Note

How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis

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Judges are "liars."[1] They "routinely engage in delusion."[2] They occupy a paradoxical position in this world, one in which their function requires them to make law, while their legitimacy depends on the fiction that they interpret law.[3] It is a strange fiction, but it is a necessary one. The legitimacy of the judicial system requires that the rule of law be above the whims of the individual personalities who happen to occupy positions on the Supreme Court at any given time. Rather, the rule of law must be grounded in objective analysis and immutable logic, reasoning that does not change with the changing of personnel. Otherwise, there would be no reason to accept the decisions of the Court as the governing framework for our society.

Judges sustain the fiction that they interpret law, but never create it, by adhering to the doctrine of stare decisis. Stare decisis states that judicial decisionmaking should adhere to precedent. Precedent provides a source external to the judges' individual opinions that legitimizes their reasoning, supplying ready evidence that judicial decisions are based on more than individual whim. After all, there is a certain amount of security in trusting precedent. Assuming that judges in a series of decisions have conducted independent analyses to confirm their predecessors' views, and that such a

1. Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 155 (1994).

2. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 85 (1998).

3. *See* Shapiro, *supra* note 1, at 156 ("This paradox means that although every court makes law in a few of its cases, judges must always deny that they make law.").

series comprises a collective judgment, precedent should be more trustworthy than an individual judge's opinion.[4]

But on occasion, judges depart from precedent,[5] and when they do, the fiction of interpretation begins to fall apart. After all, when judges overrule a previous decision, they do more than disagree with that decision; they assert an individual position and reject the external substantiation of their opinion.

How, then, can judges maintain their legitimacy when they overrule? This Note attempts to provide an answer by looking at the doctrine of stare decisis through the framework of J.L. Austin's speech act theory. Specifically, this Note argues that Austin's theory allows us to view the act of ruling as a discrete performative utterance that requires certain conditions to be fulfilled before it can function properly. As an atypical application of the general act of ruling, the act of overruling requires its own set of conditions before it can achieve legal force. This Note identifies and explores those conditions.

Part I describes J.L. Austin's speech act theory and, in particular, the constative and performative aspects of speech. Part II argues that while judges enact the constative fallacy, pretending that they are interpreting rather than creating the law, they execute an explicit performative utterance every time they make a ruling. In order for the ruling to have force, however, several felicity conditions must be fulfilled, among them the legitimacy of the Court in making the ruling. In Parts III-V, I examine the ways in which the Court meets this challenge.

In conducting my analysis, I examine cases from the last three decades in which the Supreme Court has overruled an earlier constitutional case.[6] To generate this list, I use the thirty-three cases listed in the majority opinion in *Payne v. Tennessee* to denote constitutional decisions the Supreme Court overruled in the two decades from 1971 to 1991.[7] In addition, to span the years 1991 to 2002, I use the list of overruled cases

4. Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 36 (2001).

5. Although all judges, and not just the Justices of the Supreme Court, can be said to engage in the paradoxical position of creating law while pretending to interpret it, this Note focuses on the actions of U.S. Supreme Court Justices. This Note does not consider the decisions of state supreme courts or federal circuit courts, but the following analysis may apply there as well.

6. As I argue later, it is not at all clear in every case that an overruling has taken place. Judges use a variety of different words and phrases to overrule, and sometimes a future case retrospectively views an earlier case of overruling. The judges themselves are not always certain that an overruling has taken place. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) ("Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling."). Therefore, I do not hold out this list of overruled cases to be comprehensive. Rather, it is a list that three independent sources have considered to be comprehensive. I have cross-referenced these lists to make sure that my list is as comprehensive as possible.

7. 501 U.S. 808, 828-30 (1991).

contained in *The Supreme Court Compendium*[8] and the Congressional Research Service's *Constitution of the United States of America: Analysis and Interpretation*.[9]

This sample set includes only those cases that overrule a previous constitutional decision. The doctrine of stare decisis operates under slightly different principles when the case involves statutory construction or procedural rules. Judges and academics have viewed cases turning on statutory construction as more constrained by precedent than cases of constitutional adjudication,[10] while they have viewed cases focusing on procedural rules as less constrained.[11]

I. SPEECH ACT THEORY

In the 1960s, a group of British language philosophers, led by J.L. Austin, developed a framework for understanding the way language is used, which they called speech act theory.[12] This theory "treats an utterance as an act performed by a speaker in a context with respect to an addressee."[13] In his William James Lectures, which later became the book *How To Do Things with Words*, Austin sought to revise this view by exploring the many other functions of speech acts.[14]

Austin's work identifies two general categories of speech acts—constative speech acts and performative speech acts. Constative speech acts are sentences that describe an existing state of the world. They are factual statements such as "The grass is green," opinions such as "I like your sweater," and thoughts such as "I think the sun is shining today." Each of these statements purports to describe something—material objects in the world, feelings, thoughts—and has an external referent. In other words, the substantive content of the statement exists outside the utterance of the words themselves, if not physically ("grass"), then as concepts—as

8. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 204 tbl.2-17 (3d ed. 2003).

9. CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 171 (Supp. 2000).

10. *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 711 (1995) ("Respect for precedent is strongest 'in the area of statutory construction, where Congress is free to change this Court's interpretation . . . .'" (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 349 (1986).

11. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 521 (1995) ("That role [of stare decisis] is somewhat reduced, however, in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior.").

12. ELIZABETH C. TRAUGOTT & MARY L. PRATT, LINGUISTICS FOR STUDENTS OF LITERATURE 229 (1980).

13. *Id*.

14. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 3 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

thoughts or feelings. These statements thus have a truth value—they can be deemed true or false.[15]

In contrast, performative speech acts conflate the act of doing with the act of saying; saying the statement performs the action referred to in the statement. Examples include "I promise to tell the truth," "I bet you ten dollars," and "I hereby pronounce you husband and wife." Thus, when one says, "I promise," one not only *says* that one promises but one also creates the act of promising.[16] Similarly, when one says, "I bet," one is performing the act of betting, and when one says, "I pronounce you husband and wife," one creates the legal act of marriage—given that one has the authority to do so. Performative speech acts do not have a truth value. Since the act of uttering the statement creates the referent, there is no external referent against which to measure the truth of the utterance.

As the last example suggests, however, something can go wrong in the utterance. Even within this category of performative utterances, the act of saying words alone is not enough to create the action. Obviously, children who are playacting a marriage cannot create the act of marriage just by uttering the right words. We do not say that the playacting child's statement is false, for the child is not lying or issuing a misstatement. Rather, we would say that the statement is void, or as Austin says, "[u]nhappy."[17]

Austin identifies two sets of general appropriateness conditions, which he calls "felicity conditions," that must be fulfilled in order for the "happy" functioning of the performative speech act.[18] The first set includes three conditions required for the action to be successfully performed: (1) an accepted conventional procedure must exist to give meaning to the utterance, (2) the person and circumstances must be appropriate for the conventional procedure, and (3) the procedure must be executed correctly and completely.[19] Thus, in order for the pronouncement of husband and wife to have legally binding force (i.e., in order for an action to be performed with the utterance of the words), certain conditions must be fulfilled. The person making the pronouncement must have legal authority to do so (conditions (1) and (2)), and must not say the wrong names in the ceremony (condition (3)). The person must also pronounce the words over two people who are eligible for marriage; they cannot, for instance, have a close family relationship with one another or currently have another spouse (condition (2)).

15. *Id*.

16. J.L. AUSTIN, *Other Minds*, *in* PHILOSOPHICAL PAPERS 76, 99-103 (J.O. Urmson & G.J. Warnock eds., Oxford Univ. Press 3d ed. 1971) (1961).

17. AUSTIN, *supra* note 14, at 2.

18. *Id*. at 14.

19. *Id*. at 15-24.

The second set of felicity conditions includes two additional requirements for the utterance to succeed. The two conditions are: (4) if the procedure is designed for the participants to have a certain intent or state of mind, the participants must have such feelings or thoughts; and (5) the participants must actually conduct themselves in accordance with said feelings or thoughts.[20] We can easily imagine a person who promises but never intends to keep the promise (condition (4)), or a person who never follows through on his promise (condition (5)). In this case, the promise is not void; it is given in bad intention and may be misleading, but the statement still performs the act of promising.[21] If the participants fail to abide by either of these conditions, the utterance is "abused," or rather, the action is performed but is insincere.

In addition to these five general conditions, Austin touches on other ways in which performative utterances can go wrong. For example, a performative speech act can be uttered under duress or jokingly or in a poem.[22] It can also be misheard or misunderstood.[23] However they "go wrong," these felicity conditions are of immense importance: The violation of one of them is enough to render the entire utterance devoid of performative force.

In exploring these conditions, however, Austin finds that such felicity conditions are not unique to performative utterances. Something can also "go wrong" in constative utterances. For example, the statement, "The King of France is bald," is neither true nor false. It can be more accurately said to be null or void, as the thing that it presupposes—the existence of a king in France—does not exist. The statement is thus "not about anything."[24] In addition, every constative statement can be said to be performing an action with its utterance—the act of *stating*.[25] Because the act of stating is really not so very different from the act of doing, Austin suggests that there may be less of a distinction between the two categories than he originally posited.

Likewise, Austin finds that performative utterances may have some very constative qualities. For example, although they do not have a truth value, performative utterances sometimes have "an obvious slide towards truth or falsity."[26] Specifically, Austin has in mind utterances such as those that estimate, find, or pronounce. A person may estimate rightly or wrongly that it is half-past two, find correctly or incorrectly that a man is guilty, and

20. *Id*.
21. *Id*. at 11.
22. *Id*. at 21-22.
23. *Id*. at 22.
24. *Id*. at 137.
25. *Id*. at 134.
26. *Id*. at 141.

pronounce correctly or incorrectly that the batter is out.[27] Austin identifies and explicates several more instances in which constative statements exhibit performative qualities, and vice versa. At the end of his lectures, Austin comes to the conclusion that performativity and constativity are aspects of all speech acts, rather than different categories. The utterances only appear performative or constative because one function is dominant over the other.[28]

Likewise, this Note finds that the judicial speech act of overruling is not purely performative or purely constative. Rather, the act of overruling is able to fire "properly" precisely because it contains aspects of both. Thus, while this Note retains the terms "performative" and "constative," the terms will refer to aspects, rather than categories, of speech.

II. WHEN JUDGES RULE AND OVERRULE

A. *When Judges Rule: The Typical Performative Utterance*

Judges enact the constative fallacy when they pretend to interpret the law instead of creating it.[29] They enact this fallacy in many ways. In cases that concern the application of statutes, codes, or the Constitution, judges reference these external sources of law to suggest that they are merely interpreting a preexisting body of law. But judges are also charged with making decisions that do not stem from a written expression of the law as passed by the legislature. Here, in the common law, judges do not have a fixed, external body of law on which to rely; the only texts that judges can reference are the texts of earlier judicial opinions. The indeterminate space created by the absence of external sources thus requires a doctrine such as stare decisis to constrain the arbitrary discretion of judges.[30] Although earlier judicial opinions may not have the same force of law as a code or a statute, time can change past decisions, which are themselves the decisions

27. *Id*.

