STOPPING THE PENDULUM: WHY STARE DECISIS SHOULD CONSTRAIN THE COURT FROM FURTHER MODIFICATION OF THE SEARCH INCIDENT TO ARREST EXCEPTION

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The doctrine of constitutional stare decisis—the time-honored tradition by which the Supreme Court defers to its prior decisions and applies its precedents to new cases with similar facts—has come under attack both in the scholarly community and in the high court itself, where Justices appear to pay increasingly less deference to prior decisions in deciding new cases before the Court. This Note reaffirms the importance of constitutional stare decisis in maintaining the Supreme Court's judicial efficacy and credibility through an examination of the Court's inconsistent Fourth Amendment jurisprudence with regard to the "search incident to arrest exception," most recently applied, and modified, in Arizona v. Gant.

After a reexamination of the history and rationales underlying constitutional stare decisis doctrine and a discussion of the factors for determining whether to apply prior precedents to new cases, the author discusses the convoluted history of the "search incident to arrest exception" to demonstrate the confusion resulting from a failure to adopt a consistent approach to stare decisis at the constitutional level. In order to strengthen constitutional stare decisis, the author recommends making the application of stare decisis to new Supreme Court decisions a rebuttable presumption. Further, the author recommends consistently applying the Rehnquist Court stare decisis factors of workability, reliance, changed circumstances, and developments in the law, along with the additional factors of the impact on liberty and the availability of alternatives to deviating from precedent, to determine whether to abide by a previous constitutional interpretation.

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I. INTRODUCTION

The search incident to arrest exception to the Fourth Amendment's search warrant requirement has a unique and chaotic history.[1] As Justice White wrote in his *Chimel v. California* dissent, "Few areas of the law have been as subject to shifting constitutional standards . . . as that of the search 'incident to an arrest.'"[2] The Supreme Court has consistently disregarded the importance of precedent by continuously modifying the search incident to arrest exception.[3] Justice Stewart aptly described these continual shifts as a pendulum swinging back and forth.[4] Unfortunately, the pendulum has not stopped swinging since *Chimel*.[5] To the dismay of many legal scholars,[6] the Supreme Court has favored expanding the search incident to arrest exception in its application to occupants of automobiles.[7]

On April 21, 2009, however, the pendulum swung back as the Court once again modified the search incident to arrest exception in *Arizona v. Gant*.[8] The full ramifications of *Gant* are still unknown. The Court contracted the search incident to arrest exception as it applies to automobiles by seemingly overruling its earlier decision in *New York v. Belton*,[9] holding that police may not automatically search a vehicle "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle."[10] The Court expanded the exception, however, by adopting Justice Scalia's proposal to allow police to search an automobile incident to a lawful arrest "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[11] Police officers, lawyers, and the lower courts must now untangle this confounding decision and again adapt their own practices to meet the ever changing preferences of the Supreme Court.

This Note focuses on the turbulent history of the search incident to arrest exception to exemplify the need to strengthen the Supreme Court's application of horizontal stare decisis in constitutional cases. Part II of this Note explores the doctrine of stare decisis and examines

1. *See* James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1421–45.

2. 395 U.S. 752, 770 (1969) (White, J., dissenting).

3. *See, e.g.*, *id.* at 766 (majority opinion).

4. *See id.* at 758.

5. *Compare* Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009), *with* New York v. Belton, 453 U.S. 454, 460 (1981).

6. *See generally* David S. Rudstein, Belton *Redux: Reevaluating* Belton*'s Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287 (2005); Tomkovicz, *supra* note 1.

7. *See, e.g.*, *Belton*, 453 U.S. at 460 ("[We] hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.").

8. 129 S. Ct. at 1714.

9. 453 U.S. at 455.

10. *Gant*, 129 S. Ct. at 1714.

11. *Id.*

how the Court has applied stare decisis in the past. Then, Part III examines the inconsistency between the doctrine of stare decisis and the turbulent history of the search incident to arrest exception. Part III illustrates how the *Gant* decision ignored principles of stare decisis and highlights how *Gant* will inevitably lead to uncertainty in future police practice and lower courts' adjudication of the search incident to arrest exception. Applying the lessons learned from *Gant*, Part IV recommends, contrary to predominant scholarly belief,[12] that the Court strengthen and modify its traditional stare decisis test to ensure more stable and principled constitutional jurisprudence in the future. Finally, this Note concludes, arguing that although the Court may have reached an imperfect result in *Gant*, stare decisis should stop the Court from further modification of the search incident to arrest exception because Congress and state legislatures can best adapt the exception within the broad constitutional limits set forth by the Court.

II. BACKGROUND: THE DOCTRINE OF STARE DECISIS

This Part explores the doctrine of stare decisis, highlighting that despite some inconsistency in its application, which has led to legitimate scholarly criticism,[13] stare decisis is and always has been a respected and vital part of constitutional jurisprudence. To begin, Section A examines the legal and policy underpinnings of stare decisis. Then, Section B explores the historical origins of stare decisis. Finally, Section C surveys the Supreme Court's application of stare decisis in constitutional cases.

A. Overview: The Legal and Policy Basis of Stare Decisis

1. The Legal Doctrine of Stare Decisis

Stare decisis is Latin for "stand by things decided."[14] There are two forms of stare decisis: vertical stare decisis and horizontal stare decisis. Vertical stare decisis *requires* lower courts to follow the precedents of

12. *See generally* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey*,* Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53; Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988); Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89 (1998); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism*, *and the Future of Unenumerated Rights*, 9. U. PA. S. CONST. L. 155 (2006); Robert Barnhart, Note, *Principled Pragmatic Stare Decisis in Constitutional Cases*, 80 NOTRE DAME L. REV. 1911 (2005); Todd E. Freed, Comment, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767 (1996); 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 (1986).

13. *See, e.g.*, Consovoy, *supra* note 12, at 105 ("When stare decisis is viewed in the context of relevant case law, particularly *Casey* and *Dickerson*, it is apparent that this haphazard and consequentialist application of stare decisis is not a benefit, but a detriment.").

14. 21 C.J.S. *Courts* § 193 (2010) (citation omitted).

higher courts when faced with indistinguishable facts.[15] For example, after the Supreme Court's decision in *Roe v. Wade*, all federal and state courts had to recognize a woman's fundamental right to an abortion during the first trimester of pregnancy without state interference despite any strong moral, philosophical, or legal disagreements judges may have had with the decision.[16] In contrast, horizontal stare decisis involves a court following its own precedent.[17] The Supreme Court has always viewed horizontal stare decisis as a non-mandatory judicial policy.[18] For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court *chose* not to overturn *Roe v. Wade* despite its conflicted feelings about the decision.[19]

Horizontal stare decisis is not applied with equal vigor in all cases.[20] The Supreme Court is particularly hesitant to overturn statutory and common law precedents but more willing to reexamine and overturn constitutional precedents.[21] A common explanation for this difference is the assumption that in constitutional cases "correction through legislative action is practically impossible."[22] Nevertheless, even in constitutional cases, the Court must have "special justification" to overrule a past precedent.[23] This Note is primarily concerned with horizontal constitutional stare decisis.[24]

15. Consovoy, *supra* note 12, at 57.

16. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (holding that the fundamental right of privacy includes the right of women to seek an abortion for any reason until the second trimester).

17. Consovoy, *supra* note 12, at 57–58.

18. *Id. Compare, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878–79 (1992) (upholding *Roe*, 410 U.S. 113), *with* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

19. *See Casey*, 505 U.S. at 853.

20. *See* Consovoy, *supra* note 12, at 64; William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988). Some scholars believe that the Supreme Court has created a "three-tiered hierarchy of stare decisis." Eskridge, *supra*, at 1362. In this hierarchy,

> [c]ommon law precedents enjoy a strong presumption of correctness. The Court applies a relaxed, or weaker, form of that presumption when it reconsiders its constitutional precedents, because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine. Statutory precedents, on the other hand, often enjoy a super-strong presumption of correctness. *Id.*

21. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–13 (1932) (Brandeis, J., dissenting); Eskridge, *supra* note 20, at 1362.

22. *Burnet*, 285 U.S. at 407 (noting the difficulty in amending the Constitution). This assumption is false. *See infra* Part IV.A.3.

23. Dickerson v. United States, 530 U.S. 428, 443 (2000). As Justice Souter noted, overruling constitutional precedents "is a matter of no small import, for 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987)).

24. For the rest of this Note, "stare decisis" refers to horizontal stare decisis unless otherwise specified.

2. The Principles and Rationales Underlying Stare Decisis

Stare decisis is a judicially created doctrine[25] that helps ensure the law develops "in a principled and intelligible fashion."[26] Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[27] Although the Supreme Court has noted that stare decisis "is of fundamental importance to the rule of law,"[28] it is "not . . . an inexorable command."[29] Thus, some scholars caution against the strict application of stare decisis, concerned that this would prevent courts from correcting the errors of judges and modifying decisions that are no longer consistent with modern-day social policy, politics, and law.[30]

Nevertheless, many judges fervently advocate the importance of stare decisis.[31] For example, Justice Cardozo once wrote "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[32]

The need for stare decisis—and the stability it offers—is strengthened by the fact that what is "right" is often not strictly a legal question but instead in part a political question determined by the makeup and disposition of the Supreme Court Justices.[33] In recent years, however, the doctrine of horizontal stare decisis has significantly deteriorated as the Supreme Court has shown increased willingness to reconsider and ultimately overrule past precedents, particularly in constitutional cases.[34]

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25. *See* People v. Petit, 648 N.W.2d 193, 199 (Mich. 2002). *But see* Anastasoff v. United States, 223 F.3d 898, 900–05 (8th Cir. 2000), *vacated*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc) (arguing that under Article III of the U.S. Constitution stare decisis is a constitutional requirement). For an excellent discussion on why *Anastasoff v. United States* is inconsistent with the history of stare decisis, see Barnhart, *supra* note 12, at 1916–19.

26. Vitro v. Mihelcic, 806 N.E.2d 632, 634 (Ill. 2004) (citation omitted).

27. *Payne*, 501 U.S. at 827.

28. *Welch*, 483 U.S. at 494.

29. Lawrence v. Texas, 539 U.S. 558, 577 (2003); *see* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 424 (1988) ("Doctrines with sufficiently bad pedigrees or sufficiently bad effects must go . . . ."). Chief Justice Roberts aptly points out that if stare decisis was an inexorable command, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring).

30. *See, e.g.*, Barnhart, *supra* note 12, at 1921.

31. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–69 (1992).

32. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921). Stare decisis "reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." Agostini v. Felton, 521 U.S. 203, 235 (1997) (internal quotations omitted).

33. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 650 n.14 (1999).

34. *See* Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, *in* JUDICIAL POLITICS: READINGS FROM JUDICATURE 378, 379 tbl.1 (Elliot E.

