.<sup>203</sup> There can be no definitive account of which reliance interests are implicated by a particular principle, how weighty those interests are, whether they outweigh the perceived need for error-correction, or even what sources of information ought to be consulted to resolve those inquiries. It is hard to imagine an adjudicative task more prone to the pull of motivated reasoning.

Moreover, the very nature of litigation—i.e., the resolution of discrete cases and controversies—is hardly conducive to assessing and weighing system-wide reliance interests.<sup>204</sup> Although parties can be expected to brief and vigorously contest the reliance interests that bear on *their* claims, no case will present the full range of factual scenarios to which a legal principle might extend. Yet a confining court is tasked with cleaving a doctrinal area in two—the fact patterns governed by the new principle and those subject to the old—based on reliance interests that it must divine in the context of resolving a single case. It is doubtful that judges are institutionally equipped to excel at this task. As *Ziglar v. Abbasi* regrettably demonstrated,<sup>205</sup> extra-record forays may well lead to inaccurate or overgeneralized assumptions about the strength of particular reliance interests.

Even though confining can protect a subset of the reliance interests that would be disturbed by an overruling, therefore, that advantage must be weighed against potentially serious drawbacks. Given how infrequently confining can vindicate the full range of relevant reliance interests,<sup>206</sup> and how uncritically courts have invoked the concept of reliance in the past, it is an open question whether it would not be better to prohibit confining for this purpose altogether.

Critically, though, the indeterminacy of reliance interests plagues more than just confining—it is endemic to any system that relies on *stare decisis*. So the relevant question is whether confining *incrementally* impairs judicial objectivity to an intolerable degree. We think not. Reliance-based confining requires courts to inquire about reliance interests in specific factual contexts, rather than for all of a principle's logical applications.

---

<sup>203</sup> Kozel, *supra* note 78, at 1497; see also *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410 (2015) (“Marvel and Kimble disagree about whether *Brulotte* has actually generated reliance. . . . To be honest, we do not know.”).

<sup>204</sup> See Fisch, *supra* note 78, at 119 (“Courts may not have full information on the costs associated with legal change because of the limitations of the judicial process.”).

<sup>205</sup> See *supra* note 202.

<sup>206</sup> See *infra* notes 214–217 and accompanying text.

The former analysis would seem to be far more workable—and far more susceptible to objective critique. And other scholars have helpfully begun to interrogate the key assumptions underlying judicial invocations of reliance.<sup>207</sup>

Time may well prove confining to be beyond redemption. But for now—with the study of confining in its infancy—we believe that our suggested purifications deserve a chance to play themselves out.

### *B. When to Confine*

Confining should be used with the utmost caution. In our view, confining is appropriate only when (1) compelling reliance interests have been generated by previously adjudicated cases applying a repudiated principle; (2) stakeholders have relied primarily on *those* specific applications, rather than on other circumstances to which the broader principle would reasonably have been understood to extend; and (3) allowing doctrinally outmoded holdings to persist would not tarnish the court's public image.

We acknowledge that the choice between overruling and confining necessarily involves significant discretion,<sup>208</sup> our suggested guidelines are meant to inform and channel the use of that discretion in a relatively principled manner.

*First*, the type of fact-bound adjudication entailed by confining should not be resorted to unless doing so is necessary to avoid severe disruption to reliance interests. We have in mind those conditions, practices, and institutions that have become so deeply engrained that it would be unrealistic to expect affected parties to transition to a new legal rule.<sup>209</sup> For an

<sup>207</sup> See generally Kozel, *supra* note 78 (advocating a conceptual shift from backward-looking reliance to forward-looking disruption); Levin, *supra* note 201 (examining and refining traditional reliance-based justifications for adhering to precedent); Mills, *supra* note 78 (urging abandonment of the notion of societal reliance).

<sup>208</sup> As sketched out above, see *supra* Section IV.A, there is no value-neutral way of confirming that the sum of all relevant reliance interests corresponds closely to the facts of particular cases. Nor can any objective metrics dictate whether the affected reliance interests are large enough to warrant the use of confining in the first place. Cf. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (explaining that *stare decisis* “is a principle of policy and not a mechanical formula” (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)) (internal quotation marks omitted)); Walter V. Schaefer, *The Control of “Sunbursts”: Techniques of Prospective Overruling*, 42 N.Y.U. L. Rev. 631, 646 (1967) (“[T]here will not always be agreement as to the quality or degree of reliance that justifies a particular prospective limitation.”).