28. *Id*. at 145-46.

29. The constative fallacy is also enacted in the *Miranda* rights context. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that a suspect being interrogated in police custody has, and must be informed of, the right to remain silent and the right to an attorney). The reading of the *Miranda* rights to the suspect once he or she has been taken into custody purports to describe to the suspect rights that are already in existence. The Court has held, however, that at least with respect to the right to counsel, the suspect must say or do something that clearly invokes the right before receiving its protections. *See* Edwards v. Arizona, 451 U.S. 477, 485 (1981). This requirement suggests that although the rights are supposedly constative, the performance of the proper speech act is necessary to bring the right—or at least its force—into existence, which is the same thing as saying that the speech act is necessary to create the right.

30. Nelson, *supra* note 4, at 5.

of individuals, into a "seemingly immutable source of external authority" for current courts.[31]

If they can be seen to interpret law, judges can be said to produce constative speech acts; by interpreting, and not creating, judges are presumed merely to describe the law as it exists, either within an external source of law or within the body of judicial opinions. At the same time, however, the utterances of judges must necessarily be performative; their function, after all, is to create law.

In routine moments of judges' decisionmaking, the performative function still triumphs over the fiction that judges only interpret. In these moments, the judges explicitly rule.[32] They employ an explicit performative utterance to announce their ultimate judgment—"It is affirmed," "It is reversed," or "It is remanded."[33] With these words, the action of affirming, reversing, or remanding is accomplished.

Such words also isolate the exact moment that the action is performed. This moment is rhetorically distinguishable from the rest of the opinion. The judgment generally comprises the last words of the majority opinion, is usually set apart in its own paragraph, and is often in italics. Moreover, the judgment may even come after a description of the judgment in the final paragraph. For example, in *Commonwealth Edison Co. v. Montana*, the Court ended its holding with the sentence, "Consequently, the judgment of the Supreme Court of Montana is affirmed."[34] The Court then followed this statement with the implementation of its judgment in the next paragraph, "*So ordered*."[35] In such a case, the addition of the last phrase may seem redundant, as the Court had already explained its holding in the prior sentence. The only purpose of such a sentence, therefore, seems to be to emphasize that the act of ruling can only occur at a certain moment, with certain, ritualized language. The speech act of ruling is thus a classic performative utterance.[36]

31. Samuel C. Damren, Stare Decisis*: The Maker of Customs*, 35 NEW ENG. L. REV. 1, 4 (2000).

32. Acts that have legal force are commonly perpetuated by a performative speech act—offer and acceptance in contracts, the exchange of vows in marriage ceremonies, and the bestowing of property in wills. In the courtroom, witnesses swear to tell the truth, lawyers object and make motions, and juries pronounce verdicts. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 266 (1993).

33. *See* Little, *supra* note 2, at 94-96. Little explains that, technically, Austin's performative utterances could include only those in which the language actually performs a legal act, as in the case of mandates or judgments. *Id*. at 94 & n.73 (quoting RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW METHOD § 2.01 (1997)).

34. 453 U.S. 609, 637 (1981).

35. *Id*.

36. The use of the words "It is so ordered" is a common practice for the Supreme Court. *See, e.g*., W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 410 (1990); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 290 (1988); Limbach v. Hooven & Allison Co., 466 U.S. 353, 363 (1984).

B. *Felicity Conditions for the Act of Ruling*

Just like any other performative utterance, the act of ruling must fulfill certain felicity conditions in order to have performative force. First, an accepted conventional procedure must exist for giving meaning to the utterance. The stratification of courts in our judicial system provides this procedure. Decisions of a higher court, given in the form of a written opinion, are binding on lower courts. Likewise, but to a lesser degree, decisions of past courts are also binding on future courts.

Second, the person and circumstances must be appropriate for the conventional procedure. In order for the ruling to be binding, it must be uttered by a court that has authority to rule. Thus, the words "It is affirmed" will not have the same performative force when they are uttered by a lower court or by children playacting. In addition, the ruling must be uttered in the proper opinion. The same words have different effects depending on whether they are written in the majority, concurring, or dissenting opinion. The latter two merely express an opinion; the first is the only one that has the potential to evoke the force of law.[37]

Third, the procedure must be executed correctly and completely. As Austin explains, in the purest performative utterances, "The uttering of the words is . . . usually a, or even *the*, leading incident in the performance of the act."[38] These words may be accompanied by other actions that contribute to the performance, but the act cannot be said to be performed without the words.[39] The Supreme Court announces many of its rulings orally, but provides further nuance and reasoning to its decisions through its written opinions. Indeed, since few people are present to hear decisions read orally, the written opinion is often the most important way that the Court communicates its decisions to the public.

Fourth and fifth, if the procedure is designed for the participants to have a certain intent or state of mind, the participants must have such feelings or thoughts, and the participants must actually conduct themselves in accordance with those feelings or thoughts. Therefore, the Court must intend its speech act to have the performative force of ruling. In an isolated decision, if the Court follows the proper procedures, it may not matter if it personally believes the judgment it is presenting. It may not even matter if it reaches its decision through careful consideration. Its speech act of ruling performs regardless of its intention and rationalization.

37. As this Note discusses below, *see infra* Subsection IV.B.3, statements in a concurring or dissenting opinion may later be viewed as having performative force. It is not until they appear in a majority opinion, however, that a case is overruled.

38. AUSTIN, *supra* note 14, at 8.

39. *See id*.

But the decisions of the Court cannot be seen in a vacuum. After all, as the Court stated in *Planned Parenthood v. Casey*, the source of its power is derived not from "buy[ing] support for its decisions by spending money," or from "independently coerc[ing] obedience to its decrees."[40] Rather, "[t]he Court's power lies . . . in its legitimacy."[41] The Court cultivates legitimacy by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[42] Each decision that the Court makes contributes to its legitimacy. After all, "a decision without principled justification would be no judicial act at all."[43] Too many decisions without principled justification would destroy the Court's legitimacy, and with it, the Court's authority to make decisions. Thus, a key felicity condition for the act of ruling is that the decision be based on principled justification.

In order to understand the speech act of ruling, then, it is important to examine the speech acts of overruling. Professor Little has argued that holdings, and more generally, holding paragraphs, typically function as performative utterances because they "establish the 'authoritative core' of the decision and . . . guide future cases."[44] After all, most rulings cannot stand alone; they derive their substantive content from the words that come before them.

The reason that judicial opinions exist at all may be precisely to provide this substantive content.[45] James Boyd White, a professor of law and English at the University of Michigan, asks us to imagine a legal world in which there are no judicial opinions. In such a world, the law would be determined from what the judges did, not from what was said. Judges would never be required to explain themselves, as it would be irrelevant for them to do so.[46] In contrast, a system that relies on precedent requires a decision not only to state a holding but also to explain it. Rarely, if ever, is the exact same set of facts repeated. Thus, a holding can serve as precedent when an analogy can be drawn between an earlier case and a present one. The judicial opinion allows judges to understand under what circumstances an earlier ruling was made, as well as what analysis the earlier judge employed to reach such a decision.[47]

Moreover, the structure of the judgments themselves refers to other parts of the opinion, demonstrating this inextricable link. Sometimes, the judgment itself does not fully describe the action taken by the Court, such

40. 505 U.S. 833, 865 (1992).
41. *Id*.
42. *Id*. at 866.
43. *Id*. at 865.
44. Little, *supra* note 2, at 94 (quoting CAPPALLI, *supra* note 33, § 2.01).
45. *See* James Boyd White, *What's an Opinion for?*, 62 U. CHI. L. REV. 1363 (1995).
46. *Id*. at 1363.
47. *Id*. at 1363-64.

as in the phrase, "It is so ordered."[48] This phrase necessarily refers to what has been said prior to it, unlike phrases such as "It is affirmed." With phrases like "It is affirmed," the reader can at least glean the action being taken in the phrase. In contrast, the reader does not even know what action is being taken with "It is so ordered." By using this phrase, the Court links the judgment irrevocably with the holding, the holding paragraph, and perhaps even the rest of the opinion. Other times, when the Court uses phrases that describe its action, the phrase is shortened to a single word such as "Affirmed," "Reversed," or "Remanded."[49] This single-word judgment, or full sentences of similar import, may syntactically link back to the holding paragraph. Such a typical structure is exemplified in *Collins v. Youngblood*.[50] In the penultimate paragraph of its opinion, but in regular roman type, the Court began a partial sentence: "The judgment of the Court of Appeals is . . . ." Then, in a separately indented paragraph came the ultimate word, in italics: "*Reversed*."[51] This sentence, broken up into two paragraphs—the italicization of the second indicating to us what is normally considered the judgment—suggests the inherent structural link between the formal judgment and the rest of the opinion.

Thus, in order to evaluate the principled justification of a case, we must look both at statements of ruling and at statements within the holding paragraph. Statements that occur in the holding paragraph typically fall into another category of performative utterance—verdictive statements. Verdictive statements are those that "deliver a finding as to value or fact, and thus that rate some entity or situation on a scale."[52] Examples include: "I pronounce that . . . ." and "I hold that . . . ."[53] Thus, at the conclusion of a majority opinion, we generally find two forms of performative utterances—the verdictive form, which explains the holdings or findings that support the ruling, and the judgment form (communicated in a ritualized expression, such as "It is affirmed"), which actually enacts the ruling. Both types of statements function together to give the speech act performative force. As we will see, these verdictive statements become even more important when the Justices' legitimacy is threatened.

48. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 581 (1991); Alabama v. Smith, 490 U.S. 794, 803 (1989); Batson v. Kentucky, 476 U.S. 79, 100 (1986).

49. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 336 (1986); Illinois v. Gates, 462 U.S. 213, 246 (1983); Hughes v. Oklahoma, 441 U.S. 322, 339 (1979).

50. 497 U.S. 37 (1990).

51. *Id.* at 52.