Justice Scalia commented that "the doctrine of *stare decisis* has appreciably eroded."[35] Moreover, scholars legitimately assert that the Supreme Court has been inconsistent in its application of stare decisis, opening the doctrine up to criticisms that it is merely a political tool of convenience.[36] Before examining this erosion and inconsistency in Section C below, Section B analyzes historical and legal foundations of stare decisis in American jurisprudence.[37]

B. Historical Origins of Stare Decisis: The English Connection

1. Eighteenth-Century England

In the early eighteenth century, stare decisis began gaining credence as an important legal principle in England.[38] The great legal scholar William Blackstone contributed to the growing legitimacy of stare decisis writing in his famous commentaries, "It is an established rule to abide by former precedents, where the same points come again in litigation."[39] Policy rationales advocated by Blackstone mirror stare decisis justifications espoused today, such as increasing legitimacy of the judiciary and ensuring stability in the law.[40] By the end of the eighteenth century, stare decisis had become firmly entrenched in English law.[41]

2. The Framers

Early English stare decisis theory, particularly Blackstone's commentaries, heavily influenced the Framers of the U.S. Constitution.[42] Even a cursory examination of primary and secondary sources, however, shows significant disagreement among the Framers and early scholars on

Slotnick ed., 2d ed. 1999); Eskridge, *supra* note 20, at 1362 n.11. *But see* Lee, *supra* note 33, at 733 ("Rumors of the recent demise of the Supreme Court's doctrine of precedent are greatly exaggerated.").

35. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* 18 THE TANNER LECTURES ON HUMAN VALUES 79, 87 (Grethe B. Peterson ed., 1997). Justice Scalia contributed to this deterioration in *Arizona v. Gant*, the case that sparked this Note. *See infra* Part III.A.4.b.

36. *See, e.g.*, Cooper, *supra* note 12, at 402 ("The truth, of course, is that stare decisis has always been a doctrine of convenience, to both conservatives and liberals.").

37. For a more thorough discussion of the historical origins of stare decisis see Consovoy, *supra* note 12, at 66–69; see also Lee, *supra* note 33, at 659–67.

38. SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45–46 (Charles M. Gray ed., Univ. of Chi. Press 1971) (1713). Prior to the eighteenth century, English Courts did not view themselves as bound by past precedent. *See* Lee, *supra* note 33, at 660.

39. 1 WILLIAM BLACKSTONE, COMMENTARIES *69; *see* Lee, *supra* note 33, at 661.

40. *See* BLACKSTONE, *supra* note 39, at *69.

41. *See* Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 502 (1945).

42. *See* Schick v. United States, 195 U.S. 65, 69 (1904) ("At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it."); Consovoy, *supra* note 12, at 67; Lee, *supra* note 33, at 661.

the optimal strength of stare decisis.[43] Divergence in stare decisis policy among the Framers ultimately led to the inconsistent application of the doctrine that the judiciary continues to struggle with today.[44] Although scholars debate whether stare decisis is constitutionally required,[45] almost all scholars recognize that the Framers at least recognized the importance of precedent.[46]

C. The Application of Stare Decisis to Constitutional Cases

Historically, the Supreme Court has always utilized stare decisis in constitutional cases.[47] Although stare decisis remains a respected judicial policy today, the Rehnquist Court somewhat eroded the doctrine's influence,[48] resulting in the Court overturning constitutional precedent at an increasing rate and ultimately making *Arizona v. Gant* possible.[49]

1. The Rehnquist Court

a. Modern Standards for Stare Decisis

The Rehnquist Court consistently looked at four factors to determine the applicability of stare decisis: reliance, workability, changed circumstances, and inconsistency with developments of the law.[50] None of the factors were dispositive, and different Justices weighed the importance of each factor differently.[51] In addition to the four factors discussed in detail below, individual Justices of the Rehnquist Court also considered whether the prior decision was poorly reasoned, the age of the prior decision, and the margin of victory.[52] These standards remain illu-

43. For example, Alexander Hamilton seemingly favored a stronger, less flexible, application of stare decisis than James Madison. *Compare* THE FEDERALIST No. 78 (Alexander Hamilton), *with* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 391, 391 (Marvin Meyers ed., rev. ed. 1981). *See also* Consovoy, *supra* note 12, at 69 ("The thoughts of Hamilton, Madison, Cranch, and Kent reveal a deep internal conflict between the concreteness required by the rule of law, and the flexibility demanded in error correction.").

44. Consovoy, *supra* note 12, at 69.

45. *Compare* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 91–106 (2001), *with* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447–72 (2006).

46. *See* Lee, *supra* note 33, at 662–65; *see also* Barnhart, *supra* note 12, at 1913.

47. *See* Lee, *supra* note 33, at 666–81 (discussing the Marshall Court's application of stare decisis).

48. Consovoy, *supra* note 12, at 55–56 ("Rehnquist Court rulings have clouded notions of stare decisis . . . . Rehnquist Court decisions cannot possibly form a coherent, principled theory.").

49. *See* Banks, *supra* note 34, at 379 tbl.1.

50. Consovoy, *supra* note 12, at 76–78; s*ee also* Payne v. Tennessee, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting).

51. Consovoy, *supra* note 12, at 76.

52. *See id.* at 78–81.

minating because the current Justices still consider them in their own stare decisis analyses.[53]

First, the reliance factor considers society's general dependence on stable unchanging laws and the need for stability in specific contexts such as contracts or law enforcement.[54] The Court is cognizant that overturning precedent may cause confusion and that necessary adjustments will result in societal costs.[55] Reliance remains a controversial factor,[56] but has proven to be a decisive rationale for applying stare decisis in some cases.[57]

Second, the workability factor considers the ability of lower courts to apply the holding of a previous decision.[58] An unworkable rule causes "inherent confusion" or "poses a direct obstacle to the realization of important objectives embodied in other laws."[59] For example, in *Swift & Co. v. Wickham*, the Court overruled a decision that created a standard "for allocating litigation between district courts of one and three judges" under 28 U.S.C. § 2281.[60] The Court found the standard to be unworkable as an everyday test in practice because the "proper forum" could not be determined until each case was adjudicated on its merits.[61] Thus, the test significantly delayed the litigation process instead of expediting it.[62]

Third, the changed circumstances factor considers "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[63] This necessitates not only closely comparing the factual context of the prior decision to the factual context of present day, but also considering Americans' perception of these factual changes.[64] When circumstances have not significantly changed, the Court is more likely to employ stare decisis to uphold prior decisions.[65]

53. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 920–24 (2010) (Roberts, C.J., concurring).

54. Consovoy, *supra* note 12, at 77; *see also* Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (upholding *Miranda v. Arizona*, 384 U.S. 436 (1966), in part because of the reliance law enforcement had on the decision).

55. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[W]e may ask . . . whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . . .").

56. Consovoy, *supra* note 12, at 77.

57. *Casey*, 505 U.S. at 854–55.

58. *See* Gely, *supra* note 12, at 133–34.

59. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

60. Swift & Co. v. Wickham, 382 U.S. 111, 124–25 (1965).

61. *Id.*

62. *Id.*

63. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992); *see* Consovoy, *supra* note 12, at 77.

64. Gely, *supra* note 12, at 136.

65. *Compare Casey*, 505 U.S. at 864 (upholding *Roe v. Wade*, 410 U.S. 113 (1973), after noting that "neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed"), *with* Lawrence v. Texas, 539 U.S. 558, 573 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), because legal and factual circumstances had perceptibly changed).

Fourth, the inconsistency with new developments in the law factor considers whether the legal underpinnings of prior decisions have eroded.[66] The Court attempts to discern if the prior decision is "irreconcilable with competing legal doctrines or policies."[67] Historically, the Court looked only at its own decisions, but a plurality of the Court was willing to reflect on decisions of the lower courts, and Congress as well, in *Hubbard v. United States*.[68] Similar to the changed circumstances factor, the Court is more likely to employ stare decisis when the prior decision remains consistent with developments in the law.[69]

b. (Un)Principled Rationalizations for Departures from Stare Decisis

Scholars commonly criticize the Rehnquist Court "for activist disregard of stare decisis."[70] A sampling of cases from the Rehnquist Court era highlights this perceived depreciation of stare decisis.[71] Two cases that illustrate the Rehnquist Court's willingness to overrule past precedents are *Payne v. Tennessee*[72] and *Lawrence v. Texas*.[73] Only in *Lawrence*, however, does the Court employ even a slightly principled stare decisis analysis.[74]

In *Payne*, the Court reconsidered whether the Eighth Amendment bars prosecutors from presenting and juries from considering "'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family" during the sentencing phase of a capital trial.[75] Overruling *Booth v. Maryland*[76] and *South Carolina v. Gathers*,[77] cases decided a mere four years and two years before, respectively, the Court held that the Eighth Amendment does not bar prosecutors from presenting or juries from considering victim impact evidence during the sentencing phase of a capital trial.[78] Instead of a reasoned analysis of the traditional stare decisis factors, the Court's primary basis for overturning recent precedent was its disagreement over the outcomes of the prior decisions.[79] The Court quickly and

66. Gely, *supra* note 12, at 135.
67. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).
68. 514 U.S. 695, 713 (1995); *see* Gely, *supra* note 12, at 135–36.
69. *Compare* Braden v. 30th Judicial Circuit Ct., 410 U.S. 484, 497–99 (1973), *with Patterson*, 491 U.S. at 173.
70. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1168 (2002) (italics omitted).
71. *See* Banks, *supra* note 34, at 379 tbl.1.
72. 501 U.S. 808 (1991).
73. 539 U.S. 558 (2003).
74. *Id.* at 573–78.
75. 501 U.S. at 817.
76. 482 U.S. 496 (1987).
77. 490 U.S. 805 (1989).
78. *Payne*, 501 U.S. at 827.
79. *Id.* at 817–27 (arguing that considering the personal characteristics of the victim is necessary to assess the blameworthiness of defendants).

in a conclusory fashion dismissed stare decisis concerns, stating that the previous decisions had proven to be unworkable for the lower courts and noting that both *Booth* and *Gathers* had been decided by narrow margins with spirited dissents.[80]

In *Lawrence*, the Court reexamined its seventeen-year-old decision from *Bowers v. Hardwick*, in which the Court held that the Fourteenth Amendment does not confer "a fundamental right upon homosexuals to engage in sodomy."[81] Facing indistinguishable facts, the Court directly overruled *Bowers*, holding that the right of consenting adults to engage in private sexual conduct is protected under the Fourteenth Amendment.[82]

The *Lawrence* opinion, unlike *Payne*,[83] addresses stare decisis with a principled analysis.[84] Writing for the majority, Justice Kennedy noted that the factual context had changed since *Bowers* was decided because more states had voluntarily overturned their laws against sodomy.[85] He also stated that *Bowers* was inconsistent with developments in the law, such as *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Romer v. Evans*, cases which protected sexual autonomy and stopped discrimination aimed solely at homosexuals, respectively.[86] Furthermore, he explained why societal reliance was not at issue.[87] Finally, in an admittedly conclusory fashion, Justice Kennedy asserted that the *Bower* decision "cause[d] uncertainty."[88] Despite applying a principled stare decisis analysis, the Court made clear that the main basis for its decision was its belief that *Bowers* was wrongly decided.[89]

Notwithstanding the Rehnquist Court's willingness to overturn precedent in both principled and unprincipled ways, two prominent Rehnquist era cases, *Planned Parenthood of Southeastern Pennsylvania*

80. *Id.* at 828–29.

81. Lawrence v. Texas, 539 U.S. 558, 566 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).

82. *Id.* at 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

83. *Payne*, 501 U.S. at 827.

84. *See Lawrence*, 539 U.S. at 573–79.

85. *Id.* at 573 ("The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed . . . there is a pattern of nonenforcement with respect to consenting adults acting in private.").

86. *Id.* at 573–76.

87. *Id.* at 577 ("Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."). *But see id.* at 589–91 (Scalia, J., dissenting) (arguing that overruling *Bowers* would cause a "massive disruption of the current social order").

88. *Id.* at 577 (majority opinion). It seems that Justice Kennedy was referring to the workability of the rule, but it is not entirely clear.