<sup>209</sup> As Professor Michael Gerhardt has observed, some precedents have become “so en-crust-ed and deeply embedded . . . that they have become practically immune to reconsideration and reversal.” Michael J. Gerhardt, *Super Precedent*, 90 Minn. L. Rev. 1204, 1206 (2006);

example of when this might be the case, consider again professional baseball's longstanding exemption from antitrust scrutiny. Remedying that anomaly for the first time through judicial decree—after decades of the sport operating under a contrary regime—could entail colossal transition costs, however plainly correct it would be as a matter of interpretation.<sup>210</sup> Our proposal to condition the use of confining on the presence of substantial reliance interests would put an end to the familiar practice of confining a decision simply because it is perceived to be erroneous.

*Second*, even if overruling a precedent would massively disrupt stakeholders' expectations, confining will not always be a sensible solution. Confining should be employed only when the reliance interests bound up in the specific fact patterns of past decisions comprise a sizable share of all reliance interests that would be disturbed by overruling those decisions outright. It would be a poor use of judges' discretion to confine when doing so would privilege only a fraction of the reliance interests worth protecting.

For an illustration of how confining could prove an unsuitable method of protecting even weighty reliance interests, consider the legacy of *Humphrey's Executor v. United States* (1935).<sup>211</sup> That case upheld the constitutionality of a statutory for-cause removal protection for the governing board of the Federal Trade Commission (FTC).<sup>212</sup> In doing so, *Humphrey's Executor* paved the way for modern administrative governance by permitting Congress to insulate so-called independent agencies from direct presidential control.<sup>213</sup> It is hard to imagine a precedent whose overruling could more radically upend existing institutions. Yet precisely because the principle of *Humphrey's Executor* gave rise to a multiplicity of independent agencies,<sup>214</sup> many with their own unique structures, confining that case to its facts—say, that the FTC's leadership is composed of five commissioners serving seven-year terms<sup>215</sup>—would make little

---

see also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 740 (1988) (acknowledging that some decisions “are now beyond judicial recall”).

<sup>210</sup> See *supra* notes 98–103 and accompanying text.

<sup>211</sup> 295 U.S. 602 (1935).

<sup>212</sup> *Id.* at 629.

<sup>213</sup> Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769, 778 (2013).

<sup>214</sup> See Geoffrey P. Miller, *Independent Agencies*, 1986 *Sup. Ct. Rev.* 41, 94 (“*Humphrey's Executor* has long been viewed as the fundamental constitutional charter of the independent regulatory commissions.”).

<sup>215</sup> See Commissioners, Federal Trade Commission, <https://www.ftc.gov/about-ftc/commissioners> [<https://perma.cc/545Z-4XFG>] (last visited Jan. 31, 2019).

sense.<sup>216</sup> The historical accident of the FTC's involvement as a litigant in *Humphrey's Executor* would hardly justify exempting its exact structure from generally applicable administrative-law principles, while denying that exemption to other independent agencies with differently composed governing boards.<sup>217</sup> As this hypothetical illustrates, the reliance interests associated with the particular facts of a case will usually be dramatically outweighed by the sum of all other reliance interests bound up in its underlying principle.

A comparison between confining and the defunct practice of prospective overruling helps to illustrate the scenarios in which confining would be appropriate under these two conditions. As mentioned above, prospective overruling is well suited to protecting reliance interests when (1) a rule of general applicability has been relied upon in a wide array of factual contexts and (2) those who have relied upon it will be able to successfully adapt their behavior in light of the new rule.<sup>218</sup> This might be the case if, for instance, the Supreme Court decided for the first time that certain disclosures of patients' information violated the Health Insurance Portability and Accountability Act,<sup>219</sup> medical facilities could adjust to that new reality simply by ceasing to make those disclosures. In contrast, confining is appropriate for rarer situations in which (1) persons who reasonably relied on a decision did so with respect to its particular facts and (2) those

---

<sup>216</sup> To take just one example, because the *seven* independent members of the Federal Reserve Board each serve *fourteen*-year terms, see Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 *Yale J. on Reg.* 257, 260–61 (2015), they would presumably fall outside the “facts” of *Humphrey's Executor*.