52. TRAUGOTT & PRATT, *supra* note 12, at 229.

53. AUSTIN, *supra* note 14, at 88.

C. *When Judges Overrule: The Atypical Performative Utterance*

Judges sometimes perform a particular act of ruling that we must consider in a class of its own—the act of overruling. Judges overrule because unconditional adherence to precedent is not always desirable. As the Court stated in *Planned Parenthood v. Casey*, "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."[54] The Court went on to explain that while the doctrine of stare decisis is necessary, as it would be impossible for judges to consider every issue afresh, the ability to overrule previous cases is also necessary. While precedent should presumptively be followed, then, a clearly erroneous decision requires the overruling of a case.[55] As Oliver Wendell Holmes memorably put it,

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[56]

For these reasons, and many others, Justices do depart from precedent on occasion. The act of overruling may display similarities to the typical performative utterance of ruling, as it is a specific member of a general class. Sometimes, the act of overruling employs the same explicit performative form as the act of ruling. As mentioned, Justices indicate their consciousness of the performative force of their words by using seemingly redundant language in overruling. In several instances, the Justices precede the explicit act of overruling with a description of the act, just as the Court did in *Commonwealth Edison Co. v. Montana*.[57] The most obvious examples of such redundancies include:

> We hold that it does not, and overrule our earlier decision . . . .[58]

> To the extent *Bain* stands for [a specific proposition] . . . , that case has simply not survived. To avoid further confusion, we now explicitly reject that proposition.[59]

> Accordingly, we now reject the rule of *Spector Motor Service, Inc.* v. *O'Connor* . . . and that case is overruled.[60]

54. 505 U.S. 833, 854 (1992).
55. *Id.*
56. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920).
57. 453 U.S. 609 (1981); *see also supra* notes 34-36 and accompanying text.
58. Solorio v. United States, 483 U.S. 435, 436 (1987).
59. United States v. Miller, 471 U.S. 130, 144 (1985).

> [T]he decision so far departs . . . from proper equal protection analysis that it should be, and it is, overruled.[61]

In each of these cases, the respective Justices deemed that it was not enough to hold a principle not to be true, to acknowledge that a case had not survived, to reject a rule, or to state that a case should be overruled. In each case, the Justices went one step further and explicitly overruled the case.

In many ways, however, the act of overruling is much less explicit than the act of ruling. Because it is not a direct action to be taken with the case under consideration, but rather a necessary or sometimes incidental step taken to reach the final judgment, the speech act of overruling does not occur in the final judgment.[62] It may not even occur in the holding paragraph. Indeed, it may occur anywhere at all in the opinion, from the beginning to the end. It has even been found in the footnotes of some opinions.[63]

The variety of its placement throughout the opinion suggests that the act of overruling is an atypical performative utterance. Indeed, when Justices begin to depart from precedent, they depart from the typical performative utterance of ruling. They move away from the fiction of interpretation and into the act of creation.

After all, Justices create new law when they overrule a case. Although the common law may be analogous to the written law by providing judges with an external source on which to rely, the common and written law are far from the same. The common law is composed entirely of itself; every decision joins the body of judicial decisions of the common law and must itself be followed.[64] In this way, stare decisis is a doctrine that is not only backward-looking, but also forward-looking; it dictates that a decision must be made in conformity with the decisions that came before it, but it also commands that all future decisions be made in conformity with the present one.[65] Thus, when judges overrule a previous decision, they do more than disagree with that decision—they substitute the old law for the new one that has just been created.[66]

60. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288-89 (1977).

61. City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976).

62. At least, the action of overruling does not occur in the judgment explicitly. One may argue that judgments that take the form of "It is so ordered" encompass every performative utterance within the opinion and give it force. Thus, if an opinion overrules a case while reaching its ultimate judgment, the judgment can be said to include the act of overruling.

63. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210 n.23 (1976); Dunn v. Blumstein, 405 U.S. 330, 337 n.7 (1972).

64. *See* Address by Solicitor General Stanley Reed at the Meeting of the Pennsylvania Bar Association 133 (Jan. 7, 1983) (transcript on file with the Cornell Law Review) [hereinafter Reed Address], *quoted in* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 406 (1988).

65. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572-73 (1987).

66. *See* Reed Address, *supra* note 64, at 133.

Moreover, while the act of judging is quotidian, the act of overruling is aberrational. Every case must be adjudicated. Case disposition, as a matter of course, involves affirming, reversing, or remanding a lower court's work. The Justices are not, however, "supposed" to overrule cases. In fact, according to the dictates of stare decisis, such an action is presumptively prohibited, and courts overrule only when necessitated by prudential or pragmatic considerations.[67]

Most importantly, when Justices depart from precedent, they violate one of the key felicity conditions that allow the utterance to have performative force. In order to persuade the people that the decisions they make have principled justification, Justices often rely on the doctrine of stare decisis. The doctrine of stare decisis acts as a check on reasoning. By adhering to precedent, the decisions of the Justices are backed not just by their own reasoning, but also by the reasoning of the long line of judges that came before them.[68] If the Justices can claim that their hands are tied by the force of stare decisis, they do not have to take responsibility for their actions.[69] If they do not have to take responsibility for their actions, they can be said not to be making the decision at all, but merely interpreting what the law requires.

It follows therefore that when the Justices depart from precedent, they are deprived of a justification that would automatically lend legitimacy. The legitimacy of the Justices' decisions would seem to be at its weakest when the Court departs from precedent. Indeed, the *Casey* Court told us that while "the country can accept some correction of error without necessarily questioning the legitimacy of the Court," there is "a point beyond which frequent overruling would overtax the country's belief in the Court's good faith."[70] It explained:

> There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular

67. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992).

68. *See* Nelson, *supra* note 4, at 34.

69. *See, e.g.*, Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 184 (1995) ("The fiction of the 'discovery' of the law—which the justices often declare they must obey—relieves the justices of personal responsibility. The fiction is that it is 'the law,' not the justices, that demands obedience."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) ("The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.").

70. 505 U.S. at 866.

> results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.[71]

Every time the Court engages in the performative utterance of overruling, it threatens the very legitimacy that gives it the power to rule. Therefore, the speech act of overruling is not and should not be treated like a typical performative utterance. The challenge for the Court is to find a way to overrule while sustaining its legitimacy to do so. It does this in three ways, which are explored in the next three Parts of this Note.

III. FELICITY CONDITIONS FOR THE ACT OF OVERRULING

Each act of overruling potentially challenges the Court's legitimacy, and academics and the Court alike have grappled to articulate a set of conditions that will identify the proper occasions for overruling. Academics have called for weakened standards,[72] a different standard,[73] or the elimination of stare decisis in certain contexts.[74] Just as academics cannot agree on a precise set of boundaries for stare decisis, the Court has not been able to identify these limits with certainty. In practice, the doctrine of stare decisis appears downright flexible. The standards used to determine when precedent can be ignored are multiple and inconsistent,[75] and the application of the doctrine itself is sporadic.[76] It has been said to be nothing

71. *Id*.

72. *See* Nelson, *supra* note 4 (arguing that a coherent doctrine of stare decisis need not include a presumption against overruling precedents).

73. *See* Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990) (advocating a different standard for constitutional stare decisis, not stare decisis generally).

74. Rehnquist, *supra* note 10 (advocating the elimination of stare decisis in constitutional cases only).

75. *See, e.g.*, Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 656-57 (1999) (listing, among the reasons that members of the Court have offered to justify overruling a case, that decisions are inconsistent with the mores of the day, that decisions are egregiously incorrect, and that reasonings are fairly called into question); Nelson, *supra* note 4, at 2 (stating the "conventional wisdom . . . that a purported demonstration of error is not enough to justify overruling a past decision"); Note, *supra* note 73, at 1346 (explaining that "'arts of overruling'" justify overruling a precedent when precedents conflict, when the conditions underlying the first decision have changed, or when the rules have proven unworkable (quoting Jerold Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211)).

76. *See, e.g.*, Nelson, *supra* note 4, at 81 (citing HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287 (1999) (concluding that "precedent rarely influences United States Supreme Court justices")); Daniel M. O'Keefe, Comment, *Stare Decisis: What Should the Supreme Court Do When Old Laws Are Not Necessarily Good Laws? A Comment on Justice Thomas' Call for Reassessment in the Supreme Court's Voting Rights Jurisprudence*, 40 ST. LOUIS U. L.J. 261, 263-71 (1996) (arguing that the "super-strong" presumption in favor of stare decisis is not applied consistently).

more than a "doctrine of convenience,"[77] and to operate with "the randomness of a lightning bolt."[78]

Nevertheless, the Court came close to defining a set of conditions in its 1992 decision in *Planned Parenthood v. Casey*.[79] In that case, the Court explicitly confronted the doctrine of stare decisis and discussed it at length. Indeed, its discussion comprises the Supreme Court's most extensive treatment of stare decisis in the last three decades. But the decision did not mark any change in the rhetoric the Justices use in overruling: There does not seem to be an explicit difference before and after *Casey*. Rather, the case's extensive treatment of stare decisis serves only as a particularly useful illustration of the substantive rationales the Court employs in overruling.

The *Casey* Court evaluated the decision of whether to overrule *Roe v. Wade* according to four main criteria: (1) whether the rule had proven to be unworkable in practice, (2) whether the rule had generated reliance, (3) whether principles of law had so changed as to leave the old rule inconsistent, and (4) whether society's understanding of factual circumstances had so changed as to deprive the old rule of justification.[80] The *Casey* Court carefully examined each of these criteria in turn and concluded that *Roe* should be upheld.

But the decision whether or not to overrule a case is not as straightforward as the Court's opinion in *Casey* suggested. For one thing, the Court did not hold that the four *Casey* criteria were the only factors that could be considered in evaluating whether a decision should be overruled. Indeed, in subsequent decisions the Court has sometimes considered the *Casey* factors,[81] but at other times has considered other factors.[82]

Based on the variety of criteria that Justices have relied on, James Rehnquist has argued that decisions such as *Roe v. Wade* and *Garcia v. San Antonio Metropolitan Transit Authority* show that "any theory on the proper

77. Cooper, *supra* note 64, at 402, 404 (claiming that stare decisis is a "doctrine of convenience, to both conservatives and liberals" and that stare decisis is "inherently subjective, and few judges . . . can resist the natural temptation to manipulate it").

78. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988) (stating that stare decisis "seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact").

79. 505 U.S. 833 (1992).

80. *Id.* at 854-55.

81. *See, e.g.*, United States v. Dixon, 509 U.S. 688, 711 (1993) (stating that the Court did not "lightly reconsider a precedent, but, because *Grady* contradicted an 'unbroken line of decisions,' contained 'less than accurate' historical analysis, and produced 'confusion,'" the case should be overruled (quoting Solorio v. United States, 483 U.S. 435, 439, 442, 450 (1987))).

82. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), because, among other reasons, it was decided without an expressed rationale that the majority agreed upon); Nichols v. United States, 511 U.S. 738, 743-45 (1994) (overruling *Baldasar v. Illinois*, 446 U.S. 222 (1980), because, among other reasons, it was a splintered decision without a central rationale and created confusion).

scope of stare decisis in constitutional adjudication is bound to be indeterminate."[83] Rather, Rehnquist claims that arguments can be made both for and against the decision to overrule.[84] In his note, he walks through both of the above decisions, demonstrating how each could have come out the other way if a different set of criteria had been used.[85] Thus, he concludes that "virtually any overruling can be attacked or defended on the basis of the [chosen] criteria."[86]

Whether or not one agrees with Rehnquist's point, his analysis indicates the instability of the criteria with which the Court must grapple. In addition to the variety of felicity conditions that can be applied, it is also unclear how the conditions themselves are defined. Many of these criteria invoke highly subjective terms, including whether decisions are "wrong," "unworkable," or "demonstrably erroneous." Each of these criteria has been used by the Court as an objective basis for departing from precedent, but the way the Court has applied these criteria provides little guidance to future judges.