89. *Id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."). Merely attacking the debatable reasoning of a prior decision opens up the doctrine of stare decisis to legitimate criticism. *Id.* at 592 (Scalia, J., dissenting) ("It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.").

v. *Casey*[90] and *Dickerson v*. *United States*,[91] show the Court's respect for the doctrine of stare decisis.

c. Continued Vitality of Stare Decisis: *Casey* and *Dickerson*

Both *Casey* and *Dickerson* illustrate that stare decisis remains a vital judicial doctrine even when Justices have subjective disagreements or misgivings about previous Supreme Court precedent.[92]

Casey is remarkable for both the depth of its stare decisis analysis and its application in such a controversial and divisive setting, illustrating the full power and influence of the doctrine.[93] In an opinion coauthored by Justices O'Connor, Kennedy, and Souter, the Court reconsidered and ultimately reaffirmed the central holding of *Roe v*. *Wade*, that women have the fundamental right to seek an abortion prior to viability without state interference.[94] Critical and arguably determinative to the Court's decision was the doctrine of stare decisis.[95] The Court began by noting that the *Roe* opinion had proven to be workable by the lower courts.[96] The Court then highlighted that "for two decades of economic and social developments, people have organized . . . in *reliance* on the availability of abortion."[97] The Court also observed that new developments of the law had not weakened the doctrinal underpinnings of *Roe*.[98] Finally, the Court emphasized that changes in the factual context—such as earlier fetal viability—were superfluous to the holding of *Roe*.[99]

In *Dickerson*, the Court held that the totality of the circumstances test provides inadequate safeguards for the Fifth Amendment's right against self-incrimination and reaffirmed the thirty-four-year-old decision *Miranda v*. *Arizona*, relying in part on stare decisis.[100] Writing for the majority, Justice Rehnquist noted both general societal reliance and

90. 505 U.S. 833 (1992).

91. 530 U.S. 428 (2000).

92. *Id.* at 443 ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."); *Casey*, 505 U.S. at 853 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

93. *But see* Consovoy, *supra* note 12, at 83–87, 98 (arguing that *Casey*'s application of stare decisis was unprincipled and that the doctrine is used only to justify the Justices' desired outcome).

94. *Casey*, 505 U.S. at 846.

95. *See id.* at 854–69.

96. *Id.* at 855 ("While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.").

97. *Id.* at 856 (emphasis added).

98. *Id.* at 857 ("No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking.").

99. *Id.* at 860 ("[N]o change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.").

100. Dickerson v. United States, 530 U.S. 428, 444 (2000).

law enforcement reliance on the use of *Miranda* warnings[101] and stressed that *Miranda* was consistent with developments in the law.[102] The *Dickerson* decision did not directly address the factors of workability or of changed circumstances.[103]

On the surface, it is difficult to reconcile the Rehnquist era stare decisis cases;[104] however, a closer inspection indicates a possible unifying factor.

d. Reconciling the Decisions: The Missing Factor

Scholar Drew Ensign, a former law clerk for the U.S. Court of Appeals for the Ninth Circuit, proposes that any inconsistency can be explained by the tacit additional stare decisis consideration of impact on individual liberty.[105] Ensign argues that "[w]here a prior decision took an expansive view of constitutionally based liberty rights, it was much more likely to be respected as binding than were precedents that took a restrictive view."[106] Ensign provides strong textual evidence that impact on liberty is a de facto element of the stare decisis analysis,[107] and that its use is consistent with constitutional principles.[108] The "liberty thesis" seems particularly strong when examining opinions authored or coauthored by Justice Kennedy.[109] Although Ensign's "liberty thesis" cannot completely explain the Court's stare decisis jurisprudence,[110] the future use of the de facto element of impact on liberty is crucial not only to strengthening the use of stare decisis in constitutional cases, but also to applying stare decisis in a principled and consistent manner.[111]

101. *Id.* at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

102. *Id.* at 443–44 ("If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.").

103. Justice Scalia attacked the majority's presumptive use of stare decisis in his dissent. *Id.* at 465 (Scalia, J., dissenting).

104. *See, e.g.*, Consovoy, *supra* note 12, at 105 ("When stare decisis is viewed in the context of relevant case law, particularly *Casey* and *Dickerson*, it is apparent that this haphazard and consequentialist application of stare decisis is not a benefit, but a detriment.").

105. *See* Drew C. Ensign, Note, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1138 (2006) ("The Court's approach to stare decisis in constitutional cases can be explained remarkably well with the addition of a single factor to the stare decisis analysis: the impact of the previous decision on individual liberty rights.").

106. *Id.* at 1138.

107. *See id.* at 1144–54.

108. *Id.* at 1160 ("The inclusion of liberty in stare decisis analysis is faithful to [constitutional] traditions, and it may even be required by them.").

109. *Id.* at 1164. Ensign believes that Justice Kennedy is the critical proponent of the "liberty thesis." *Id.* at 1165.

110. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that the Eighth Amendment did not prevent the introduction of victim impact evidence).

111. *See* discussion *infra* Part IV.A.3.a.

2. *Sneak Preview: The Roberts Court*

Pundits predict that the Roberts Court will continue to weaken the doctrine of stare decisis.[112] Although the direction of the Roberts Court is not entirely clear, the Court's recent decision in *Citizens United v. Federal Election Commission*,[113] coupled with the Court's decision in *Arizona v. Gant* discussed in Part III.A.4 below, gives credence to this prediction.

III. ANALYSIS: THE INCONSISTENCY BETWEEN THE HISTORY OF THE SEARCH INCIDENT TO ARREST EXCEPTION AND THE DOCTRINE OF STARE DECISIS

The turbulent history of the search incident to arrest exception highlights the implications of ignoring stare decisis. Section A analyzes the Supreme Court's search incident to arrest exception jurisprudence, illustrating a fickle Supreme Court turning the Fourth Amendment into "nothing more than what five Justices say it [means]" by repeatedly overturning its own decisions.[114] Next, Section B explains why *Arizona v. Gant* directly overruled *New York v. Belton*, despite Justice Stevens's adamant denials.[115] Then, Section C demonstrates how *Gant* was inconsistent with the principles of stare decisis set forth by the Rehnquist Court. Finally, reviewing the consequences of the *Gant* majority's refusal to pay credence to *Belton*, Section D highlights the immense value and benefit of the doctrine of stare decisis.

A. *The History of the Search Incident to Arrest Exception: A Story of Vacillation*

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[116]

Traditionally,[117] the Supreme Court interpreted the Fourth Amendment to mean that "searches conducted outside the judicial process, without

112. *See* Linda Greenhouse, *Precedents Begin Falling for Roberts Court*, N.Y. TIMES, June 21, 2007, at A21; *Demise of Stare Decisis Under the Stewardship of Chief Justice Roberts*, THE DAILY CENSORED: UNDERREPORTED NEWS AND COMMENTARY (Jan. 22, 2010), http://dailycensored.com/2010/01/22/demise-of-stare-decisis-under-the-stewardship-of-chief-justice-roberts/.

113. 130 S. Ct. 876 (2010).

114. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990).

115. Arizona v. Gant, 129 S. Ct. 1710, 1722 n.9 (2009).

116. U.S. CONST. amend. IV.

117. Certain members of the Court have always advocated that the Fourth Amendment does not require warrants, but only that all searches and seizures be reasonable. *See, e.g.*, United States v. Ra-

prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."[118] The search incident to arrest rule is one of the exceptions delineated by the Court. Since 1914, the Court has continuously vacillated between a broad search incident to arrest exception focused on law enforcement's interest in gathering evidence and an exception narrowly tailored to protect individuals' privacy interests.

1. The Early Years

The Supreme Court was extremely indecisive when originally formulating the search incident to arrest exception.[119] In the dicta of the 1914 case *Weeks v. United States*, the Court recognized the existence of the search incident to arrest exception, noting that the right "to search the person of the accused when legally arrested" had never been questioned by American or English law.[120] In 1925, again in dicta, the Court expanded the principle to include a search of the place of arrest.[121]

The search incident to arrest exception was firmly established two years later in *Marron v. United States*.[122] In *Marron*, the Court upheld the seizure of a ledger, holding the officers "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise" after a lawful arrest.[123]

The Court quickly reversed directions, however, by significantly limiting, if not directly overruling, the holding of *Marron* in *Go-Bart Importing Co. v. United States*[124] and *United States v. Lefkowitz*.[125] The Court held in both cases that a lawful arrest could not provide justifica-

binowitz, 339 U.S. 56, 66 (1950). The Court in recent years has shown a tendency to move away from the warrant requirement and toward a reasonableness test, which balances the individual's privacy interest against the governmental interest. *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 333–34 (1990). Under this approach, the search incident to arrest rule would not be characterized as an "exception" to the Fourth Amendment's warrant requirement, but instead merely a situation where a search is reasonable.

118. Katz v. United States, 389 U.S. 347, 357 (1967) (citations omitted); *see also* Johnson v. United States, 333 U.S. 10, 14 (1948).

119. *See* Chimel v. California, 395 U.S. 752, 755 (1969) ("The decisions of this Court . . . have been far from consistent, as even the most cursory review makes evident."); Tomkovicz, *supra* note 1, at 1421.

120. 232 U.S. 383, 392 (1914) (citations omitted). It should be noted, however, that the case did not make "reference to any right to search the *place* where an arrest occurs, but was limited to a right to search the 'person.'" *Chimel*, 395 U.S. at 755.

121. Agnello v. United States, 269 U.S. 20, 30 (1925) ("The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."). The full scope of a permissible search was not made clear. Tomkovicz, *supra* note 1, at 1422 n.24.

122. 275 U.S. 192, 199 (1927).

123. *Id.*

124. 282 U.S. 344 (1931).

125. 285 U.S. 452 (1932).

tion for a warrantless search of the defendants' homes,[126] distinguishing the cases from *Marron*, in which the defendant was committing the crime at the time of arrest and the items seized were readily apparent.[127]

Astonishingly, the Court remained relatively consistent over the next fifteen years until again enlarging the exception in 1947.[128] In *Harris v. United States*, the Court held that the warrantless search of the defendant's four-room apartment was lawful after a valid arrest.[129]

Unable to remain steady, the Court one year later contracted the search incident to arrest exception in *Trupiano v. United States*, writing that a search incident to arrest required "something more in the way of necessity than merely a lawful arrest."[130] The Court held that under the facts of this case, the search incident to arrest was not an "inherent necessit[y]" because the officers had plenty of time and opportunity to obtain a search warrant and therefore the search was unlawful.[131]

A mere two years later, the Court directly overruled *Trupiano* in *United States v. Rabinowitz*.[132] In *Rabinowitz*, the police lawfully arrested the defendant and incident to arrest searched the defendant's desk, safe, and file cabinets.[133] The Court upheld the search, asserting "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[134]

After *Rabinowitz*, police officers could generally search "the area that is considered to be in the 'possession' or under the 'control' of the person arrested."[135] For the next nineteen years, the Court did not modify the search incident to arrest exception. A close examination of judicial opinions, however, indicates discontent with *Rabinowitz* and foreshadows what would turn out to be only another temporary contraction.[136]

126. *Id.* at 465–67; *Go-Bart Importing Co.*, 282 U.S. at 358.

127. *Go-Bart Importing Co.*, 282 U.S at 358.

128. Harris v. United States, 331 U.S. 145, 156 (1947).

129. *Id.* at 151–52 ("The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control.").

130. 334 U.S. 699, 708 (1948).