<sup>217</sup> Some jurists and scholars have endorsed a related approach—the so-called “anti-novelty” canon—as a means of limiting perceived constitutional problems posed by the administrative state. See Leah M. Litman, *Debunking Antinovelty*, 66 *Duke L.J.* 1407, 1425–26 (2017). Advocates of this approach seek to cabin earlier assertions of federal power within their existing domains, viewing skeptically any institution whose structure they believe represents a qualitative shift from past practices. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010); *PHH Corp. v. CFPB*, 881 F.3d 75, 166 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); see also Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 *Fla. L. Rev.* 1331, 1348 (2013) (advocating a “this far and no further” approach to congressional authority, whereby “any claim of additional *new* powers . . . requires special justification”). Notably, the anti-novelty technique would permit the creation of new agencies—even constitutionally suspect ones—whose structures *have* existed before. This concession would be unnecessary if the Court's retroactivity doctrine were modified to accommodate prospective overruling once again.

<sup>218</sup> See *supra* Subsection II.B.2.

<sup>219</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

stakeholders could not easily begin conforming to the new rule. Returning to professional baseball's exemption from the Sherman Act, an antitrust exemption that extended only backward to insulate preexisting contracts might have jeopardized MLB's continued survival;<sup>220</sup> in fact, this is presumably why the Court rejected Justice Marshall's recommendation in dissent that *Federal Baseball Club* instead be prospectively overruled.<sup>221</sup>

*Third*, and finally, even when all the other necessary conditions for confining are satisfied, a court should consider how that judgment would ultimately reflect on it as an institution. Overruling can signal a clean break from—a *disdain* for—a previous decision in a way that confining cannot. For example, the Supreme Court's opinions validating legal apartheid undoubtedly generated massive social and economic reliance interests.<sup>222</sup> But it would have been morally intolerable for the Court to have confined its decisions upholding the lawfulness of "separate but equal" facilities to their facts. Certain principles deserve nothing less than total extirpation from the American legal system.<sup>223</sup>

### *C. How to Confine*

Assuming that the preconditions for confining have been satisfied, how should a court deploy this unorthodox tool? We offer three recommendations for improving the practice of confining, ones drawn from various shortcomings we have observed in its use to date.

*First*, courts should confine only explicitly, never by implication. That is, courts should discontinue the practice of articulating doctrinal tests that all but foreclose new applications of disfavored principles. The sort of de

---

<sup>220</sup> See *supra* notes 100–102.

<sup>221</sup> See *Flood v. Kuhn*, 407 U.S. 258, 293 (1972) (Marshall, J., dissenting) ("To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only.").

<sup>222</sup> See Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. Rev. 1165, 1184 (2008) (acknowledging the magnitude of "the vested social, cultural, and even commercial reliance interests in maintaining segregation").

<sup>223</sup> See Daniel B. Rice, *The Riddle of Ruth Bryan Owen*, 29 *Yale J.L. & Human.* 1, 66–69 (2017) (advocating that legal decisionmakers cease according morally abhorrent principles residual legal effect). The reverse is not true, however—courts should not leverage these expressive differences by confining when the conditions for confining are not present. To take one relevant example, judges may understandably wish to avoid being perceived as trivializing violations of constitutional rights by federal officials. But the remedy for that difficulty is to avoid repudiating the *Bivens* principle in the first place, rather than effectively confining the case to its facts with no plausible reliance-based justification. See *supra* note 202.

facto confining exemplified by the Court's treatment of *Bivens* generates unnecessary litigation<sup>224</sup> and obscures the true nature of courts' actions. Had the *Abbasi* Court instead explicitly confined *Bivens*, it would have thrown into greater relief the real issue at stake: whether the principle underlying *Bivens* should serve as a basis for deciding future cases. Instead, courts are charged with determining whether a particular contextual factor is "special." Our proposal would also reduce the incentive for judges to offer implausible readings of precedents with an eye toward gradually abrogating them.<sup>225</sup>

*Second*, courts should not vaguely assert that a case is to be "confined to its facts" or "limited to its precise circumstances." Formulaic recitation of the language of confining invites continued disagreement over the residual scope of a repudiated principle. Judges who lament the principle's rejection will be inclined toward a broader understanding of a confined case's "facts," and vice versa. To forestall needless litigation delimiting a repudiated principle's domain, confining courts should endeavor to specify as precisely as possible the zone of facts within which it will be preserved.<sup>226</sup>