For instance, whether or not a decision is "wrong" is highly subjective.[87] The reasons given for such a determination are far from conclusive. For example, in *Payne v. Tennessee*, the Court concluded that *Booth v. Maryland* had been "wrongly decided," offering as its only reasons the fact that the Court had overruled thirty-three decisions in the past twenty terms, the fact that the case had been "decided by the narrowest of margins, over spirited dissents," and the fact that the case had "been questioned by Members of [the] Court in later decisions [and had] defied consistent application by the lower courts."[88] The only compelling reason to question *Booth*'s ruling is the last one offered, as the first two reasons—that the Court had overruled thirty-three decisions and that several Justices had dissented in *Booth*—are true for a large majority of cases. In addition, the fact that *Booth* was decided by a narrow margin is not necessarily significant, as the Court has not overruled 5-4 opinions at a disproportionate rate.[89] Even the final reason—that lower courts have not applied the rule

83. Rehnquist, *supra* note 10, at 359.

84. *Id*.

85. *Id*. at 359-64.

86. *Id*. at 359 (citation omitted).

87. *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 667 (2000) ("[T]he natural tendency of many of us . . . is to conclude that our . . . views are obviously correct and that those with whom we disagree are 'egregiously incorrect.'"); Monaghan, *supra* note 78, at 762 ("Whether a precedent is seen as clearly wrong is often a function of the judge's self-confidence more than of any objective fact." (emphasis omitted)).

88. 501 U.S. 808, 829-30 (1991), *overruling* Booth v. Maryland, 482 U.S. 496 (1987).

89. *See* Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1711-12 (1994) (finding that, of cases overruled from 1981 to

consistently—seems to be a reason to grant certiorari, not a reason that independently supports or requires an overruling.[90] The Court's labeling of the prior case as "wrongly" decided thus seems to stem more from personal viewpoint than objective fact.

Likewise, the concept of unworkability has been called a "euphemistic label."[91] The Court's decision in *United States v. Dixon*, which overruled *Grady v. Corbin*, provides a good example: Justice Scalia's majority opinion claimed that *Grady* was "unworkable" and "unstable in application."[92] As reasons for its unworkability, Justice Scalia noted that the Court had recognized a large exception to *Grady*, and that many were confused by the Court's application of the rule. Again, it is far from clear that mere confusion amounts to unworkability. Furthermore, Justice Scalia's opinion does not appear "to accord independent significance to the notion of unworkability,"[93] for he seemed to deem the case unworkable because it was wrongly decided.[94] In the end, then, the analysis of the *Dixon* Court boils down to the same analysis offered to justify the overruling of precedent in *Payne v. Tennessee*; the case was unworkable or wrong because the Justices deemed it to be so.

In contrast, Professor Caleb Nelson has argued that the concept of "demonstrable error"—as opposed to merely being "wrong"—has substantive content.[95] He explains that a decision is "demonstrably erroneous" if it goes beyond the discretionary authority of the judge, not if the decision simply employs a different discretionary choice.[96] This distinction is useful, but it is still far from clear whether an objective evaluation can determine that a case is demonstrably erroneous. For one thing, Nelson derives his definition of "demonstrable error" from a doctrine that focuses on permissible and impermissible interpretations of statutes.[97] Even if we assume that judges are able to make this distinction in cases that interpret statutes, the extended application of this definition to constitutional cases may be tenuous. Moreover, although Nelson assumes that judges are reasonably good at making this distinction,[98] his only

1990, only fourteen percent were 5-4 decisions, while twenty percent of all decisions rendered in that period were decided by 5-4 votes).

90. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 329 (1986) ("Because of the inconsistent approaches taken by lower courts . . . and the apparent lack of adequate guidance from this Court, we granted certiorari.").

91. Lee, *supra* note 75, at 658.

92. United States v. Dixon, 509 U.S. 688, 709, 712 (1993), *overruling* Grady v. Corbin, 495 U.S. 508 (1990); *see also* Lee, *supra* note 75, at 658.

93. Lee, *supra* note 75, at 658.

94. *See Dixon*, 509 U.S. at 710 (finding that the fact that the Court had made a large exception "gave cause for concern that the rule was not an accurate expression of the law").

95. Nelson, *supra note* 4, at 7.

96. *Id*. at 6-7.

97. *See id*. at 80.

98. *See id*. at 67.

response to the question of whether or not demonstrable error can be determined is simply that "[i]f one believes so strongly in the indeterminacy of legal language . . . *every* version of stare decisis is based on an illusion."[99] This response offers no more reason to believe that "demonstrable error" can be objectively determined. Moreover, as the Court stated in *Casey*, it is "rare" that a decision to overrule a case is "virtually foreordained"—that is, that it is "seen so clearly as error that its enforcement was for that very reason doomed."[100]

Given the multiplicity and ambiguity of these standards, the Court's felicity conditions may only go so far in sustaining its legitimacy. The more powerful technique, then, may lie in the rhetoric of the act of overruling.

IV. TO RULE BUT NOT TO RULE: REENACTING THE CONSTATIVE FALLACY

There has been a recent surge in academic interest in the rhetoric and language of judicial opinions.[101] Both judges and academics have viewed the style and content of the judicial opinion as inextricably intertwined. For example, Judge Griffin Bell has argued that "the style of an opinion may affect the manner in which it is interpreted by the reader" and that "style must be regarded as one of the principal tools of the judiciary."[102] Justice Cardozo has declared, "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim."[103] Finally, Professor Richard Weisberg has stated, "[S]tyle inevitably contributes to, and often controls, the present and future meaning of . . . opinions. . . . [S]tyle thus conceived is an element to be evaluated as part of the correctness of a decision, not as [an] ancillary or merely ornamental element."[104]

In the performative utterance of overruling, style may be all the judiciary has to sustain its legitimacy. The judiciary uses style in three ways: (1) to disguise the existence of the performative utterance of overruling, (2) to create the impression that it is following precedent even as it departs from it, and (3) to assert the authority of its words. The first two ways are examined in this Part; the third way is examined in Part V.

99. *Id*. at 79.

100. Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

101. *See* Little, *supra* note 2, at 79-80 nn.10-11 (citing articles).

102. Griffin B. Bell, *Style in Judicial Writing*, 15 J. PUB. L. 214, 214 (1966), *quoted in* HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 16 (1992).

103. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 9 (1931), *quoted in* BOSMAJIAN, *supra* note 102, at 16.

104. Richard Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 309-10 (1979), *quoted in* BOSMAJIAN, *supra* note 102, at 17.

A. *Occluding the Performative Utterance*

1. *The Court Employs Nonritualized Language*

The typical performative utterance—the ruling—is always announced in uniform and predictable ways. As previously mentioned,[105] the judgment is located in the final words of the majority opinion, normally occupies its own paragraph, and is usually italicized. In addition, with the exception of "so ordered," the Court's vocabulary corresponds directly to its action—the Court uses a form of the word "affirm" to perform the action of affirming a case and a form of the word "reverse" to reverse a case. Finally, it is usually expressed in syntactical forms that closely resemble "It is affirmed."

The predictable expression of the judgment helps to "control the meaning" that future courts will attribute to the current Court's words.[106] As Professor Jack Balkin argues, when a judge writes an opinion, the judge intends a principle that will control future cases, but it is not the judge's intent that controls; rather, it is the interpretation of the judge's intent.[107] Because the Court cannot fully control the future understanding of its words, the potential for misinterpretation is high.

Using ritualized language is one way of ensuring the stability of the sign. For those familiar with the law, statements such as "It is reversed," spoken by the proper authority, have a fixed, universal meaning. The courts tend to use "ritualized" speech acts and "time-honored language" to spell out their rulings explicitly.[108] These speech acts include: "I plead guilty"; "I take this man to be my lawful wedded husband"; and "We, the jury, find the defendant not guilty."[109]

Likewise, performative utterances within the majority opinion are highly significant because they have the force of law behind them. We would thus expect all performative utterances to be made with such ritualized language. In the typical case of ruling, this phenomenon appears to be true. It is decidedly not true in the atypical case of overruling.

Unlike the judgment, which uses a set number of words to enact its performative force, Justices have overruled cases using a variety of words and constructions. Sometimes these phrases do not even include the word "overrule." Instead of "overruling," the Court has simply rejected a rule or a principle.[110] It has also "disapproved" of cases,[111] concluded that cases

105. *See supra* text accompanying notes 33-36.

106. Ainsworth, *supra* note 32, at 268.

107. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 782 (1987).

108. Ainsworth, *supra* note 32, at 267.

109. *Id*.

110. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 93 (1986) ("For reasons that follow, we reject this evidentiary formulation . . . ."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) ("We therefore now reject . . . a rule of state immunity . . . ."); Dep't of Revenue

"have no authoritative effect,"[112] claimed that a case is "no longer good law,"[113] and simply accepted a contrary rule.[114] The Court has also "accept[ed] the Government's invitation to overrule,"[115] and it has "disavow[ed] the method of analysis used."[116] Finally, the Court has claimed simply that a rule has "outlived its usefulness,"[117] that it could not follow a case and "stay within the narrow confines of judicial review,"[118] and that it is "wiser to abandon" a test.[119] In these last three cases, it was not at all clear that an act of overruling had occurred.

"Overrule" is a safe word. It does its job effectively, every time. It contains no uncertainties and no surprises. It is, after all, the very word that defines the action that the Justices are taking. Why, then, would the Court revert to any other language? Viewed from any other context, the fact that the Court uses a variety of synonyms when it overrules cases does not seem very important. After all, part of good writing is having a large vocabulary, and one could argue that using different words to express the same thing is more interesting than relying on the same monotonous phrase all the time. But when performing an action that has overwhelming legal ramifications for the present and future, the Court's main concern should not be aesthetics. It should instead be to prevent any potential misunderstanding of that action's meaning.

After all, in issuing a judgment, the Court never says solely that it "disagrees with the Court of Appeals," or that it "holds that the Court of Appeals is correct." If we see statements similar to these, they are usually accompanied by a statement further explaining that the case is "affirmed" or "reversed."[120] Because the act of overruling is arguably more powerful than the judgment, as it substitutes the old law with a new one, the Court should be equally concerned—if not more so—that the meaning of its action passes into the future preserved.

v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 748 (1978) ("[T]he analysis of *Carter & Weeks* must be rejected.").

111. *E.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981) ("Any contrary statements in *Heisler* and its progeny are disapproved.").