131. *Id.* It should be noted that despite the broad language, the Court did not directly overrule *Harris*. *Id.* at 708–09. Despite conciliatory language, only Justice Douglas voted for the majority in both *Harris* and *Trupiano*, highlighting a sharp philosophical schism between the Justices over the search incident to arrest rule. *Id.* at 699 (majority opinion written by Justice Murphy and joined by Justices Frankfurter, Douglas, Jackson, and Rutledge); *Harris*, 331 U.S. at 145 (majority opinion written by Chief Justice Vinson and joined by Justices Black, Reed, Douglas, and Burton).

132. 339 U.S. 56, 66 (1950).

133. *Id.* at 58–59.

134. *Id.* at 66.

135. Chimel v. California, 395 U.S. 752, 760 (1969).

136. *See* Tomkovicz, *supra* note 1, at 1425–26.

2. The Modern Basis for the Search Incident to Arrest Exception

Discontent over the search incident to arrest exception came to fruition in 1969 when the pivotal case of *Chimel v. California* significantly, albeit temporarily, constrained the search incident to arrest exception by overruling *Harris* and *Rabinowitz*.[137] In *Chimel*, police officers lawfully arrested a man and then, without a search warrant, conducted a search of his entire home.[138] Writing for the majority, Justice Stewart refused to merely distinguish the present facts from *Harris* and *Rabinowitz*,[139] and instead directly attacked the foundation of those decisions.[140] Justice Stewart noted that a rule allowing police to search an entire house incident to arrest had no theoretical limit and was "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests."[141] Thus, Justice Stewart concluded that "[t]he only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other" because only the former could be justified by the twin rationales of officer safety and evidence preservation.[142] One scholar noted, "[b]y exposing the pendular pattern of the prior decisions . . . limiting [the] rationales that dictated contraction, and by tying its holding to historical goals and principles" the Court hoped to ensure long-term stability in the search incident to arrest exception jurisprudence.[143] Not surprisingly in light of Justice White's spirited dissent, such stability would not arrive.[144]

In *United States v. Robinson*, the Court chipped away at the underlying rationale of *Chimel*. Writing for the majority, Justice Rehnquist held that an officer's subjective intention for conducting a search incident to arrest is irrelevant because "[i]t is the fact of the lawful arrest which

137. *Chimel*, 395 U.S. at 768.

138. *Id.* at 754. The search involved at least a cursory examination of every room in the house and opening drawers. *Id.*

139. For example, the Court could have narrowly held that the search of an entire house is unacceptable, but that *Harris* involved a four room apartment and *Rabinowitz* merely involved a single room. *See id.* at 758–60.

140. Justice Stewart examined the historical basis of the Fourth Amendment's warrant requirement and asserted that it should only be dispensed with when there is ample justification. *See id.* at 759–61.

141. *Id.* at 764–65 (emphasis omitted) ("Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest.").

142. *Id.* at 766. Justice Stewart explained that it is reasonable for an officer to search an arrestee's person because the arrestee may be carrying weapons that could be used to harm the officer or evidence that could be concealed or destroyed and similarly that "the area into which an arrestee might reach in order to grab a weapon or evidentiary items must . . . be governed by a like rule." *Id.* at 761.

143. Tomkovicz, *supra* note 1, at 1429.

144. Justice White advocated for a broader search incident to arrest exception that would include "those areas under the control of the defendant and where items subject to constitutional seizure may be found." *Chimel*, 395 U.S. at 772 (White, J., dissenting).

establishes the authority to search."[145] Thus, the search incident to arrest became *automatic* upon any lawful arrest.[146] Likely unbeknownst to the Court, this decision would have significant implications for the expansion of the search incident to arrest exception to automobiles discussed below.

3. Expansion of the Search Incident to Arrest Exception to Cars

In 1981, the Supreme Court openly shifted back toward expanding the search incident to arrest. In *New York v. Belton*, an officer arrested four occupants of an automobile on probable cause that they possessed illegal narcotics.[147] After patting down the defendants and ordering them to exit the car and stand apart, the officer searched the automobile, discovering marijuana and cocaine.[148] The Court upheld the search holding "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" including containers found within.[149] Thus, *Belton* created the search of an automobile incident to arrest exception to the Fourth Amendment's warrant requirement.

The Court claimed that its decision was faithful to *Chimel*,[150] but a close examination of the case shows the Court moving away from the twin rationales that justified *Chimel*.[151] Instead, the Court primarily focused on creating a bright-line rule that would provide clarity and guid-

145. United States v. Robinson, 414 U.S. 218, 235 (1973) ("A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.").

146. *Id.* ("[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."). *But see* Arizona v. Gant, 162 P.3d 640, 644 (Ariz. 2007) ("But *Robinson* does not hold that *every* search following an arrest is excepted from the Fourth Amendment's warrant requirement; if it did, the Court's opinions in the cases following *Chimel* would hardly have been necessary. Rather, *Robinson* teaches that the police may search incident to an arrest without proving in any particular case that they were concerned about their safety or the destruction of evidence; these concerns are assumed to be present in every arrest situation. Once those concerns are no longer present, however, the 'justifications [underlying the exception] are absent' and a warrant is required to search." (alteration in original)).

147. New York v. Belton, 453 U.S. 454, 455–56 (1981).

148. *Id.* at 456.

149. *Id.* at 460 (footnote omitted).

150. *Id.* at 460 n.3 (asserting that decision was only interpreting *Chimel*'s principles in the automobile context and that the decision "in no way alters the fundamental principles established in the *Chimel* case"). Justice Brennan disagreed, writing in his dissent, "the Court for the first time grants police officers authority to conduct a warrantless 'area' search under circumstances where there is no chance that the arrestee 'might gain possession of a weapon or destructible evidence.'" *Id.* at 468 (Brennan, J., dissenting).

151. *Id.* at 458 (majority opinion) ("A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . may be literally impossible of application by the officer in the field." (quotation marks omitted)). *But see infra* Part III.C.2.d (arguing that officer safety remains a concern even after a suspect is handcuffed and placed in a police car).

ance to police officers in the field.[152] To accomplish this goal, the Court rationalized that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item."[153] The Court relied on *Robinson* to justify reliance on this broad generalization, implicitly declaring that the mere fact of arrest of an occupant of an automobile provides the requisite authority to search the car.[154]

To the dismay of a plethora of legal scholars,[155] *Belton* remained the law for the next twenty-eight years and in fact was reaffirmed and expanded as recently as 2004 in *Thornton v. United States*.[156] In *Thornton*, the Court expanded the search of an automobile incident to arrest exception, holding that "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle."[157]

Justice Scalia, joined by Justice Ginsburg, concurred in the judgment, presenting a novel approach to applying the search incident to arrest exception to recent occupants of an automobile.[158] Justice Scalia argued that neither of *Chimel*'s rationales—officer safety and evidence preservation—were present in this case or in most cases when police searched an automobile incident to arrest;[159] instead the *Belton* rule, consistent with pre-*Chimel* cases, primarily relied on the government's interest in gathering evidence.[160] Justice Scalia concluded that officers should only be able to search an automobile incident to arrest when officer safety or the imminent destruction of evidence is a legitimate concern or "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[161]

152. *Belton*, 453 U.S. at 458 ("[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront." (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979))).

153. *Id.* at 460 (quotations and citations omitted).

154. *Id.* at 459 ("[In *Robinson*] the Court rejected the suggestion that 'there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.'").

155. *See generally* Carol A. Chase, *Cars, Cops, and Crooks: A Reexamination of* Belton *and* Carroll *with an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles*, 85 OR. L. REV. 913 (2006); Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines:* Belton *and Its Progeny*, 79 TUL. L. REV. 365 (2004); Rudstein, *supra* note 6.

156. 541 U.S. 615, 617 (2004).

157. *Id.* at 617–21 ("The stress [of an arrest] is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle.").

158. *Id.* at 625–32 (Scalia, J., concurring).

159. *Id.* at 625–29 (noting that Thornton was handcuffed and locked inside a police car and that the government could not provide a "single example of a handcuffed arrestee's retrieval of arms or evidence from his vehicle").

160. *Id.* at 629.

161. *Id.* at 632. Justice Scalia's proposal implicitly overrules the holding of *United States v. Robinson*. *Id.* at 631–32. *See generally* United States v. Robinson, 414 U.S. 218 (1973) (holding that the search incident to arrest exception automatically applies after a lawful arrest).

It would not take long for Justice Scalia's proposal to become law. A mere four years later his proposal would be adopted by the Court.[162]

4. The Last Word: Arizona v. Gant

After twenty-eight years of relative stability, the Court once again modified the search incident to arrest exception in *Arizona v. Gant*.[163] In *Gant*, two Tucson police officers went to a local house to investigate a narcotics tip, but Rodney Gant told them that the owner of the house was not home.[164] The officers left the premise, but ran a records check on Gant, which showed an outstanding arrest warrant for driving on a suspended license.[165] The officers returned, but Gant was no longer at the house.[166] Shortly thereafter, Gant returned, parking in the driveway of the house.[167] The officers arrested Gant after he exited his car, placed him in handcuffs, and then locked him inside a police car.[168] Subsequently, they searched his car and discovered cocaine and a gun.[169] Gant moved to suppress the evidence.[170] The Supreme Court of Arizona suppressed the evidence,[171] reasoning that the justifications underlying *Chimel* were not present after the scene was completely secured.[172] The U.S. Supreme Court granted certiorari to revisit the *Belton* decision.[173]

a. Opinion of the Court

The Court, in an opinion written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, significantly modified the search incident to arrest exception as it applies to automobiles, holding that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest."[174] Applying this refor-

162. Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009). Ironically, Justice Scalia no longer fully supported his own proposal four years later. *Id.* at 1724–25 (Scalia, J., concurring).

163. *Id.* at 1714 (majority opinion).

164. *Id.* at 1714–15.

165. *Id.* at 1715.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Arizona v. Gant, 162 P.3d 640, 646 (Ariz. 2007) ("[W]e hold that the warrantless search of Gant's car was not justified by the search incident to arrest exception to the Fourth Amendment's warrant requirement.").

172. *Id.* at 644 ("[W]hen, as here, the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer, the warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.").

173. Arizona v. Gant, 552 U.S. 1230, 1230 (2008).

174. *Gant*, 129 S. Ct. at 1723 (emphasis added).

mulated rule to the facts of the case, the Court affirmed the Arizona Supreme Court's decision that the search was unlawful.[175]

The majority defended its decision on both legal and policy grounds. Justice Stevens admitted that the majority of lower courts interpreted *Belton* to allow searches of automobiles even under circumstances where an arrestee could not possibly reach inside the car.[176] Nonetheless, Justice Stevens believed this was an incorrect reading of *Belton*.[177] He argued that a broad interpretation of *Belton* is inconsistent with the proclamation in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case" because the validity of the search under *Chimel* depends on the existence of the twin justifications of officer safety or evidence preservation.[178]

Moreover, Justice Stevens believed the value of a bright-line rule did not outweigh arrestees' privacy interests in their vehicles.[179] To begin, he noted that individuals have a substantial privacy interest in their cars[180] and that *Belton* did not provide the clarity promised.[181] Finally, Justice Stevens presumptively stated that even a narrow interpretation of *Belton* combined with other exceptions regarding warrantless searches of automobiles sufficiently protected any legitimate evidentiary or safety interest police officers may have.[182]

Also, the Court quickly dismissed stare decisis concerns by denying that they were actually overruling *Belton*.[183] Believing that any police reliance on a broad interpretation of *Belton* was misplaced and insufficient to prevent modification of the search incident to arrest exception, the Court stated that stare decisis could not support the "continuance of an unconstitutional police practice."[184] The Court concluded that "[t]he ex-

175. *Id.* at 1724. Justice Stevens pointed out that Gant was in handcuffs and secured in the back of a locked squad car and thus, not within reaching distance of the inside of his car and that the officer lacked a reasonable basis to believe evidence was in the car because Gant was arrested for driving on a suspended license. *Id.* at 1719.