*Third*, and finally, a confined decision's factual domain should correspond with the reliance interests that justified confining the case to its facts. Each instance of confining should accordingly be accompanied by a coherent explanation of the case-specific reliance interests at stake, as well as why those reliance interests warrant grandfathering in an exception of a particular size. These explanations are necessary to ensure that courts have a compelling reason to abandon the "principled character" of judicial decisionmaking.<sup>227</sup> In fact, it is actually in a confining court's interest to tether the preserved factual domain to a specific set of reliance interests. Otherwise, a principle understood to be deeply flawed may continue in force more broadly than circumstances require. Similarly, when

---

<sup>224</sup> See Leading Case, *supra* note 75, at 320 (predicting that the Court's treatment of *Bivens* "will continue to provoke (or prolong) litigation that is unlikely to succeed").

<sup>225</sup> For example, in using the phrase "*special* factors counselling hesitation," *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (emphasis added), the Court could not possibly have been referring to types of conditions that would be present in virtually every case.

<sup>226</sup> To be sure, in resolving the case at hand, it will rarely be strictly necessary to provide a detailed description of the repudiated principle's surviving factual domain. We nonetheless believe that additional guidance on that score is both appropriate and essential to the successful use of confining as a jurisprudential tool—even if it is technically dicta.

<sup>227</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992).



courts are faced with discerning which facts of a confined case are *the* “facts,” they should look to which facts stakeholders were likely to have relied on, thereby engendering the sizable reliance interests that purportedly justified confining the case in the first place.<sup>228</sup>

#### *D. The Lessons of Confining*

As we hope to have shown in this Article, confining is a phenomenon worth exploring on its own terms. But our study of confining has also revealed a number of insights into other features of jurisprudential practice. As we explain below, an appreciation of the mechanics of confining highlights the significance of the concept of repudiation, the linchpin of any departure from *stare decisis*. We close by contending that the use of confining should rise or fall with various other techniques designed to minimize the disruptive impact of adjudicative change. Most notably, we are unconvinced that confining and the currently discredited practice of prospective overruling ought to stand on separate legal footing.

##### *1. The Centrality of Repudiation*

One of the focuses of this Article has been on the relationship between repudiation, confining, and overruling. In particular, we have sought to illuminate the critical distinction between merely repudiating a principle and overruling the cases decided in reliance upon that principle.<sup>229</sup> Because repudiation is the true law-changing event, it is usually unwise to accord talismanic significance to the presence of an “overruling.” Recognizing the woefully undertheorized connection between repudiation, overruling, and confining yields six concrete lessons for judicial decisionmaking.

*First*, the triggering condition for the Supreme Court’s “special-justification” doctrine should not be the overruling of a precedent, but the repudiation of a principle. In demanding a special justification before overruling one of its decisions,<sup>230</sup> the Court has recognized that it should not depart from its precedents simply because they were poorly reasoned. What this formula overlooks, however, is that the mere repudiation of a principle effectuates the very departure from precedent that the Court

---

<sup>228</sup> Of course, this advice holds only insofar as a past instance of confining can plausibly be understood to have safeguarded reliance interests.

<sup>229</sup> See *supra* Section I.B.

<sup>230</sup> See *supra* notes 109–110 and accompanying text.

thinks must be backed by a heightened explanation. It is not the eventual choice between confining and overruling that unmakes a precedent, but the prior act of repudiation.<sup>231</sup> The Court should therefore clarify that it may not *repudiate* the principle of an earlier case without providing a special justification for doing so. This recommendation would plug a doctrinal loophole that has allowed the Court to break with precedent without satisfying the requisite formal requirements.<sup>232</sup>

*Second*, and relatedly, federal courts of appeals should convert their prohibition on inter-panel overruling to a ban on repudiating a principle laid down by an earlier panel. The present rule is designed to require en banc consideration before an appeals court may deviate from *stare decisis*.<sup>233</sup> But this sort of departure occurs the moment a court discards everything a precedent stands for except its exact result. There is no readily apparent justification for restricting three-judge panels from overruling decisions of other panels, yet leaving them perfectly free to achieve nearly identical results by confining those decisions to their facts. This recommendation applies equally to any rules for overruling prior cases that state courts have imposed on themselves.<sup>234</sup>

*Third*, a decision to repudiate a principle should be preceded by the same degree of process as a decision to overrule a precedent. The Supreme Court has often hesitated to overrule its decisions without an explicit request from a party, and without having received briefing and heard argument on whether to do so. The Court recently justified this practice as a means of learning about the relevant reliance interests: “It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential *amici*

---

<sup>231</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 198 (1977) (“[T]he importance of *Pennoyer* is not its result, but . . . its principles . . .”); see also *supra* Section I.B.