112. *E.g.*, Perez v. Campbell, 402 U.S. 637, 652 (1971).

113. *E.g.*, Healy v. Beer Inst., 491 U.S. 324, 343 (1989).

114. *E.g.*, California v. Acevedo, 500 U.S. 565, 576 (1991) ("In light of the minimal protection to privacy afforded by the *Chadwick-Sanders* rule . . . we now hold that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.").

115. United States v. Dixon, 509 U.S. 688, 712 (1993).

116. Hudson v. United States, 522 U.S. 93, 96 (1997).

117. United States v. Salvucci, 448 U.S. 83, 95 (1980).

118. Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 365 (1973).

119. Illinois v. Gates, 462 U.S. 213, 238 (1983).

120. After all, many cases in which the Court is exercising appellate jurisdiction include one of the three words "affirm," "reverse," or "remand."

In light of these compelling reasons to use ritualized language, we have to assume that the Court has its own reasons for using a variety of terms. That reason may well be its attempt to mask the act of overruling as a performative utterance.

Austin distinguishes between explicit and implicit performatives, characterizing the former as including unambiguous expressions, such as "I order you to go," and the latter as lacking such certainty as in the imperative, "[G]o."[121] The trouble with implicit performatives, he claims, is that it is always left unclear whether the imperative, "[G]o," is an order or merely a warning or advice.[122] This lack of clarity may lead to circumstances in which we cannot "decide whether or not the utterance is performative at all."[123] But this may be exactly what the Court wants. Since the very act of overruling threatens the Court's legitimacy to rule, it may be to the Justices' advantage if their words—while distinct enough to set forth a precise rule—are nondescript enough to avoid the alarm bells set off when there is a departure from precedent. The ideal statement, then, would function as a performative utterance while not drawing attention to itself as one. In such a case, the Justices' actions would not be as scrutinized, and if the nondescript language directs the audience's attention elsewhere, the Court may be able to sneak the act of overruling by with minimal damage to its legitimacy.

2. *The Passive Voice: The Court Uses Highly Constative Syntactical Forms in Overruling*

The classic form of a performative utterance is the first person present indicative active—"I bet," "I promise," or "I do."[124] Although the Court sometimes uses this form, as in "we overrule," it frequently invokes the third person passive voice that is common to formal or legal occasions,[125] such as "It is affirmed" and "It is overruled." The passive voice may be employed to increase the fluency of a sentence in various ways, so one should not be too hasty to read meaning into it.[126] This form, however, is not found in just any random sentence that a judge happens to write. It is used, repeatedly, when a judge rules, as well as overrules. I am not implying, of course, that judges only rule by using the passive voice. Judges

121. AUSTIN, *supra* note 14, at 32-33.
122. *Id*.
123. *Id*. at 33.
124. *Id*. at 56.
125. *See id*. at 57 (noting that the third person passive voice is "usually found on formal or legal occasions").
126. *See* Little, *supra* note 2, at 130 (cautioning against reading too much into the passive voice, since it may also be used to avoid awkward sentences, improve their flow, or eliminate unnecessary words).

just as often use the present active voice.[127] But the passive voice surfaces frequently enough to have become a time-honored form that is recognized in conjunction with the act of ruling.[128] Thus, there must be something intrinsic about the passive voice that contributes to its wide recognition as a form of ruling.

The passive voice eliminates the agent in the sentence, downplaying the individual judge's responsibility and suggesting that her action is out of her control.[129] While the alleviation of personal responsibility may certainly play a role,[130] the passive voice has another effect central to the divide between performative and constative speech. Simply put, the passive voice effectuates a description of the world. The verb that is most used in the passive voice is also the verb that appears in the most common construction, "It is *X*." The word "is" is perhaps the most constative of verbs. It is used to signify an equation or an identity. It describes or states some fact about the world. "Is" states what is.

In addition, the verb "to be" is frequently followed by a subject complement, which is a grammatical form that operates like a nominalization. While a nominalization is a verb that acts like a noun, subject complements are verbs that act as adjectives, as in "[I]t is overruled,"[131] and "Any contrary statements . . . are disapproved."[132] The passive voice of the overruling rhetoric thus goes beyond simply removing the agent in the sentence;[133] it removes the *action* from the sentence. The statement "It is overruled" follows the same structure as "The grass is green" or "The girl is happy." The language thus suggests that the judges are mere observers of the law, just as a person can be a mere observer of the characteristics of grass or the emotional state of mind of a little girl.

127. I have not attempted a comprehensive study of all of the Court's overruling decisions. In my sample set of thirty-three cases spanning the two decades between 1971 and 1991, however, I have found the breakdown between the passive voice and the active voice to be more or less equal.

128. I include the broader category of ruling in my analysis here, as it, too, benefits from using a highly constative structure. Recall that judges are engaged in the constative fallacy of pretending to interpret, not create, law, as well as the constative fallacy of overruling while pretending not to rule.

129. *See* Little, *supra* note 2, at 97.

130. *See, e.g.*, Forrester, *supra* note 69, at 184 ("The fiction of the 'discovery' of the law . . . relieves the justices of personal responsibility. . . . This is most helpful in hard cases that impose painful consequences on people.").

131. *E.g.*, Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987).

132. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981).

133. Professor Little identifies subject complements as one of the linguistic devices that conceal information. She claims that by removing the agent from the sentence such a construction hides who performed the action. She contrasts the statement, "'[T]he District Court's remand order is . . . indistinguishable . . . .'" with "The Supreme Court cannot distinguish . . . ." Little, *supra* note 2, at 100 (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 715 (1996) (alteration in original)).

When overruling and justifying its decision to overrule, the Court utilizes the typical passive voice form of ruling, but it extends the lessons of the passive voice even further. From the simple construction "It is *X*," the Court moves to more sophisticated constructions of the passive voice. For example, in *United States v. Dixon* the Court stated, "Less than two years after it came down . . . we were forced to recognize a large exception to [*Grady v. Corbin*],"[134] and in *Lewis v. Casey* it asserted, "It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied . . . ."[135] Like the simpler structure, these statements lack agent and action. Instead of performing the action of recognizing a large exception, the Justices merely observe what they were forced to do. Although the Court in these two cases is actually performing judgments, its words appear merely descriptive.

The Justices convey this idea even in the active voice by implying an external agent in statements such as, "We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled,"[136] and, "The same considerations that justify this holding require us to conclude . . . ."[137] The agent may be absent in the sentence, but strong verbs such as "bound" and "require" lift the responsibility off the Court and place it on that external agent. The Justices thus accomplish the task of performing, while suggesting that their hands are tied.

3. *Verdictive Statements*

Sometimes, the Justices do not hide the fact that they are making a performative utterance. They make explicit verdictive statements within the holding paragraph, but they manage to deflect attention away from the performative force of their statements. They accomplish this feat by emphasizing the body of the statement. They consistently write sentences beginning with "We are convinced,"[138] "We think,"[139] "We believe,"[140] or

134. 509 U.S. 688, 709 (1993).

135. 518 U.S. 343, 354 (1996).

136. Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996).

137. Agostini v. Felton, 521 U.S. 203, 235 (1997).

138. *E.g.*, Illinois v. Gates, 462 U.S. 213, 239 (1983) ("We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests . . . ."); United States v. Salvucci, 448 U.S. 83, 89 (1980) ("We are convinced not only that the original tenets . . . have eroded, but also that no alternative principles exist . . . ."); United States v. Scott, 437 U.S. 82, 95 (1978) ("[O]ur growing experience with Government appeals convinces us that we must re-examine the rationale of *Jenkins* . . . .").

139. *E.g.*, Collins v. Youngblood, 497 U.S. 37, 49-50 (1990) ("The Court's departure . . . was, we think, unjustified. . . . We think such a reading . . . departs from the meaning of the Clause . . . and is not supported by later cases."); Alabama v. Smith, 490 U.S. 794, 801 (1989) ("We think the same reasoning leads to the conclusion . . . ."); *id.* at 802 ("In cases like the present one, however, we think there are enough justifications . . . .").

"We are persuaded."[141] Many times, the act of overruling itself is cast in these terms:

> We are convinced that the automatic standing rule of *Jones* has outlived its usefulness . . . .[142]
>
> We thus confirm that subsequent case law has overruled the holding . . . .[143]
>
> We hold that time has revealed the error of the early resolution reached in that case, and accordingly *Geer* is today overruled.[144]
>
> Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect . . . .[145]

Within these utterances, "the main body . . . has generally or often the straight-forward form of a 'statement,' but there is an explicit performative verb at its head which shows how the 'statement' is to be fitted into the context of conversation."[146] The explicit performative verbs are "confirm," "hold," and "conclude."[147] According to Austin, these verbs are "quite satisfactory pure performatives . . . [i]rritating though it is to have them as such, linked with clauses that look like 'statements.'"[148]

Thus, the statements retain some agency for the Justices, even as they "shift from descriptive to performative utterance and waver between them."[149] This wavering indicates that although these statements still encompass a performative act, it is a very limited one. Isolating the main body of each statement leaves us with:

140. *E.g.*, *Smith*, 490 U.S. at 803 ("Believing, as we do, . . . we overrule . . . ."); Thornburgh v. Abbott, 490 U.S. 401, 411 (1989) ("We do not believe that *Martinez* should, or need, be read as subjecting the decisions of prison officials to a strict 'least restrictive means' test."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545 (1985) ("We believe . . . that there is a more fundamental problem at work here . . . ."); Nat'l League of Cities v. Usery, 426 U.S. 833, 854 (1976) ("[W]e do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative."), *overruled by Garcia*, 469 U.S. 528.

141. *See, e.g.*, Michelin Tire Corp. v. Wages, 423 U.S. 276, 283 (1976) (stating that the Court's independent study had "persuade[d]" it that a previous case's reliance on certain dicta was "misplaced").

142. *Salvucci*, 448 U.S. at 95.

143. South Carolina v. Baker, 485 U.S. 505, 524 (1988).

144. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

145. Perez v. Campbell, 402 U.S. 637, 652 (1971).

146. AUSTIN, *supra* note 14, at 85.

147. "[C]onvinced" in the first example above is not a performative verb, but it still illustrates how the Justices' use of verdictive statements tends to create the impression that they are mere observers of another agent.

148. AUSTIN, *supra* note 14, at 86.

149. *Id.*

> [T]he automatic standing rule . . . has outlived its usefulness . . . .[150]
>
> [S]ubsequent case law has overruled the holding . . . .[151]
>
> [T]ime has revealed the error . . . .[152]
>
> *Kesler* and *Reitz* can have no authoritative effect . . . .[153]

The main body of each statement describes an existing state of the world, and has a subject of its own. These subjects act as substitute agents; they partially shield the Justices by placing the blame, at least syntactically, on "the automatic standing rule," "subsequent case law," and "time."[154] Because the main body is largely constative, the Justices' agency becomes one of *observing* an action that another agent—albeit an inanimate object—has taken. The Justices become observers of facts that already exist. They become interpreters and not creators—exactly the role they want to occupy. These syntactical structures illustrate how it is possible for the Justices to have the best of both worlds; while they are doing the performative utterance of overruling, the structure of their sentences shields them from responsibility.