176. *Id.* at 1718.

177. *Id.* at 1718–19. Justice Stevens stated that Justice Brennan's *Belton* dissent—characterizing *Belton*'s holding as built on a fiction that the inside of an automobile is always within reach of arrestees who were recent occupants of a car—resulted in this incorrect broad interpretation. *Id.* at 1718.

178. *Id.* at 1719.

179. *Id.* at 1720.

180. *Id.*

181. *Id.* at 1720–21 ("[Courts] are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene." (footnotes omitted)).

182. *Id.* at 1721.

183. *Id.* at 1722 n.9. The majority opinion distinguished *Belton*, pointing out that in *Belton* the arrestees were within reach of the car and not handcuffed and then distinguished *Thornton* by noting that Gant was not arrested for a drug offense. *Id.* at 1722. Justice Stevens's distinguishing fact from *Thornton* is misleading, however, because the type of offense committed by the arrestee was not relevant under the old *Belton* test and therefore, cannot explain the inconsistent outcome.

184. *Id.* at 1722–23 ("[There is a] checkered history of the search-incident-to-arrest exception . . . . [N]one of the dissenters [in these cases] . . . argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.").

perience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded."[185]

b. Justice Scalia's Concurrence

Justice Scalia disagreed with both Justice Stevens's majority opinion and Justice Alito's dissent discussed below.[186] Justice Scalia was not persuaded by Justice Alito's stare decisis argument, asserting that his "formulation of officers' authority both preserves the outcomes of [past] cases and tethers the scope and rationale of the doctrine to the triggering event."[187] In contradiction to Justice Stevens, however, Justice Scalia advocated that *Belton* stood directly for the proposition that "arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons" and should be directly overruled.[188] Justice Scalia disagreed with the majority's rule, which allows search of automobiles incident to arrest when the "arrestee is within reaching distance of the passenger compartment," arguing that it causes unnecessary judicial and police confusion by providing little practical guidance, does little to protect officer safety, and risks police manipulation.[189] Thus, Justice Scalia only wanted to adopt the second part of the new *Gant* rule, allowing searches of automobiles incident to arrest "when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."[190]

To prevent the uncertainty that would result from a 4-1-4 decision, however, Justice Scalia decided to adopt the majority rule despite his doctrinal disagreements.[191] He viewed upholding the *Belton* decision as "the greater evil" and therefore would accept what he believed was the limited certainty and clarity the majority rule provided.[192]

c. Justice Alito's Dissent

Justice Alito's dissenting opinion firmly recognized the principles of stare decisis and provided the impetus for this Note.[193]

185. *Id.* at 1723.

186. *See infra* Part III.A.4.c (discussing Justice Alito's dissent).

187. *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring). Justice Scalia recognized that the Court needed a legitimate and significant reason to overturn precedent but thought that *Belton*'s poor reasoning and wrong result provided the necessary justification. *Id.*

188. *Id.* at 1724–25.

189. *Id.* (pointing out that police could "leave the scene unsecured . . . in order to conduct a vehicle search").

190. *Id.* at 1725.

191. *Id.*

192. *Id.*

193. *Id.* at 1726–32 (Alito, J., dissenting). Justices Roberts and Kennedy in full and Justice Breyer except as to Part II-E (bad reasoning) joined Justice Alito's dissent. *Id.* at 1726.

Justice Alito argued that the majority—despite their denials—overruled *Belton*.[194] He pointed out that the Court in *Belton* was primarily concerned with creating a "single familiar standard" bright-line rule for police and, therefore, "adopted a rule that categorically permits the search of a car's passenger compartment incident to the lawful arrest of an occupant."[195] He also noted that a narrow interpretation of *Belton*—involving a case by case determination of whether an arrestee is within reach of the vehicle—would be inconsistent with the goal of creating a bright-line rule.[196] Thus, Justice Alito concluded that the Court needed "special justification" to overturn *Belton* in light of stare decisis.[197]

Justice Alito believed that the majority lacked sufficient justification to overrule a twenty-eight-year-old precedent.[198] Synthesizing the Court's previous cases, he determined that the relevant factors for determining the applicability of stare decisis were reliance, changed circumstances, workability, consistency with later cases, and bad reasoning.[199] Justice Alito noted that this case was analogous to *Dickerson v. United States*[200] because in both decisions there was substantial police reliance on previous Supreme Court decisions.[201] Next, he asserted that factual circumstances had not changed since *Belton* was decided in 1981.[202] Then, Justice Alito conveyed how the *Belton* rule had been extremely workable, especially in contrast to the issues police and law enforcement personnel would face by the majority's rule[203] and also noted that the *Belton* rule was completely consistent with the Court's later decisions and "[o]n the contrary . . . was reaffirmed and extended just five years ago in *Thornton*."[204] Finally, he defended the reasoning of *Belton* as a "quite defensible-extension of *Chimel*."[205]

d. Justice Breyer's Dissent

Essentially, Justice Breyer agreed with Justice Alito's dissent, asserting that the majority did not meet its heavy burden in light of the

194. *Id.*

195. *Id.* at 1727.

196. *Id.*

197. *Id.* at 1727–28 ("Because the Court has substantially overruled *Belton* and *Thornton*, the Court must explain why its departure from the usual rule of *stare decisis* is justified.").

198. *Id.* at 1728.

199. *Id.*

200. In *Dickerson* the Court refused to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966), in part because of the doctrine of stare decisis. *See* Dickerson v. United States, 530 U.S. 428, 431–44 (2000).

201. *Gant*, 129 S. Ct. at 1728–29.

202. *Id.* at 1729 ("[S]urely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.").

203. *Id.*

204. *Id.*

205. *Id.* Justice Alito argued that the *Chimel* Court must have wanted the scope of a search incident to arrest "to be measured at the time of the arrest" because otherwise the rule would rarely be applicable and would create "perverse incentive[s]" for police to manipulate the scene. *Id.* at 1730.

doctrine of stare decisis.[206] Justice Breyer, however, believed that *Belton* was poorly reasoned.[207]

B. Did Gant *Overrule* Belton*?*

Before analyzing the stare decisis concerns raised by Justices Breyer and Alito, it is necessary to answer an initial question: did *Gant* overrule *Belton*? The majority vehemently denied overruling *Belton*,[208] instead stating that the Court was merely settling confusion over the scope of *Belton*.[209] This statement cannot withstand scrutiny. The Court admitted that the "predomina[nt]" view among the lower courts is to interpret *Belton* broadly, but insisted that there was a federal circuit split.[210] The cases cited by the Court do not support this proposition.[211] First, the Court cited the Fifth Circuit case *United States v. Green*.[212] This case cannot possibly support the idea that lower courts interpreted *Belton* narrowly because the opinion explicitly states that *Belton* does not apply.[213] Next, the Court cited the Tenth Circuit case *United States v. Edwards*.[214] Again, this case did not interpret *Belton* at all because the defendant was 100 to 150 feet away from his car at the time of arrest and did not have control over the car immediately preceding his arrest.[215] Finally, the Court cited the Ninth Circuit case *United States v. Vasey*.[216] In *Vasey*, the basis for suppressing the evidence was that the search incident was not *contemporaneous* with the arrest because it occurred thirty to forty-five minutes after the arrest.[217] The *Vasey* opinion explicitly uses this fact to distinguish itself from other cases where searches were upheld despite the defendant being handcuffed at the time of the search.[218] Thus, the only evidence of the purported narrow interpretation of *Belton* is among states interpreting their own state constitutions rather than the federal Constitution.[219]

206. *Id.* at 1725–26 (Breyer, J., dissenting).

207. *Id.* (asserting that the search incident to arrest exception developed in *Belton* "can produce results divorced from its underlying Fourth Amendment rationale").

208. *Id.* at 1722 n.9 (majority opinion).

209. *Id.* at 1719.

210. *Id.* at 1718.

211. *Id.* at 1718 n.2.

212. *Id.* (citing United States v. Green, 324 F.3d 375, 379 (5th Cir. 2003)).

213. *Green*, 324 F.3d at 378–79. It should be noted that this case would have turned out differently after *Thornton v. United States*, 541 U.S. 615, 623–24 (2004) (expanding the *Belton* bright-line rule to recent occupants of automobiles).

214. *Gant*, 129 S. Ct. at 1718 n.2 (citing United States v. Edwards, 242 F.3d 928, 938 (10th Cir. 2001)).

215. *Edwards*, 242 F.3d at 938.

216. *Gant*, 129 S. Ct. at 1718 n.2 (citing United States v. Vasey, 834 F.2d 782, 787 (9th Cir. 1987)).

217. *Vasey*, 834 F.2d at 787.

218. *Id.* ("These cases are distinguishable, however, because the searches in these cases followed closely on the heels of the arrest.").

219. *Gant*, 129 S. Ct. at 1721 n.8.

Conversely, the cases cited to show lower federal courts broadly interpreting *Belton* truly stand for that proposition.[220] The Supreme Court itself had assumed that the suspect did not have to actually be within reach of the automobile to apply *Belton* a mere five years before in *Thornton v. United States*.[221] Even a majority of the Justices in *Gant* agreed that Justice Stevens's narrow interpretation of *Belton* was a fallacy because *Belton* cannot fairly be read in the narrow fashion asserted by Justice Stevens.[222] The *Belton* decision explicitly created a bright-line rule because the Court was concerned that determining on a case-by-case basis if a suspect was within reaching distance of a car would be burdensome on police officers and lower courts.[223] Justice Stevens's narrow interpretation of *Belton* would not lessen this burden in the slightest. Justice Marshall and Justice Brennan dissented in *Belton* precisely because of the broad scope of the new bright-line rule.[224]

Justice Stevens's remaining argument hinged on a single line found in a footnote of the *Belton* opinion, which states that the *Belton* rule "in no way alters the fundamental principles established in the *Chimel* case."[225] The *Belton* majority, however, ardently believed they were being faithful to *Chimel* and merely used a generalization to make *Chimel* more workable in the context of automobiles.[226] Thus, the "narrow interpretation" of *Belton* was merely a ploy around a generalization that Justice Stevens and others thought to be unfounded.

If *Gant* did in fact overrule *Belton*, the question now becomes whether this was consistent with the doctrine of stare decisis.

C. Constitutional Stare Decisis and Arizona v. Gant*: A Perfect Match*

Arizona v. Gant is a troubling decision. Not only is it another swing of the pendulum in the Court's already turbulent and erratic search incident to arrest jurisprudence,[227] but it may highlight the Roberts Court's likely continuation of the trend of weakening the doctrine of constitutional horizontal stare decisis because a principled analysis of the Rehnquist stare decisis factors of relevance, workability, changed circum-

220. *See, e.g.*, United States v. Hrasky, 453 F.3d 1099, 1102 (8th Cir. 2006); United States v. Weaver, 433 F.3d 1104, 1106 (9th Cir. 2006); United States v. White, 871 F.2d 41, 44 (6th Cir. 1989).

221. 541 U.S. 615 (2004) (applying *Belton* when the defendant was handcuffed and locked in a squad car at the time of the search).