<sup>232</sup> In applying to all types of written opinions—majorities, pluralities, concurrences, and dissents—our proposal would not only discipline the drafting of decisions that immediately change the law. It would also constrain the content of separate opinions that so often inspire doctrinal transformation. For an example of this phenomenon in the *Bivens* context, see *supra* Section I.D.

<sup>233</sup> See *supra* note 117 and accompanying text.

<sup>234</sup> For rare examples of our suggestion in action, see *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1133 (D.C. Cir. 2015) (construing a request to limit a case “to its facts” as one to “overturn [the] earlier decision,” and declining to do so because “[w]e are obliged to follow the law of the circuit”); *United States v. Smith*, 354 F.3d 390, 399 (5th Cir. 2003) (“[N]o panel is empowered to hold that a prior decision applies only on the limited facts set forth in that opinion.”); *State v. Hayes*, 2003 WI App 99, ¶ 12, 663 N.W.2d 351 (“We cannot sub silentio get around this rule by simply holding a prior existing case “[limited] to its facts.””).

had little notice that the matter might be decided.”<sup>235</sup> But no such custom currently precedes the act of confining. As should be evident by now, repudiation should be treated with the same procedural caution as the prospect of an overruling.<sup>236</sup> The Justices owe it to stakeholders to consider the full sweep of reliance interests implicated when they are contemplating a principle’s repudiation. And affected parties deserve no less of an opportunity to educate the Court as to their reasonable expectations simply because a case might be confined rather than overruled.

*Fourth*, courts should not simply repudiate the principle of an earlier case without specifying the case’s fate. After a principle has been repudiated, one of two outcomes will ultimately follow: cases decided in reliance upon the principle will either be overruled or confined to their facts. In most instances, overruling will be the only appropriate course; there will usually be no serious reliance-based imperative to confine instead.<sup>237</sup> If confining *is* appropriate, however, it should occur at the moment of repudiation. Failing to do so denies well-deserved repose to the relevant stakeholders, and—by leaving uncertain whether a case will ultimately be confined or overruled—threatens to upset the very reliance interests confining is designed to protect.

But if the conditions for confining are not present, related decisions should be overruled forthwith, without waiting for a set of “facts essentially on all fours with” those of a discredited case.<sup>238</sup> The U.S. Reports are replete with examples of decisions overruled years after their central

<sup>235</sup> *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011); see also *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 n.\* (2009) (“We do not revisit today whether *Thermtron* was correctly decided. Neither the brief for petitioner nor the brief for respondents explicitly asked the Court to do so . . . .”); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447 n.1 (1994) (“[W]e think it inappropriate to overrule *Jensen* in dictum, and without argument or even invitation.”). The Justices often express similar concerns in separate opinions. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 264 (2006) (Alito, J., concurring in part and concurring in the judgment) (“Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue.”); *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (“Respondents did not, however, advocate the overruling of *Sitz* and *Martinez-Fuerte*, and I am reluctant to consider such a step without the benefit of briefing and argument.”).

<sup>236</sup> See *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 39, 416 P.3d 663 (declining to “confine[] to its facts” an earlier decision “absent any argument . . . that it should be overruled”); see also *id.* at ¶ 59, 416 P.3d at 680 (“We’re an adversarial court that ought not upend our precedents absent argument from the parties that they be overruled.”).

<sup>237</sup> See *supra* Section IV.B.

<sup>238</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979). This recommendation does not apply to any decision supported by an alternative ground that remains valid.

premises had been rejected.<sup>239</sup> Delay of this sort simply postpones the inevitable<sup>240</sup> while burdening courts with wasteful litigation. Every moment the legal system is forced to harbor contradictory principles—with no effort made to reconcile them—is a loss to that system’s integrity.<sup>241</sup> And deferring a foreordained overruling can lead to grave injustices, such as unconstitutional imprisonments on a massive scale.<sup>242</sup>