B. *Following Stare Decisis Even When Departing from Precedent*

As illustrated by the previous Section, the Court attempts to adhere to precedent by disguising its performative utterance as a constative one. Often, however the Court takes this disguise one step further. Not only does it attempt to hide the fact that it is departing from precedent, but it also attempts to create the impression that it is *following* precedent. This reversal reveals just how fundamental the concept of precedent is to our legal thinking. Precedent is so symbolic of logic and objectivity that, even when it is disavowing precedent, the Court cannot help but appeal to it to sustain its legitimacy.

150. United States v. Salvucci, 448 U.S. 83, 95 (1980).

151. South Carolina v. Baker, 485 U.S. 505, 524 (1988).

152. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979); *see also* Fulton Corp. v. Faulkner, 516 U.S. 325, 345 (1996) ("To the extent that *Darnell* [is inconsistent] . . . time simply has passed it by.").

153. Perez v. Campbell, 402 U.S. 637, 652 (1971).

154. In the last example, "*Kesler* and *Reitz*" are not agents in the same way because they do not perform an action. The preceding sentence of the opinion, however, reads: "Although it is possible to argue that *Kesler* and *Reitz* are somehow confined . . . *analysis* discloses no reason why . . . ." *Id*. at 652 (emphasis added). Here, "analysis" functions as the substitute agent.

1. *Hiding Behind Stare Decisis*

Many times, before the Court overrules a case, it acknowledges the doctrine of stare decisis, as if to prove that it is not making the decision to overrule arbitrarily. For example, in *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, the Court stated, "[T]he *Stevedoring Cases* control today's decision . . . unless more recent precedent and a new analysis require rejection of their reasoning."[155] By hiding its caveat in the subordinate clause, the Court leads the reader to believe that the *Stevedoring Cases* control the decision. In the next sentence, however the Court says that "[w]e conclude that *Complete Auto Transit, Inc*. . . . requires such rejection."[156] By leading with the contrary conclusion in the first statement, the Court syntactically indicates the implicit assumption that precedent should be followed. Any departure from precedent would be the exception to the rule. Once this assumption was made, the Court could be more confident in making its decision.

In *United States v. Scott*, the Court stated this even more explicitly: "We recognize the force of the doctrine of stare decisis, but we are conscious as well of the admonition of Mr. Justice Brandeis . . . ."[157] The structure of this argument evoked stare decisis only to reject it.[158] The only reason for the Court to evoke the concept, then, was to prove to the audience that it had incorporated stare decisis into its decisionmaking process. In other words, a thoughtful and comprehensive decisionmaking process may indicate that the decision is correct.[159] We see an even more interesting illustration of this phenomenon in *Welch v. Texas Department of Highways & Public Transportation*: In Part IV of the majority opinion, the Court considered and overruled *Parden v. Terminal Railway of the Alabama State Docks Department*, claiming that previous decisions had already implicitly overruled this case.[160] In Part V, however, the Court

155. 435 U.S. 734, 745 (1978).

156. *Id.*

157. 437 U.S. 82, 101 (1978).

158. *See also* Agostini v. Felton, 521 U.S. 203, 235 (1997) (saying that stare decisis "does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions"); Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (saying that stare decisis "counsel[s] strongly against reconsideration of our precedent," but reconsidering it nonetheless).

159. For a parallel argument in corporate law, compare the case law on fiduciary duty of care, where judges look to the process of corporate decisionmaking as a proxy for substantive review. *See, e.g.*, Barnes v. Andrews, 298 F. 614 (S.D.N.Y. 1924) (finding the director of a company negligent in his duties because he made little effort to keep advised of the actual conduct of corporate affairs); Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981) (holding that a director violated her fiduciary duty of care because she was not active in the business and did not attend board meetings).

160. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 476-78 (1987), *overruling* Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184 (1964).

considered another case, *Hans v. Louisiana*,[161] and decided not to overrule it.[162] Only in this Part—and not in Part IV—did the Court hail stare decisis as a "time-honored principle."[163] The Court extensively quoted the virtues of the doctrine, yet it completely and conveniently ignored the fact that it had just departed from it with respect to another case in the previous Part.[164] By emphasizing its adherence to the doctrine in considering the second case, the Court created the impression that it had taken the authority of precedent seriously and did not overrule easily. Yet it got away with exactly that—overruling easily—by not confronting this "time-honored principle" when it actually departed from it.

More amazingly, however, the Justices sometimes do more than hide behind stare decisis as a straw man. The overruling rhetoric they employ sometimes actually creates the impression that precedent is being followed. This technique is at its most explicit in Justice Souter's concurring opinion in *Payne v. Tennessee*, which overruled *Booth v. Maryland*: Justice Souter claimed that "there is precedent in our stare decisis jurisprudence" for overruling the case.[165] He proceeded to explain, "In prior cases, when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent."[166] Justice Souter extended this analogy so far as to imitate the structure of precedent by citing several cases to support this last statement, literally showing that the decision to depart from precedent had precedent.[167] This technique was imitated in *Agostini v. Felton*[168] and *Adarand Constructors, Inc. v. Pena*.[169]

Finally, the Court sometimes admits that it is departing from precedent but claims that the departure is more faithful to the doctrine of stare decisis than adherence to precedent would be. For example, in *United States v. Dixon* the Court stated, "We would mock stare decisis and only add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not."[170] Similarly, in *Adarand* the Court claimed that "[b]y refusing to follow *Metro Broadcasting*, then, we do not depart from the

161. 134 U.S. 1 (1890).

162. *Welch*, 483 U.S. at 478-95.

163. *Id.* at 479.

164. *Id.*

165. Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring), *overruling* Booth v. Maryland, 482 U.S. 496 (1987).

166. *Id.* at 843.

167. *Id.*

168. 521 U.S. 203, 235-36 (1997) (citing three cases to support the claim that "we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law").

169. 515 U.S. 200, 232-33 (1995) (citing three cases to support the claim that "[o]ur past practice in similar situations supports our action [of overruling] today").

170. 509 U.S. 688, 712 (1993).

fabric of the law; we restore it."[171] The *Adarand* Court further explained that it was "[r]emaining true to an intrinsically sounder doctrine established in prior cases," a doctrine with which the overruled case was inconsistent.[172] While the logic behind this technique is skewed—using adherence to the doctrine of stare decisis to justify a departure from it—the argument is nevertheless persuasive, primarily because of its structure. The argument appeals to past doctrine that was "established in prior cases," allowing the Court to push its precedents aside while appearing to embrace them.

2. *The Implicit Overrule*

Thus far, we have examined how Justices stray from the traditional, explicit form of a performative utterance by using a variety of different words and a surprisingly constative syntactical form. This technique can be said to overrule a case implicitly; after all, the Justices clearly intend the act of overruling to take place, even though they do not utter the explicit phrase, "It is overruled." As nontraditional as these devices are, we can still point to a single, identifiable utterance that performs the act of overruling.

But the rhetoric that the Justices use allows for another type of implicit overruling. Even when a case does not intend to perform the act of overruling, future cases may deem that the case has done so, when viewing that case retrospectively. In other words, the Justices may choose to overrule a case simply by stating that the case has already been overruled. That is, the case's demise was implicit in prior doctrine—doctrine whose import the Court now makes explicit.

This is not to confuse when the act of overruling actually takes place. As the Court explained in *Hohn v. United States*, "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."[173] Thus, a case is not overruled until we can point to that single, identifiable utterance in which the Court intends the act of overruling. To hold otherwise would violate one of the felicity conditions of the act of ruling—namely, that the author of an opinion must intend for a performative act to take place. Rather, an utterance that implies that a case has been overruled previously is simply a justification for the explicit act that is currently being performed. The fact that this distinction is confusing reveals the Justices' reasons for using this form, some examples of which include:

171. 515 U.S. at 233-34.
172. *Id.* at 231 (internal quotation marks omitted).
173. 524 U.S. 236, 252-53 (1998).

> In the interest of removing any lingering uncertainty . . . we recognize today what was all but determined in *Brown-Forman*: to the extent that *Seagram* holds that [certain statutes] do not facially violate the Commerce Clause, it is no longer good law.[174]
>
> To the extent that *Martinez* itself suggests such a distinction, we today overrule that case; the Court accomplished much of this step when it decided *Turner*.[175]
>
> We thus confirm that subsequent case law has overruled the holding in *Pollock* . . . .[176]
>
> Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity . . . is no longer good law.[177]
>
> Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion . . . .[178]
>
> Today we simply acknowledge what has long been evident and was evident to the Ninth and Fifth Circuits and to the District Court.[179]

These statements clearly illustrate the tension between the performative and the constative aspects of speech in the act of overruling: While the language purports to describe an action that has already taken place, it actually performs that action in the very same utterance. Each of the above statements contains words that we would normally consider to be the explicit performative act of overruling, such as "It is no longer good law" and "We today overrule."[180] But, in the same breath, these statements seem

174. Healy v. Beer Inst., 491 U.S. 324, 343 (1989). Before reaching the explicit act of overruling *Seagram*, the Court explained just how *Brown-Forman* had already implicitly overruled the case:

> While our decision in *Brown-Forman* did not overrule *Seagram*, it strictly limited the scope of that decision to retrospective affirmation statutes. . . .
>
> More important, *Brown-Forman* removed the legal underpinnings of *Seagram*'s Commerce Clause analysis. . . . Indeed, *Brown-Forman* leaves *Seagram* intact only to the extent that the Court in the former case felt no compulsion . . . to address [the issue].

Id. at 342-43. The Court has explained the implicit overruling in the other cases similarly.

175. Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989).

176. South Carolina v. Baker, 485 U.S. 505, 524 (1988).

177. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987).

178. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

179. Mitchell v. Helms, 530 U.S. 793, 836 (2000).

180. The only exception is the quotation from *Welch*. This statement is the first sentence in the holding paragraph, which concludes with a more explicit statement of overruling:

to deprive the utterance of its performative force.[181] An earlier case has "all but determined," "accomplished much of," or left "no doubt" as to the ruling. Indeed, this language suggests that the act of overruling is a mere formality, while the real work has already been accomplished in an earlier case. In the third and sixth quotes, the Court goes on to claim that it is only "confirming" and "acknowledging" what prior case law has already performed. Yet this very act of confirming is essential to the overruling of the case. After all, without this explicit act of confirmation, *Parden* is not actually overruled, no matter how strongly prior case law suggests that it was.