222. Justice Alito, Chief Justice Roberts, Justice Kennedy, and Justice Breyer all dissented, asserting that *Belton* allowed the police to automatically search an automobile contemporaneously to a lawful arrest. *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting). Justice Scalia concurred with the majority but agreed with the dissenters that *Gant* overturned *Belton*. *Id.* at 1724–25 (Scalia, J., concurring).

223. *See* New York v. Belton, 453 U.S. 454, 458 (1981); *see also Gant*, 129 S. Ct. at 1727 (Alito, J., dissenting).

224. *Belton*, 453 U.S. at 468 (Brennan, J., dissenting).

225. *Id.* at 460 n.3; *see Gant*, 129 S. Ct. at 1719 (majority opinion).

226. *Belton*, 453 U.S. at 460 ("In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization.").

227. *See* discussion *supra* Part III.A.

stances, and new developments in the law illustrate that *Belton* should not have been overruled.[228]

1. Applying the Rehnquist Court Factors

a. Reliance

The reliance factor weighs in favor of upholding *Belton*. Law enforcement personnel immeasurably relied on *Belton*'s bright-line rule.[229] Justice Stevens recognized this, noting that "*Belton* has been widely taught in police academies" and "law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years."[230] Justice Stevens quickly dismissed this concern, however, arguing that law enforcement reliance is outweighed if the police practice is unconstitutional.[231] But any underlying privacy interest is tangential to the weight of the reliance factor. The merits of the previous decision would only possibly be appropriate when analyzing the stare decisis factor of bad reasoning.[232] Thus, the reliance of law enforcement should not have been discounted by Justice Stevens's view of *Belton* on the merits.

Justice Stevens also argued that the reliance of law enforcement is not relevant for stare decisis purposes.[233] The interest of law enforcement personnel, however, is explicitly considered in the stare decisis analysis of *Dickerson v. United States*.[234] No policy rationale was provided in *Gant* for why reliance of law enforcement personnel should be discounted and none exists.[235]

The reliance of law enforcement also invariably intertwines with the general societal interest of the proper enforcement of criminal laws. Society has an interest in punishing individuals who ignore its laws.[236] Overruling *Belton* hindered this interest because *Gant* applied retroactively to

228. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) ("When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.").

229. *Gant*, 129 S. Ct. at 1722 (majority opinion).

230. *Id.*

231. *Id.* at 1723 ("The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."). This argument is contrived because the *Belton* search only became unconstitutional after *Gant*.

232. See *infra* Part IV for a discussion of why the reasoning and merits of a past decision should not be considered in a stare decisis analysis.

233. *Gant*, 129 S. Ct. at 1723 ("The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest . . . .").

234. 530 U.S. 428, 443 (2000) (noting that the *Miranda* rule had become "embedded in routine police practice"); *see also Gant*, 129 S. Ct. at 1728 (Alito, J., dissenting) ("If there was reliance in *Dickerson*, there certainly is substantial reliance here.").

235. *See Gant*, 129 S. Ct. at 1723 (majority opinion); *id.* at 1728 (Alito, J., dissenting).

236. WAYNE R. LAFAVE, CRIMINAL LAW 25–26 (4th ed. 2003).

pending cases, resulting in evidence suppression despite police officers' good faith reliance on the *Belton* rule.[237] Undoubtedly, it will take time for police officers to learn the *Gant* rule; in the interim, more evidence will be suppressed because officers will unwittingly continue to commit what are now unconstitutional *Belton* searches.[238] Evidence suppression in the context of recent arrestees of automobiles is particularly problematic because legal alternatives—such as inventory searches—are available.[239] Justice Stevens's refusal to account for law enforcement's reliance on the *Belton* rule also hindered the societal interest of judicial efficiency after a flood of defendants asked for their cases to be reconsidered in light of *Gant*.[240] Thus, police reliance on *Belton* impacted not only the police officers themselves, but society in general, which only bolsters the weight of the reliance factor for stare decisis purposes.[241]

b. Workability

The workability factor weighs heavily in favor of upholding *Belton*. The greatest strength of *Belton* was that it provided "a single familiar [bright-line] standard," which helped police officers with "limited time and expertise" apply it in the field and judges apply it in the courtroom.[242] Justice Stevens argued that *Belton* did not offer its promised clarity because there has been litigation over the meaning of contemporaneous and whether a search could take place after a suspect leaves the scene.[243] These issues, however, had already been fleshed out and clarified through twenty-eight years of case law.[244] Moreover, these issues are rel-

237. *See, e.g.*, United States v. Hrasky, 567 F.3d 367, 368 (8th Cir. 2009). But some courts have been unwilling to suppress evidence for illegal *Belton* searches made in good faith. *Compare* United States v. McCane, 573 F.3d 1037, 1045 (10th Cir. 2009) (holding the good-faith exception to the Fourth Amendment's exclusionary rule applied), *and* People v. Branner, 103 Cal. Rptr. 3d 256, 259 (Ct. App. 2009) (refusing to apply the exclusionary rule to an unconstitutional search under *Gant* because the officers relied in good faith on *Belton*), *with* United States v. Buford, 623 F. Supp. 2d 923, 927 (M.D. Tenn. 2009) (refusing to apply the good-faith exception to an unlawful *Gant* search). Of course, evidence will not be suppressed if a search falls within the new *Gant* rule.

238. *Gant*, 129 S. Ct. at 1728 (Alito, J., dissenting) ("It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule.").

239. Prosecutors have successfully invoked the inevitable discovery doctrine to avoid evidence suppression in some cases. *See, e.g.*, United States v. Morillo, No. 08 CR 676(NGG), 2009 WL 3254431, at *8 (E.D.N.Y. Oct. 9, 2009).

240. *See, e.g.*, People v. Hunter, 766 N.W.2d 844, 844 (Mich. 2009).

241. Admittedly, any Supreme Court decision creating new constitutional protections for criminal defendants could be characterized as interfering with society's interest in enforcing the law and the efficiency of the judiciary. Thus, neither can be outcome determinative. Nevertheless, these societal reliance interests remain relevant to a stare decisis analysis.

242. New York v. Belton, 453 U.S. 454, 458 (1981) (citations omitted); *see also Gant*, 129 S. Ct. at 1729 (Alito, J., dissenting).

243. *Gant*, 129 S. Ct. at 1720–21 (majority opinion).

244. *E.g.*, United States v. Hrasky, 453 F.3d 1099, 1101–02 (8th Cir. 2006) (noting that 8th Circuit precedent plainly illustrates that searches of an automobile incident after a suspect has left the scene are proper and discussing how case law has developed the meaning of "contemporaneous"); United States v. Weaver, 433 F.3d 1104, 1106 (9th Cir. 2006) (discussing how the 9th Circuit applies the *Belton* rule).

atively minor in comparison to the case-by-case litigation that will be necessary to determine if a suspect was actually within reaching distance of the automobile under the first part of the *Gant* rule.[245] In addition, the second part of the *Gant* rule—allowing searches incident to arrest when "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle'"—will result in new ambiguities.[246] For example, it is not clear what "reasonable to believe" means.[247] Thus, *Belton* was significantly more workable than the new *Gant* rule.

c. Changed Circumstances

The factor of changed circumstances weighs in favor of upholding *Belton*. Justice Stevens disagreed, writing, "[w]e now know that articles inside the passenger compartment are rarely within the area into which an arrestee might reach."[248] The validity of this statement is at best questionable. Did the *Belton* Court not understand that its generalization was over-inclusive? Justice Alito aptly points out that "surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence."[249] Even if the *Belton* Court did not consider searches of automobiles incident to arrest after an arrestee has been handcuffed—an extremely unlikely proposition—the Court conclusively applied *Belton* to this exact circumstance a mere five years before *Gant*.[250] Any changes in applicable police practices, the use of automobiles, and the need for bright-line rules have been *de minimis* and cannot justify overruling *Belton*.

d. New Developments in the Law

The factor of new developments in the law weighs in favor of upholding *Belton*. The Supreme Court's Fourth Amendment jurisprudence has repeatedly placed less value on individuals' privacy interest in their automobiles.[251] *Belton* was consistent with these cases by deferring to law enforcement interests.[252] Cases since *Belton* have only continued

245. *Gant*, 129 S. Ct. at 1729 (Alito, J., dissenting).

246. *Id.* at 1719 (majority opinion) (citations omitted); *id.* at 1729 (Alito, J., dissenting).

247. Myron Moskovitz, *The Road to Reason:* Arizona v. Gant *and the Search Incident to Arrest Doctrine*, 79 MISS. L.J. 181, 193–94 (2009) (attempting to explain what "reasonable to believe" means).

248. *Gant*, 129 S. Ct. at 1723 (majority opinion) (internal quotation marks omitted).

249. *Id.* at 1729 (Alito, J., dissenting).

250. Thornton v. United States, 541 U.S. 615, 617–18, 623–24 (2004) (holding that a search of an automobile incident to arrest was valid despite the search occurring while the arrestee was handcuffed in the back of a squad car).

251. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 52 (1970) (permitting searches or seizures of automobiles when officers have probable cause to believe that evidence of a crime or contraband will be found therein).

252. *See* New York v. Belton, 453 U.S. 454, 460–61 (1981) (allowing police officers to search the passenger compartment of the car and any containers therein incident to a lawful arrest of one of its occupants).

this trend.[253] Furthermore, *Belton* was reaffirmed in *Thornton* in 2004.[254] Thus, new developments in the law have strengthened the foundation of the *Belton* decision for stare decisis purposes.[255]

2. Other Possible Stare Decisis Considerations

The traditional Rehnquist Court stare decisis factors clearly favor upholding the *Belton* opinion. Nontraditional stare decisis considerations—such as the age of the decision, margin of victory, and bad reasoning—are more ambivalent, but also favor upholding *Belton*.[256]

a. Age of the Decision

Under the traditional view, older cases are viewed as more likely to be outdated and are therefore viewed with increased scrutiny and given less precedential value.[257] The *Belton* opinion, however, was reaffirmed as recently as 2004.[258] More importantly, the age of decision is only relevant if it shows the opinion is archaic and incongruent with modern reality. The factors of new developments of the law and changed circumstances already encompass concerns that a decision is outdated.[259]

In recent years, some Justices have argued that older decisions should be given greater stare decisis deference "as . . . society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."[260] Under this view, *Belton* deserved deference because it was twenty years old at the time *Gant* was decided. Thus, the age of decision cannot support ignoring the principles of stare decisis.

b. Margin of Victory

The margin of victory weighs in favor of overruling *Belton*. Part III.A highlighted the controversy that has always surrounded the application of the search incident to arrest exception. In *Belton*, five Justices—Stewart, Burger, Blackmun, Powell, and Rehnquist—joined the majority opinion and three Justices—Brennan, White, and Marshall—dissented.[261]

253. *See* California v. Acevedo, 500 U.S. 565, 580 (1991); Michigan v. Long, 463 U.S. 1032, 1051–52 (1983).

254. *See Thornton*, 541 U.S. at 623–24 (expanding *Belton* to apply to recent occupants of automobiles).

255. *But see* Arizona v. Gant, 129 S. Ct. 1710, 1721 n.8 (2009) (noting that a minority of states refuse to apply the *Belton* rule to their own state constitutions).

256. *See* Consovoy, *supra* note 12, at 78–81 (discussing how those factors are used in a stare decisis analysis).

257. *Id.* at 79.

258. *See Thornton*, 541 U.S. at 623.

259. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). To support overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court noted that circumstances had changed drastically since 1896, particularly the importance of public education.

260. South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

261. New York v. Belton, 453 U.S. 454, 454–55 (1981).

Justice Stevens concurred in the judgment, but his opinion cannot be characterized as supporting the principles of the majority opinion.[262] The *Thornton* opinion was decided by an equally thin margin.[263]

Nevertheless, margin of victory alone has never been the sole basis for overruling a past decision and the factor has marginal relevance.[264] Many constitutional issues sharply divide the liberal and conservative Justices; however, controversial cases benefit the most from stare decisis because such cases threaten the legitimacy of the judiciary by invoking the wrath of the public.[265]

c. Impact on Liberty

The de facto impact on liberty factor does not support overruling *Belton*. Although the liberty thesis suggests that the Court applies stare decisis more loosely in cases that take a restrictive view of constitutional rights, the *Belton* decision did not significantly impact liberty interests such as privacy.[266] *Belton* applies only to a small subset of individuals who are readily distinguishable from society in general.[267] Police could not just arbitrarily and capriciously search automobiles at will because a *Belton* search was only valid if the officer had probable cause to make an arrest.[268] Furthermore, overruling *Belton* had little practical implications for protecting individuals' privacy interests. Numerous other exceptions, such as the automobile exception and inventory search, still allow a determined law enforcement officer to search a recent arrestee's car in the future. Thus, the only individuals who benefit from the Court overruling *Belton* are defendants who subsequently have evidence suppressed because police searched their car relying on the now unconstitutional *Belton* rule.[269] In fact, as discussed in Part III.D below, the *Gant* decision may potentially harm liberty interests by threatening Fourth Amendment protection in many other areas.[270]

d. Bad Reasoning

Although the bad reasoning factor is murky, overall it favors upholding *Belton*. The Justices predictably split on the issue based on

262. *Id.* at 463 (Stevens, J., concurring).

263. Chief Justice Rehnquist wrote the majority opinion joined by Justices Kennedy, Thomas, and Breyer in full and Justice O'Connor except for footnote four. *Thornton*, 541 U.S. at 616. Justice Scalia concurred in the judgment and in an opinion joined by Justice Ginsburg. *Id.* Justice Stevens dissented in an opinion joined by Justice Souter. *Id.*

264. *See* Consovoy, *supra* note 12, at 78–79.

265. *See* Linda Greenhouse, *In Latest Term, Majority Grows to More than 5 of the Justices*, N.Y. TIMES, May 23, 2008, at A22.

266. *See* Ensign, *supra* note 105, at 1138.

267. *See Thornton*, 541 U.S. at 630 (Scalia, J., concurring).

268. New York v. Belton, 453 U.S. 454, 462–63 (1981).

269. *See, e.g.*, United States v. Buford, 623 F. Supp. 2d 923, 927 (M.D. Tenn. 2009) (suppressing evidence despite the officer's good-faith reliance on the old *Belton* rule).

270. *See infra* Part III.D.

whether they agreed with *Belton* on its merits.[271] Justice Scalia noted that the reasoning of *Belton* has been heavily scrutinized as an indefensible extension of the guiding *Chimel* rationales of officer safety and evidence preservation.[272] Critics argue that the *Belton* generalization that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item"[273] is simply unfounded.[274]

The reasoning of *Belton*, however, is not beyond justification. As an initial matter, it is unclear under *Chimel v. California*[275] whether "the area from within which an arrestee might gain possession of a weapon or destructible evidence is to be measured at the time of the arrest or at the time of the search."[276] Justice Alito aptly explains that *Chimel* would be a "specialty rule, applicable to only a few unusual cases" if the scope was measured at time of search because police officers almost always secure the area before conducting any type of search.[277] Although most legal scholars interpret *Chimel* as measuring the scope of the search at the time of the search, an examination of case law shows some disagreement among lower courts.[278] If *Chimel* measured the scope of the search incident to arrest from the time of arrest, the *Belton* generalization holds true because occupants of the car can usually reach areas of the passenger compartment at the time of arrest.[279]

Moreover, even if *Chimel* is interpreted to allow only searches contemporaneous with arrest, *Belton*'s reasoning remains defensible. In *United States v. Robinson*, four years after *Chimel*, the Court wrote, "A police officer's determination as to how and where to search the person

271. *But see* Arizona v. Gant, 129 S. Ct. 1710, 1725–26 (2009) (Breyer, J., dissenting) (arguing that stare decisis should apply despite disagreeing with *Belton* on its merits).

272. *See Thornton*, 541 U.S. at 625–33 (Scalia, J., concurring); Rudstein, *supra* note 6, at 1287–88.

273. *Belton*, 453 U.S. at 460 (1981) (quotation marks and brackets omitted).

274. *See Gant*, 129 S. Ct. at 1723; *Thornton*, 541 U.S. at 626 (Scalia, J., concurring) (noting that the government could only provide a single instance of a handcuffed arrestee "retriev[ing] a weapon from somewhere else"); Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657, 675–76.

275. 395 U.S. 752 (1969).

276. *Gant*, 129 S. Ct. at 1730 (Alito, J., dissenting) (quotation marks and brackets omitted). To illustrate this confusing concept, imagine that Daisy Defendant is in her automobile when approached by police officer Paulina who has probable cause to arrest Daisy for driving on a suspended license. At the time of arrest, Daisy would likely be inside the car or right next to it and therefore would likely be able to reach inside the passenger compartment for evidence or weapons. After she is handcuffed and put inside the police car, however, Daisy would likely not be able to reach inside the passenger compartment of her car. Because most searches occur after the suspect is completely secured, measuring from the time of the search would usually make the *Chimel*/*Belton* rule inapplicable. *Id.*

277. *Id.* It would also "create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer." *Id.* (quotation marks omitted).

278. *Compare* United States v. Moclavo-Cruz, 662 F.2d 1285, 1289–90 (9th Cir. 1981) (suppressing evidence when the police searched the arrestee's purse at the police department), *with* Curd v. City Court, 141 F.3d 839, 842 (8th Cir. 1998) (holding that a search of an arrestee's purse was constitutional despite occurring fifteen minutes after arrest).

279. *See Gant*, 129 S. Ct. at 1730 (Alito, J., dissenting).

of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search."[280] The *Robinson* Court made clear that it would not analyze ex-post the "probability" that one of the exigencies for the search incident to arrest exception was actually present, instead deferring to the judgment of law enforcement.[281] *Belton*'s bright-line categorical rule is consistent with the *Robinson* Court's deference to law enforcement and warranted because officer safety remains an issue even after suspects are handcuffed. An abundance of news stories show that handcuffed arrestees do escape or attempt to escape police custody.[282] It is unfair for judges—safely within courthouses surrounded by armed guards—and ivory-tower scholars to discount this legitimate safety threat. In light of this threat, the bright-line *Belton* rule makes perfect sense.

Of all the stare decisis factors, bad reasoning is most vulnerable to partisan manipulation. As *Belton* highlights, the reasoning of prior decisions is almost always debatable and Justices' determinations are often contingent on whether they believed the prior decision reached the correct outcome.[283] Unlike other stare decisis factors, formulating objective tangible criteria to evaluate the reasoning of a prior decision is extremely difficult considering the subjective nature of the factor.[284] Because asking Justices to separate their view of the prior decision on its merits and perform an "objective" analysis of the reasoning of a prior decision ignores human nature, bad reasoning may not be an appropriate consideration for stare decisis analyses.[285] If considered despite these immense problems, however, bad reasoning still does not support overturning *Belton*.

3. Why Was Belton *Overturned?*

Neither traditional nor nontraditional stare decisis factors can explain why *Belton* was overruled. *Belton* can only be explained by the Justices discounting stare decisis in favor of achieving what they deemed to be the "correct outcome." *Belton* was inconsistent with Justice Stevens's interpretation of the Fourth Amendment when it was decided, and Justice Stevens waited patiently for twenty-eight years until he could find

280. United States v. Robinson, 414 U.S. 218, 235 (1973).

281. *Id.*

282. *See, e.g.*, *Man Leads Police on Chase While Wearing Handcuffs*, WKYT 27 NEWSFIRST, http://www.wkyt.com/news/headlines/7645087.html?story (last visited Jan. 31, 2011); *Handcuffed Suspect Steals Police Car, Strikes SUV*, MSNBC (Dec. 23, 2010), http://www.msnbc.msn.com/id/21134540/vp/35601669#35601669 (presenting video evidence of a handcuffed arrestee locked in the back of a police car escaping). For a plethora of other examples see also *Trooper Trap: Prisoner Seatbelt Alarm*, http://www.oktrooper.com/examples-2007.html (last visited Jan. 31, 2011).

283. *See* Consovoy, *supra* note 12, at 80.

284. *See id.*

285. *See infra* Part IV.A.4.

enough support to overturn it.[286] It will be left to lower courts, police officers, and society generally to deal with the implications of the confounding *Gant* decision.

D. Implications of Arizona v. Gant

Arizona v. Gant exemplifies the pitfalls of ignoring the doctrine of stare decisis. It implicates the three main policy considerations that support the use of stare decisis: (1) ensuring predictability and stability in the law, (2) promoting judicial economy, and (3) protecting the legitimacy of the judiciary.[287]

1. Predictability and Stability of the Law

Gant creates unpredictability in the law. *Gant* replaced *Belton*'s bright-line rule, "leav[ing] the law relating to searches incident to arrest in a confused and unstable state."[288] The first part of the *Gant* rule forces lower courts to litigate on a case-by-case basis whether or not the suspect actually could have reached inside the car.[289] Unlike after *Belton*, usually neither the government nor the defendant can be certain whether evidence found in the suspect's car will get suppressed before trial.[290] Moreover, now lower courts must learn how to apply *Gant*'s new evidence-gathering rule and interpret the ambiguous meaning of "reason-to-believe" standard.[291] This adds uncertainty to a once stable area of the law.

Gant also generates uncertainty about Fourth Amendment law generally. The *Gant* decision leaves both *Chimel* and a plethora of lower court cases open to re-litigation. *Gant* revives the evidence-gathering rationale by allowing officers to search a car incident to arrest "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[292] This directly contradicts *Chimel*, which tied the search incident to arrest exception to the twin rationales of officer safety and evidence preservation.[293] If the evidence-gathering rationale justifies searches of cars incident to arrest, it is not clear why it should not apply in other settings. Consequently, the government may attempt to use *Gant* to overrule *Chimel* and expand the scope of the search incident to arrest exception, threatening privacy interests in a more significant man-

286. *See* New York v. Belton, 453 U.S. 454, 463 (1981) (Stevens, J., concurring); *see also* Thornton v. United States, 541 U.S. 615, 633 (2004) (Stevens, J., dissenting).

287. Consovoy, *supra* note 12, at 54.

288. Arizona v. Gant, 129 S. Ct. 1710, 1731 (2009) (Alito, J., dissenting).

289. *Id.* at 1723 (majority opinion).

290. Admittedly, the application of *Belton* was not *always* straightforward. *See, e.g.*, United States v. Doward, 41 F.3d 789, 791–93 (1st Cir. 1994). Usually, however, the bright-line rule could be summarily applied. *See, e.g.*, United States v. Maguire, 918 F.2d 254, 259 (1st Cir. 1990).

291. *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting).

292. *Id.* at 1714 (majority opinion).

293. Chimel v. California, 395 U.S. 752, 764 (1969).

ner than *Belton*. Additionally, many lower courts applied *Chimel* in cases "even where the item searched has been out of defendants' reach or defendants have been handcuffed."[294] These cases must now be reconsidered in light of *Gant*.