<sup>239</sup> See, e.g., *United States v. Hatter*, 532 U.S. 557, 566–67, 570 (2001) (overruling *Evans v. Gore*, 253 U.S. 245 (1920), in light of a 1939 decision that “repudiated *Evans*’ reasoning”); *Mitchell v. Helms*, 530 U.S. 793, 836 (2000) (characterizing the act of overruling two decisions as “simply acknowledg[ing] what has long been evident”); *Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991) (acknowledging that *Hoyt v. Florida*, 368 U.S. 57 (1961), had been “overrul[ed] in effect” by a 1975 decision); *South Carolina v. Baker*, 485 U.S. 505, 520, 524 (1988) (confirming that *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), had been overruled by subsequent cases that “thoroughly repudiated” its rationale); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987) (plurality opinion) (partially overruling *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), in light of later decisions “leav[ing] no doubt” that *Parden* was “no longer good law”); *United States v. Miller*, 471 U.S. 130, 135–36, 144 (1985) (overruling one aspect of *Ex parte Bain*, 121 U.S. 1 (1887), given that its reasoning “did not . . . survive” two cases decided in 1926 and 1927); *Hughes*, 441 U.S. at 325–26, 333 (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896), to account for the Court’s explicit “shift away from *Geer*’s . . . analysis” in a 1948 decision); *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) (clarifying that the Court’s opinion in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), had the effect of overruling *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), because it “amounted to a total rejection of the holding in *Logan Valley*”); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 321–22 (1972) (overruling *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941), in light of cases decided in 1957 and 1966 that “repudiated the reasoning” of *Moore*); *United States v. Interstate Commerce Comm.*, 337 U.S. 426, 439 n.8 (1949) (explaining that *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939), had “effectively overruled a host of prior decisions”). As the Court commented long ago, “we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not.” *Asher v. Texas*, 128 U.S. 129, 132 (1888).

<sup>240</sup> See *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 667 (1965) (Black, J., dissenting) (“The Court . . . has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons.”).

<sup>241</sup> See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting) (“It damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions.”); *United States v. Dixon*, 509 U.S. 688, 712 (1993) (“We would mock *stare decisis* and only add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not.”).

<sup>242</sup> See *Shepard v. United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment) (“Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres* . . .”). These results should not be tolerated in the name of constitutional avoidance or the perceived lack of a special justification for overruling. For expressions of these reasons, see *Dretke v. Haley*, 541 U.S. 386, 395–96 (2004) (invoking constitutional avoidance as a reason for declining to revisit a decision whose core principle had been disavowed); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (2006) (Stevens, J., respecting the denial of certiorari) (“[T]here is no special justification for

Moreover, discarding the practice of repudiating principles without specifying their ultimate fate could exert a powerful disciplining effect. Specifically, if the lag time between repudiating a principle and specifying its ultimate precedential status were narrowed, courts might hesitate to disavow precedents that they were not prepared to overrule (and could not justifiably confine).<sup>243</sup> Whatever the virtues of incrementalism—including what Professor Re has termed “the doctrine of one last chance”<sup>244</sup>—courts should not repudiate a principle in anticipation of *potentially* overruling related decisions in the future.

*Fifth*, when a court has decided to confine a case to its facts, that decision should be entitled to full stare decisis effect. The act of confining represents—or certainly ought to represent—a court’s considered view that the holding of an earlier decision deserves to survive.<sup>245</sup> Such determinations should not be lightly revisited. Despite some past practice to the contrary,<sup>246</sup> it should be just as difficult to overrule a previously confined decision as it would be to revitalize an overruled precedent.

*Sixth*, and finally, the interaction between repudiation, confining, and overruling casts new light on the Supreme Court’s admonition that lower courts should not deem its decisions to have been overruled by implication. The Court has repeatedly insisted that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case

---

overruling *Almendarez-Torres*.”). The fact that a decision’s underlying principle has *already* been adjudged erroneous—and rendered inapplicable in nearly all contexts—is the consummate justification for overruling precedent, assuming that reliance interests do not warrant confining instead.

<sup>243</sup> We acknowledge that our proposal would require courts to identify and assess any especially weighty reliance interests at the moment of repudiation, before having an opportunity to adjudicate disputes presenting those facts. Individual cases are not ideal settings in which to perform this system-wide task. But for the reasons identified above, we believe that the drawbacks of delay significantly outweigh any judicial-competency objections to confining at the moment of repudiation. And in our view, it is far preferable to assess reliance interests imperfectly than to neglect those interests entirely when repudiating a principle.