This technique goes beyond an innocuous shifting of responsibility, however. When the Court justifies its decisionmaking process by evoking stare decisis, it merely highlights one of the factors it considered in the process. When it syntactically attributes responsibility to an inanimate object, it is merely shuffling the wording of a constative statement. In contrast, when the Court states that an implicit overruling has already taken place, it is actually *creating* the precedent that it is supposedly following. This utterance thus has an additional performative function—the function of changing events of the past by renaming them in the present.[182] After all, the cases to which the future Court attributes action did not actually overrule, implicitly or otherwise. They merely limited the application of a rule to certain cases,[183] made an analogous—but not identical—ruling,[184] or distinguished the facts from such a rule.[185] These decisions implicitly overrule only through the Court's renaming.

"Accordingly, to the extent that *Parden* . . . is inconsistent . . . it is overruled." *Welch*, 483 U.S. at 478.

181. Even though the explicit statement of overruling does not occur in the same sentence as the quotation from *Welch*, the analysis remains the same. The two statements are sufficiently close to indicate that the Court attributed its explicit statement of overruling to the fact that earlier decisions had already implicitly overruled the case.

182. *See* Balkin, *supra* note 107, at 774 (arguing that every reading is partial, and that future readers can discover features in a text that earlier interpreters ignored); Schauer, *supra* note 65, at 580 (arguing that the Justices cannot prevent subsequent interpreters from recharacterizing the decision they are currently making).

183. *See* Thornburgh v. Abbott, 490 U.S. 401, 410 (1989) ("[T]he Court declined to apply the *Martinez* standard in 'prisoners' rights' cases because, as was noted in *Turner*, *Martinez* could be . . . read to require a strict 'least restrictive alternative' analysis . . . ."); *Welch*, 483 U.S. at 477-78 (finding that subsequent cases limited the rule in *Parden*).

184. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 342-43 (1989) (treating the previous case's ruling concerning "prospective affirmative laws" as tantamount to announcing the same rule concerning "retrospective affirmation" laws); South Carolina v. Baker, 485 U.S. 505, 522-23 (1988) (saying the same with regard to government contracts and government bonds).

185. *See* Scalia, *supra* note 69, at 1178 ("When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*."); Schauer, *supra* note 65, at 594 ("[A] precedent is always followed or distinguished. We never face a situation where a precedent presumptively ought to be followed, but some special overriding condition in this case leads us not to follow it. Rather, we say that this case is simply different—that there is actually no relevant precedent to follow or disregard.").

This act of implicit overruling relieves the Court of responsibility at every point in the process. When the Court explicitly overrules a case, it is insulated from criticism because it can pretend that it is merely following what previous case law already requires. But by the same token, the Court upon whose precedent the current case relies is also free from blame: Its decision, when handed down, has merely distinguished a case, without overruling it. The implicit overrule only occurs in hindsight, under scrutiny of the present-day Court. By this circular logic, the Court is never *performing*; all it is ever doing is distinguishing (in the case of the previous Court) or interpreting (in the case of the present-day Court).

3. *Turning Bad into Good*

The Court's power implicitly extends beyond creating a precedent where none had existed before; it also has the power to turn what supposedly ran counter to the correct law into a justification for new law. In other words, when the Court overrules, it turns something bad (cases that refuse to apply the applicable law) into something good (justification for the overruling): The act of overruling can transform the statements written in a dissenting opinion into an authoritative source. The dissenting opinion provides an arena for defeated Justices to voice their opinion, but every first-year law student knows that statements in the dissent—which by definition have no binding effect—should only be cited with caution. But, in departing from precedent, the Court freely and frequently cites dissenting opinions:

> Dissenters in *Ross* asked why . . . . We now agree . . . .[186]
>
> As the dissenting in opinion in *Parden* states . . . .[187]
>
> As noted by Justice Harlan in his *O'Callahan* dissent . . . .[188]
>
> [T]here is overwhelming force to Justice Harlan's reasoning that . . . .[189]
>
> In his *O'Callahan* dissent, Justice Harlan forecasted . . . .[190]
>
> The view of the *Geer* dissenters increasingly prevailed in subsequent cases. . . . [T]he Court, in a passage reminiscent of the dissents in *Geer* . . . .[191]

186. California v. Acevedo, 500 U.S. 565, 573-74 (1991) (citation omitted).
187. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 477 (1987).
188. Solorio v. United States, 483 U.S. 435, 441 (1987).
189. *Id.* at 447.
190. *Id.* at 448.

> The dissenting opinion written by Mr. Justice Douglas for himself and three others noted that . . . .[192]

This practice once again exemplifies the Court's ability to wield power while pretending not to have it. By quoting from the dissent, the Court incorporates the dissent's language into the majority opinion. The very act of writing these words, in the proper context with the proper authority, transforms such words into an authoritative source on which future judges can rely. At the same time, however, the current Justices can hide behind these words. If such reasoning has been spoken before, then it provides some form of precedent. In this sense, even when the Justices are departing from precedent, they are never voicing a completely new decision, and they are never creating new law from scratch.

This technique is even more explicit when the Court reinterprets a seemingly neutral action in the past and turns it into support for its present decision to overrule. For example, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court claimed that

> [c]alling what a prior case has flatly decided a "question" in need of "deciding," and . . . making it clear that we "intimat[e] no view" as to whether the answer given by that prior case was correct, surely was handwriting on the wall which even an inept cryptologist would recognize as spelling out the caption of today's opinion.[193]

This statement is amazing in its bold transformation. Although the previous Court *explicitly* stated that it was intimating no view, the *College Savings Bank* Court asserted that this was evidence of its implicit decision of the question. The Court made similar moves in *Hubbard v. United States* and *State Oil Co. v. Khan*, respectively:[194]

> Although other federal courts have refrained from directly criticizing *Bramblett*'s approach to statutory construction, it is fair to say that they have greeted the decision with something less than a warm embrace.[195]

191. Hughes v. Oklahoma, 441 U.S. 322, 329 (1979).

192. Perez v. Campbell, 402 U.S. 637, 651 (1971); *see also* United States v. Hatter, 532 U.S. 557, 570 (2001) ("For one thing, the dissenters in *Evans* cast the majority's reasoning into doubt."); Seminole Tribe v. Florida, 517 U.S. 44, 65 (1996) ("As the dissent in *Union Gas* recognized . . . ."); Nichols v. United States, 511 U.S. 738, 746 (1994) ("We adhere to that holding today, but agree with the dissent in *Baldasar* that a logical consequence of the holding is that . . . .").

193. 527 U.S. 666, 678 n.2 (1999) (second alteration in original).

194. Note that these two cases each overrule a decision of statutory construction, rather than a constitutional adjudication.

195. Hubbard v. United States, 514 U.S. 695, 708 (1995).

> Most recently, in *ARCO*, although *Albrecht*'s continuing validity was not squarely before the Court, some disfavor with that decision was signaled by our statement that we would "assume, *arguendo*, that *Albrecht* correctly held that vertical, maximum price fixing is subject to the *per se* rule."[196]

Thus, the Court transforms previous cases that greet a decision with "less than a warm embrace," and that assume arguendo that a decision was correctly decided, into support for their current overruling. This technique evinces judges' ability to state whatever they want, and to be able to make it true simply by incorporating it into their decision. This technique is further expounded in the next Part.

V. THE PERFORMATIVE FALLACY: SAYING MAKES IT SO

When all else fails, the Court has one more technique to sustain its legitimacy. It can enact what I call the performative fallacy. While the Court enacts the constative fallacy by attempting to disguise its performative utterances as constative ones, the Court can enact the performative fallacy by attempting to cast all of its statements, constative or otherwise, with a specific quality of the performative—that is, the quality that "saying makes it so." Perhaps the most well-known figure who has this power at his command is God. The book of Genesis states that "God said, Let there be light: and there was light."[197] In this sentence, "let" is an order, equivalent to the statement, "I order that there be light." Although this utterance performs the narrow act of ordering, it should not—by itself—perform the larger function of creating light. This second act is performed only because of the authority who spoke the words. God, and God alone, has the adequate authority to turn command into reality—to have his orders fulfilled simply by pronouncing them.[198]

196. State Oil Co. v. Khan, 522 U.S. 3, 14 (1997) (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 335 n.5 (1990) (citation omitted)).

197. *Genesis* 1:3 (King James).

198. For another example of an omnipotent literary figure who uses the constative form to perform an action, see CHRISTOPHER MARLOWE, TAMBURLAINE THE GREAT, PART TWO (Anthony B. Dawson ed., The New Mermaids 2d ed. 1997) (c. 1590). Tamburlaine, the authority figure, makes such grand statements as "Let it be so," *id*. act 5, sc. 1, l. 215; "Let [the hearse] be placed by this my fatal chair," *id*. act 5, sc. 3, l. 211; and "[L]et there be a fire presently," *id*. act 5, sc. 1, l. 176. Each of these statements proves to be self-fulfilling, suggesting that Tamburlaine's speech acts are leading the performance of the action. Of course, these speech acts cannot be said to be pure performative speech acts unless the speech act and the action occur simultaneously, or close to simultaneously. In the last instance, however, Tamburlaine's speech act, "[L]et there be a fire presently," is almost simultaneous with the action. *Id*. Remarkably like the structure in Genesis, "And God said, Let there be light: and there was light," Tamburlaine's command is immediately followed by the stage direction, "They light a fire." *Id*. act 5, sc. 1, ll. 176-78.

Although the Justices of the Supreme Court are not gods, they sometimes aspire to similar authority. Just as God can assert light into existence, the Justices assert the existence of law. After all, if every statement that the Justices utter creates the content of its words, then turning their interpretation—and creation—of the law into an undisputed fact is automatic. If the Court can assert enough authority, and if that authority is believed, then its legitimacy will never be called into question.

A. *Mimicking God: The Absolute and Authoritative Tone*

The Court first attempts to capture God's power by donning an absolute and authoritative tone. The Court uses a variety of words and largely constative forms to execute the act of overruling. Thus, it may be difficult to distinguish between the performative act itself and a supporting sentence. Because we are used to the omnipotence of Justices in certain speech acts, the similarity of the forms encourages us to extend the same impression of authority to other speech acts. In other words, because "saying makes it true" in one case, we are more likely to believe that "saying makes it true" in all cases. Thus, the overruling rhetoric imbues the personal viewpoint with more authority than it should have.

The Court further imbues the overruling rhetoric with authority by employing absolute language. Examples include:

> *No one doubts* that the Eleventh Amendment nullified the Court's decision . . . .[199]

> The dissenters offer their *unsupported* view . . . .[200]

> Our conclusion regarding *Meek* and *Wolman* should come as *no surprise*. The Court as early as *Wolman* itself left *no doubt* that *Meek* and *Allen* were irreconcilable, and we have repeatedly reaffirmed *Allen* since then.[201]

Unequivocal phrases such as "no surprise," "[n]o one doubts," and "unsupported" leave no room to question their veracity. This language asserts a position with confidence and conveys a sense of authority. In addition, the Court has used statements such as "*Of course*, the dissent's assertion . . . is *simply* question-begging."[202] Words and phrases such as "of course" and "simply" illustrate the implication that comes with this

199. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 484 (1987) (emphasis added).