<sup>244</sup> See generally Re, *supra* note 4 (describing the Roberts Court’s practice of signaling a willingness to issue disruptive decisions before actually doing so).

<sup>245</sup> See, e.g., *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119, 123 (5th Cir. 1994) (commenting that “[t]he Supreme Court’s explicit limitation of *Gaudet* to its facts . . . indicates that the Supreme Court did not intend to overrule *Gaudet*”); *Kann v. Comm’r*, 210 F.2d 247, 252 (3d Cir. 1953) (Kalodner, J., dissenting) (“Had the Supreme Court intended in *Rutkin* to overrule *Wilcox* it . . . undoubtedly would have said so.”).

<sup>246</sup> See *James v. United States*, 366 U.S. 213, 215, 222 (1961) (overruling *Commissioner v. Wilcox*, 327 U.S. 404 (1946), even though it had been expressly confined to its facts in *Rutkin v. United States*, 343 U.S. 130 (1952)).

which directly controls, leaving to this Court the prerogative of overruling its own decisions.”<sup>247</sup> This directive would make little sense if repudiation inevitably resulted in overruling, because repudiating the principle underlying a case—“reject[ing]” its reasons—would be tantamount to overruling the case itself. But because confining may be a live option for a case containing a repudiated principle, this admonition can be understood as a way to ensure that the Supreme Court makes the ultimate decision whether to confine or overrule.<sup>248</sup>

## 2. Safeguarding Reliance Interests During Transitional Moments

Whatever its faults, confining can be an effective means of protecting reliance interests during times of doctrinal instability. A confining court accomplishes this end by abandoning principled adjudication in favor of reaching a pragmatic equilibrium between correcting legal mistakes and accommodating stakeholders’ concerns. In this way, confining can facilitate the correction of grave errors that themselves threaten the integrity of the legal system.

Confining is hardly unique in this respect. The erstwhile practice of prospective overruling operated in much the same way.<sup>249</sup> Because of its unusual prominence during the Warren Court years, prospective overruling was marked for special opprobrium in the Court’s retroactivity jurisprudence. Yet confining is no less offensive to the conception of the judicial role embodied in that jurisprudence. The principal difference between the two techniques is the scope of reliance interests they safeguard; in particular, confining—unlike prospective overruling—can protect reliance interests that extend past the date of the law-changing decision. But

---

<sup>247</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); see also *United States v. Hatter*, 532 U.S. 557, 567 (2001) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))). Query, however, whether a lower court would actually be chastised for failing to apply a “morally repugnant” Supreme Court precedent that it perceived to have been “overruled in the court of history.” See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>248</sup> The directive, moreover, is yet another reason why principles should not be repudiated in a vacuum. If the Court fails to specify whether a repudiated principle is to be confined or overruled, lower courts *must* choose one of these options when presented with the facts of a decision whose fate remains uncertain. Those courts cannot simply decline to decide cases properly before them.

<sup>249</sup> Both techniques “represent a forthright attempt to deal with the problems posed by legal change.” See Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 *Yale L.J.* 922, 980 (2006) (describing one virtue of nonretroactivity devices, which conceptually include both prospective overruling and confining).

this distinction furnishes no basis for prohibiting only prospective overruling. If anything, confining should be regarded as *more* inimical to the judicial role because it causes judges to draw unprincipled factual distinctions across doctrinal areas that linger in perpetuity.

One might object to prospective overruling on the ground that it partakes of dicta: when prospectively overruling a case, a court purports to specify the rule that will govern future cases even though that rule is not being applied to the case at hand. But the same can almost always be said of confining. In fact, in every instance of confining we have come across, the confining court declared that a repudiated principle would be confined to a set of facts not presented by the case under review.<sup>250</sup> None of this is to say whether confining should, or should not, be routinely employed. Our point here is instead that, whatever one's views of confining, that technique represents a more extreme departure from the traditional judicial role than does prospective overruling.

In fact, we think that the availability of confining necessarily entails the validity of other reliance-protecting tools. A confining court casts off strict adherence to principle for the sake of optimizing the transition between old and new legal rules. The court achieves this end by carefully carving out both a factual and temporal domain within which a repudiated principle will continue operating. We see no obvious reason why this altogether pragmatic undertaking should be bounded by the idiosyncrasies of confining—a tool, after all, that the Supreme Court has never examined in any depth. If a court's goal is to reach a sensible accommodation of weighty reliance interests, all manner of innovations that would advance that end should be entertained.