200. *Id.* at 487 (emphasis added).

201. Mitchell v. Helms, 530 U.S. 793, 835 (2000) (emphasis added) (citation omitted).

202. *Welch*, 483 U.S. at 487 (emphasis added).

authority. Not only does this language convey authority, but it also suggests that the statement that it precedes is so universally accepted and obvious that its utterance is not even necessary. In so doing, this language raises the bar for someone to disagree. Any dissenting opinion would have to stand alone against the weight of the opinion of the rest of the world.

It may be just one word, but sometimes one word or one phrase is enough to persuade. In many instances, the reasons supporting the Court's decision to overrule a case are not new; the only difference seems to be that in the particular Court, a majority, instead of a minority, holds that viewpoint. In order to justify its decision, then, the Court relies on a key pivotal phrase or word. For example, in *Daniels v. Williams*, the Court overruled *Parratt v. Taylor* by explaining the facts and holding of *Parratt*, quoting extensively from Justice Powell's concurring opinion, and concluding with the sentence, "*Upon reflection*, we agree and overrule *Parratt* to the extent that it states . . . ."[203] The only new reason that the *Daniels* Court offered, then, was contained in the phrase "[u]pon reflection." This one phrase asks us to rely on the decisionmaking process of the Court. Purely because the Court did not expound on the decisionmaking process and confined the description to one small phrase, we are required to trust not only that the process occurred, but also that the process was thorough. Similarly, in *City of New Orleans v. Dukes*, the Court justified overruling *Morey v. Doud* in one paragraph: In that paragraph, the Court merely explained what the Court of Appeals held and then stated, "*Actually*, the reliance on the statute's potential irrationality in *Morey* v. *Doud*, as the dissenters in that case correctly pointed out, was a needlessly intrusive judicial infringement . . . and we have concluded that the . . . analysis employed . . . should no longer be followed. . . . [W]e are *now* satisfied that the decision was erroneous."[204]

In this case, the words "actually" and "now"[205] do the main work of justifying the decision to overrule.[206] Like "[u]pon reflection," "[a]ctually" indicates that substantial thought was given to the decision but closes off the substance of such thought from the audience. This confinement leaves

203. Daniels v. Williams, 474 U.S. 327, 330 (1986) (emphasis added), *overruling* Parratt v. Taylor, 451 U.S. 527 (1981).

204. City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (emphasis added) (citation omitted), *overruling* Morey v. Doud, 354 U.S. 457 (1957).

205. *See also* Fulton Corp. v. Faulkner, 516 U.S. 325, 345 (1996) ("[W]e now understand the dormant Commerce Clause to require . . . .").

206. The *Dukes* Court also stated, "*Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds," and "[T]he decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled." 427 U.S. at 306. But neither of these reasons indicates why the viewpoint adopted was the correct one, as the former reason fails to state why it is significant and the latter does little more than assert that the analysis is not "proper," without explaining why. I would argue that the justification hinges on the key phrases identified above.

the audience with limited options; it can accept the Court's decision or not accept it. Because the Court does not provide further reasons for its decision, the option to disagree with the substance of the Court's reasoning is not available. Because the audience's disagreement can thus have no basis, the audience is more likely to accept the Court's decision. As a result, the Court accomplishes the feat of turning what it says into reality.

In addition, by employing the constative verb "to be," the Court often asserts the truth of a statement. It has made such utterances as:

> In light of these considerations, *it is understandable* that the Court . . . concluded that the regulations . . . at issue swept too broadly.[207]
>
> Moreover, *the dissent is simply wrong* in asserting that the doctrine lacks a clear rationale.[208]
>
> [A] reading of the provisions . . . leaves the impression that the Arizona Court's description of the statutory purpose *is not only logical but persuasive*.[209]
>
> [W]e think it time to acknowledge what is now, three years after *Grady*, compellingly clear: The case *was a mistake*.[210]

Each of these statements encourages us to treat it like a performative utterance; by asserting that something is understandable, wrong, persuasive, or a mistake, the Court comes close to making it true. For one thing, *all* utterances can be said to bring something into existence with their assertion. After all, before such a statement was made, the concept never existed in writing. Thus, by stating that something is persuasive, the Justices bring that concept into consideration and incorporate it as part of the majority decision. Although the statement may only be dicta, because it is incorporated into the majority decision, future Justices now have free rein to quote this statement as support in future decisions. If quoted enough, the statement becomes true; the "elixir of time" will convert this assertion into precedent,[211] and from there into a "true" statement, so long as the precedent is accepted.

207. Thornburgh v. Abbott, 490 U.S. 401, 412 (1989) (emphasis added).

208. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 486 (1987) (emphasis added).

209. Perez v. Campbell, 402 U.S. 637, 645-46 (1971) (emphasis added).

210. United States v. Dixon, 509 U.S. 688, 711 (1993) (emphasis added).

211. Damren, *supra* note 31, at 4.

B. *When All Else Fails: The Justices Assert Their Superior Intelligence*

If the Justices cannot be God, they can at least be better than everyone else—or at least, better than their predecessors. As the *Casey* Court explained, "People understand that some of the Constitution's language is hard to fathom and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions."[212]

When all else fails, the Court can fall back on the explanation that, sometimes, the current Justices are just smarter than their esteemed predecessors. Sometimes, they can "perceive significant facts" and "understand principles of law" that "eluded" previous Justices.[213] Sometimes, they are simply better at interpreting the law.

The Court has adhered to this rhetoric in countless other decisions overruling previous cases. The Court has suggested that it overruled a decision not because times had changed, but because it had the opportunity to rethink the issue and come up with a better—"wiser"[214]—answer.[215] The language in these judicial opinions indicates that the correct interpretation of the law had been there all along; it was simply up to the current Court to discover it.[216]

Many times, the decision to overrule turns on what the current Court believes:

> The plurality's citation of prior decisions for support was based upon what we believe to be a misreading of precedent. . . . The plurality's extended reliance upon our decision . . . was also, we believe, misplaced.[217]

212. Planned Parenthood v. Casey, 505 U.S. 833, 866 (1992).

213. *Id*. The Court also observed that "[e]ach case [*West Coast Hotel* and *Brown*] was comprehensible as the Court's response to facts that the country could understand . . . but *which the Court of an earlier day*, as its own declarations disclosed, *had not been able to perceive*." *Id*. at 863 (emphasis added).

214. Illinois v. Gates, 462 U.S. 213, 238 (1983) ("For all these reasons, we conclude that it is wiser to abandon the 'two-pronged test' . . . .").

215. *See, e.g*., Solorio v. United States, 483 U.S. 435, 440-41 (1987) ("On reexamination of *O'Callahan*, we have decided that the service connection test . . . should be abandoned."); Daniels v. Williams, 474 U.S. 327, 330 (1986) ("Upon reflection, we agree and overrule *Parratt* . . . ."); United States v. Scott, 437 U.S. 82, 95 (1978) ("[O]ur growing experience with Government appeals convinces us that we must re-examine the rationale of *Jenkins* in light of *Lee*, *Martin Linen*, and other recent expositions of the Double Jeopardy Clause.").

216. *See* Forrester, *supra* note 69, at 183 ("[T]o read the individual opinions, one is led to believe that the ultimate ruling is based on 'the law' which the opinion writer seemingly 'discovers.' All too often the 'discovery' is remarkably consistent with the justice's long-standing predilections.").

217. Seminole Tribe v. Florida, 517 U.S. 44, 65 (1996) (citations omitted).

> [F]or these same reasons, we conclude that *Clark*, *Gunter*, and *Gardner* represent the sounder line of authority.[218]

> We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it.[219]

One of the reasons this technique works so well is that the Court's adversary in the debate is a distant Court of the past.[220] This earlier Court cannot respond to the current Court's claims, much less defend its ruling. This fact also obscures a fundamental problem with such rhetoric: If we believe the present Court that its predecessor made an error in judgment, is it not equally as likely that the current Court, too, may be wrong in its rejection of the precedent?[221]

VI. CONCLUSION

Judges have been called liars, but lying is not necessarily a bad thing. Judges must be given the ability to overrule; otherwise, we would be stuck with a decision even if it was wrongly decided and times and thinking had changed. In the recent case of *Lawrence v. Texas*, the Court employed many of the rhetorical devices identified in this Note to overrule the controversial case of *Bowers v. Hardwick*.[222] *Lawrence* held that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual contact violated the Due Process Clause.

The *Lawrence* Court applied two of the *Casey* factors—that *Bowers* had not induced detrimental reliance and that the case itself had caused uncertainty.[223] It cited the dissenting opinion of Justice Stevens in *Bowers* as support for the present decision.[224] It employed elements of implicit overruling by asserting that cases subsequent to *Bowers* had already

218. Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 623 (2002).

219. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999). The same technique has been employed by the Court in a nonconstitutional decision. *See* Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 278 (1994) ("We do not slight the importance of adhering to precedent, particularly in a case involving statutory interpretation. But here our precedents are in tension, and we think our approach in *Steadman* makes more sense than does the *Transportation Management* footnote.").

220. *Seminole Tribe*, however, overruled *Pennsylvania v. Union Gas Co*., 491 U.S. 1 (1989), which was also a decision by the Rehnquist Court. In the *Seminole Tribe* quotation above, the Court is asserting its superior intelligence over a past plurality. Of course, members of that original plurality can respond in the dissent. But the analysis that the Justices in the majority opinion use—the technique of asserting their superior intelligence—still applies.

221. *See* Lee, *supra* note 87, at 665.

222. Lawrence v. Texas, 123 S. Ct. 2472 (2003), *overruling* Bowers v. Hardwick, 478 U.S. 186 (1986).

223. 123 S. Ct. at 2483.

224. *Id*. at 2483-84.

weakened *Bowers*'s foundation.[225] It even enacted the performative fallacy of "saying makes it so" by asserting its superior intelligence in authoritative tones.[226]

Whether or not *Lawrence* was rightly decided, the Court requires the flexibility of overruling. The Justices are not trying to trick us when they use these rhetorical devices. They are not trying to enact bad law through sleight-of-hand semantics. Rather, these devices allow the Justices to achieve the near impossible—the ability to overrule effectively when necessary, even as the very legitimacy on which they rely to give their rulings force is threatened.

Judges may be liars, but in this paradoxical world of law in which we live, they have no other choice. They must lie, or the fiction of legitimacy that we have so carefully constructed will come crashing down, bringing with it the entire judicial system as we know it. We should thank our lucky stars, then, that they do their job so well.

225. *Id*. at 2481-82.

226. *Id*. at 2484 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today.").