If courts may engage in confining, for example, they should also enjoy the flexibility to limit a repudiated principle's reach not just to the particular facts of previously adjudicated cases, but also to other factual scenarios in which stakeholders have relied heavily on the principle.<sup>251</sup> Perhaps courts should also be able to announce that a principle's validity will

---

<sup>250</sup> See, e.g., *Radovich v. Nat'l Football League*, 352 U.S. 445, 446–47, 451 (1957) (declaring, in a case involving professional football, that *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), would be limited to the context of professional baseball); *Rutkin*, 343 U.S. at 132, 138 (declaring, in a case involving extortion, that *Commissioner v. Wilcox*, 327 U.S. 404 (1946), would be limited to the context of embezzlement).

<sup>251</sup> See *Re*, supra note 5, at 931 (“A court might . . . conclude that stare decisis protects a precedent from being overruled only insofar as the precedent has become an object of reliance.”).

expire after a certain number of years; by that time, those who had relied on the principle would be expected to wean themselves off of it.<sup>252</sup> Or perhaps a court should be able to delay issuing its mandate until a specified date in the future, after which the new rule could begin operating either retroactively or prospectively only.<sup>253</sup> Alternatively, a court could deem a new rule retroactive, but only extending back to the date on which the present litigation commenced.<sup>254</sup> The sky is the limit in creatively tailoring the basic infrastructure of confining and prospective overruling to protect reliance interests in times of doctrinal change.

As explained above,<sup>255</sup> confining is incompatible with the norm of across-the-board retroactivity embraced by the modern Supreme Court. If this incompatibility leads the Court to discard confining, so be it. If the Court opts instead to retain that practice, however, both prospective ruling and other creative reliance-cushioning techniques should be on the table. Whether it is a *good* thing for courts' menus to be so full is debatable, of course. But the Supreme Court should either embark upon a wholesale reassessment of its retroactivity jurisprudence—one that leaves room for prospective overruling and other innovative practices—or it should relegate confining to the Island of Misfit Tools.<sup>256</sup>

#### CONCLUSION

Confining has lingered in obscurity for too long. A widespread failure to reckon with this unusual practice has enabled its use as a workaround

---

<sup>252</sup> See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (ordering that public schools be desegregated “with all deliberate speed”); *id.* at 300 (instructing lower courts to require the defendants to “make a prompt and reasonable start toward full compliance . . . at the earliest practicable date”).

<sup>253</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 50, 88 (1982) (plurality opinion) (declaring, on June 28, 1982, that “we stay our judgment until October 4, 1982”); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (“[W]e order our mandate stayed for 180 days . . .”); *Widell v. Holy Trinity Catholic Church*, 121 N.W.2d 249, 249, 254 (Wis. 1963) (announcing, on April 30, 1963, that “[w]e make the new rule . . . prospective to July 1, 1963”). Other nations’ courts often employ the related technique of “suspension of invalidity,” which “gives a period of time for the government to apply its own fix to a constitutional infirmity before judicial invalidation of an act.” Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 *Harv. L. Rev.* 28, 118 (2018).

<sup>254</sup> Actions taken in reliance on the old case, and before the present challenge was brought to it, would thereby be treated differently than actions taken after the case’s validity had been called into question.

<sup>255</sup> See *supra* Subsection III.B.1.

<sup>256</sup> With apologies to dear Rudolph. See *Rudolph the Red-Nosed Reindeer and the Island of Misfit Toys* (Good Times Entertainment 2001).



to the strictures of overruling precedent. Our Article exposes this underhanded use of confining for what it is—and urges courts to put an end to it. Instead, confining can be justified only as a means of safeguarding entrenched reliance interests. This recognition in turn exposes a deep tension between confining and modern retroactivity doctrine, one that the Supreme Court should resolve at its earliest opportunity.

A clearer understanding of confining's distinctive nature could hardly be more urgent. With Justice Kennedy's retirement, the newly constituted Supreme Court may be tempted to discard unwanted precedents with minimal friction. But before disposing of disfavored precedents through confining, the Court should reflect on the practice's pitfalls and practical limitations. We hope that the guidelines provided here will contribute to the tool's responsible use going forward, consigning confining to its rightful—but limited—role in our judicial system.