Most troubling, ignoring stare decisis in *Gant* has made it easier for Justices to justify outcome-oriented decisions. For example, in *Montejo v. United States*, Justice Stevens wrote a passionate dissent arguing that stare decisis should prevent the court from overruling the twenty-three-year-old case *Michigan v. Jackson*.[295] Justice Alito in a concurring opinion, however, justified overruling *Jackson*, writing, "[t]he treatment of stare decisis in *Gant* fully supports the decision in the present case."[296] This illustrates how stare decisis loses its future force when applied in an inconsistent and haphazard manner. All Justices, as well as society in general, ultimately suffer from this depreciation of stare decisis because their opinions will be less likely to stand the test of time.

2. Promoting Judicial Economy

Gant also hinders judicial economy. Judicial economy invariably intertwines with predictability and stability. Stable laws discourage litigation because contours of rules get fleshed out over time.[297] Thus, over time it becomes harder for litigants to distinguish their facts from past cases and easier for the courts to quickly apply vertical stare decisis. Litigants also have little incentive to expend resources to overturn past decisions if higher courts consistently apply horizontal stare decisis to uphold previous decisions.[298]

Gant provides an illustrative example of these principles in action. The bright-line rule established in *Belton* provided easy guidelines for courts to follow, thereby easing the workload of the judiciary and discouraging appeals.[299] Most pre-*Gant* cases applied the *Belton* rule summarily.[300] The contours and confusion that did exist after *Belton*—such as the meaning of contemporaneous—had already been dealt with by numerous decisions by the time *Gant* was decided.[301] Post-*Gant*, however, lower courts are faced with new ambiguities and must deal with a slew of

294. United States v. Morillo, No. 08 CR 676(NGG), 2009 WL 3254429, at *12 (E.D.N.Y. Aug. 12, 2009); *see, e.g.*, United States v. Nelson, 102 F.3d 1344, 1347 (4th Cir. 1996); United States v. Hernandez, 941 F.2d 133, 135–37 (2d Cir. 1991); United States v. Fleming, 677 F.2d 602, 607–08 (7th Cir. 1982).

295. Montejo v. Louisiana, 129 S. Ct. 2079, 2098–99 (2009) (Stevens, J., dissenting).

296. *Id.* at 2094 (Alito, J., concurring) (emphasis omitted).

297. Gely, *supra* note 12, at 106.

298. Consovoy, *supra* note 12, at 54.

299. Arizona v. Gant, 129 S. Ct. 1710, 1729 (2009) (Alito, J., dissenting) ("[T]he [*Belton*] rule was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply.").

300. *See, e.g.*, United States v. Jorge, 865 F.2d 6, 9 (1st Cir. 1989).

301. *See, e.g.*, United States v. Doward, 41 F.3d 789, 791–93 (1st Cir. 1994).

litigants trying to distinguish their cases from *Gant*.[302] The *Gant* opinion also shows significant disagreement among Justices, with Justice Scalia only joining the majority opinion to prevent a 4-1-4 decision.[303] This only increases the likelihood that the Court will be asked to reevaluate the search incident to arrest exception once again.

3. The Legitimacy of the Judicial Branch

Finally, *Gant* hinders the legitimacy of the judiciary. As Justice Thurgood Marshall eloquently wrote, "[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."[304] Conversely, every time the Court directly overturns its own decisions, it contributes to the common notion that members of the Supreme Court are really "politicians in robes."[305] Decisions like *Gant* damage the reputation of the judicial branch, which the Constitution purposefully designed to be separate from the politics of the other branches.[306] When the Supreme Court does not respect and follow its own decisions, it loses credibility with the public, ultimately making it more likely that lower courts and individuals will ignore the Court's decisions.

Overall, the *Arizona v. Gant* decision exemplifies both the weakened condition of stare decisis and the urgent need to both strengthen the doctrine and apply it consistently.

IV. RECOMMENDATION: USING STARE DECISIS TO STOP THE PENDULUM

The Court has reached a crucial point in its stare decisis jurisprudence. The doctrine has considerably weakened over the past forty years and has become subject to scholarly attack.[307] The Justices continue to selectively apply stare decisis, invoking its importance when it serves their purpose and ignoring it when it stands as a barrier to what they deem to be the "correct outcome."[308] It is easy to fall into the trap of outcome-oriented decision making; however, the history of the search incident to arrest exception shows the dangers of chasing the elusive "cor-

302. *See, e.g.*, United States v. Morillo, No. 08 CR 676(NGG), 2009 WL 3254429, at *12–14 (E.D.N.Y. Aug. 12, 2009).

303. *Gant*, 129 S. Ct. at 1725 (2009) (Scalia, J., concurring).

304. Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986).

305. Howard Wilkinson, *Rare Intersection of Law, Politics Raises Questions*, CINCINNATI ENQUIRER, Dec. 12, 2000, at A3.

306. Gerald E. Rosen & Kyle W. Harding, *Reflections upon Judicial Independence as We Approach the Bicentennial of* Marbury v. Madison*: Safeguarding the Constitution's "Crown Jewel,"* 29 FORDHAM URB. L.J. 791, 792 (2002).

307. *See* Banks, *supra* note 34, at 379 tbl.1; *see also* Rehnquist, *supra* note 12, at 370–76.

308. *Compare Gant*, 129 S. Ct. 1710, *with* Montejo v. Louisiana, 129 S. Ct. 2079 (2009).

rect outcome."[309] Since 1914, the Court has overturned or modified its own search incident to arrest doctrine an outlandish seven times.[310] Inevitably, voices will urge the Court to overturn or modify *Arizona v. Gant*.[311] But enough is enough. Valid arguments can be raised by Justices of all political leanings and legal philosophies. The Framers' true intentions for how the Constitution should be interpreted are debatable.[312] Reasonable Justices can disagree and sometimes there is no "correct outcome." Although adherence to stare decisis means *everyone* must compromise, all the Justices ultimately benefit from knowing future Justices will treat their own decisions with equal deference. Moreover, both Justices and society benefit from the judicial economy, stability, and the enhanced legitimacy of the judicial branch that stare decisis offers.[313]

Section A of this Recommendation presents a modified constitutional stare decisis test that can be used to apply the doctrine consistently and principally.[314] Then, Section B resolves that this proposed stare decisis test can nullify or minimize the concerns presented by critics of horizontal stare decisis.

A. The Proposal

To ensure that stare decisis is applied consistently and principally, four steps should be taken: (1) stare decisis should become a rebuttable presumption; (2) the Rehnquist Court stare decisis factors should be applied objectively; (3) the Court should consider the additional factors of impact of liberty and the availability of alternatives; and (4) irrelevant considerations such as the reasoning, age, and margin of victory of the prior decision should be ignored by the Court.

1. Why a Rebuttable Presumption?

"A rebuttable presumption is a legal fiction that allows the finder of fact to determine 'the existence of one fact (the presumed fact), for which there may be no direct evidence, upon presentation of proof of other facts (the basic facts).'"[315] In the context of horizontal stare decisis, the presumed fact would be applying stare decisis to uphold a point of

309. For one thing, such judicial flip-flopping resulted in a painful, but necessary lengthy march through the history of the search incident to arrest doctrine in Part III.A.

310. *See supra* Part III.A for a complete discussion of this erratic history.

311. Moskovitz, *supra* note 247, at 201 ("There are still several kinks in the opinion that need straightening . . . .").

312. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 1.4 (3d ed. 2006).

313. Consovoy, *supra* note 12, at 54.

314. This test is also applicable in statutory and common law cases; however, its application in such settings is beyond the scope of this Note.

315. Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 430–31 (1993) (footnotes omitted) (quoting 7 JAMES A. ADAMS & KASEY W. KINCAID, IOWA PRACTICE, EVIDENCE § 301.1 (1988)).

law upon a showing that a prior Supreme Court precedent on the matter exists. The burden of persuasion would then be placed on the opposing party to show that stare decisis should not be applied to uphold the previous decision.[316]

A rebuttable presumption is vital for both practical and symbolic purposes. The use of a rebuttable presumption formalizes "the special justification" requirement that the Court has already elucidated, putting it into a legal standard that is intimately familiar to the Justices.[317] It makes clear that the automatic default position is to uphold prior precedent and that the opposing party must address the stare decisis factors to possibly succeed on the merits.[318] The Court would no longer be able to briefly mention or ignore stare decisis when overturning past precedent, which has been all too common in the past.[319] A formal factor-by-factor stare decisis analysis would become a necessity to rebut the stare decisis presumption.[320] Forcing Justices to articulate why the stare decisis factors do not apply in a particular case ensures they will carefully consider their reasoning and justifications for ignoring stare decisis. A careful consideration of stare decisis validates decisions where the Court does decide to overturn past precedent; conversely, the Court risks appearing openly disingenuous if it manipulates the test to reach a results-oriented outcome.

2. The Objective Use of the Rehnquist Court Stare Decisis Factors

The success of stare decisis hinges on the good-faith application of the Rehnquist Court factors of workability, reliance, changed circumstances, and developments in the law.[321] The existence of any single factor should be neither necessary nor sufficient to ignore stare decisis. Examining each factor independently from the others from the perspective of a reasonable person is helpful, but insufficient alone. More importantly, the Court should avoid the common error of allowing the merits of a previous decision to adversely affect the stare decisis analysis.[322] Without these precautionary steps, stare decisis becomes vulnerable to being labeled a political tool of convenience.[323] Unfortunately, only the Justices' sense of accountability and fairness can ensure such objectivity.[324]

316. *Id.* at 431.
317. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).
318. *See id.*
319. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 817–27 (1991).
320. Justice Alito's dissent in *Gant* provides an example of how this would look. *See* Arizona v. Gant, 129 S. Ct. 1710, 1728–31 (2009) (Alito, J., dissenting).
321. Consovoy, *supra* note 12, at 76–78.
322. *See, e.g.*, *Payne*, 501 U.S. at 817–27.
323. *See* Cooper, *supra* note 12, at 402.
324. Powell, *supra* note 114, at 288 (noting that judicial restraint is crucial to the future success of stare decisis).

If analyzed objectively, however, the Rehnquist Court factors effectively screen out past decisions that no longer should be followed. The factors ignore the merits of the prior decision, instead encapsulating the underlying interests relevant to stare decisis. For example, workability implicates the efficiency of the judicial system and notions of fairness involves applying rules consistently to different individuals.[325] Conversely, the changed circumstances factor recognizes society's pragmatic interest in having the law adapt to meet modern realities.[326]

3. Additional Stare Decisis Factors

Although the traditional factors perform their screening role admirably, two additional factors should be considered by the Court to ensure that stare decisis is palatable to Justices of all political leanings: the impact on liberty and the availability of alternatives.[327] Before examining the synergy between these two factors, it is necessary to briefly look at each factor separately.

a. Impact on Liberty

The impact on liberty factor reconciles some of the inconsistency of the Rehnquist Court's stare decisis jurisprudence.[328] Essentially, this factor makes liberty "an additional and compelling factor in evaluating the force of stare decisis."[329] Thus, the force of stare decisis is weaker when prior cases take a restrictive view of individual liberty and stronger when prior cases take an expansive view.[330]

The Court should formally adopt this factor as part of the stare decisis test.[331] The addition of the impact of liberty factor is consistent with the spirit of a Constitution, which was "an inherently value-driven endeavor."[332] To ensure stare decisis cannot be exploited to the benefit of the liberal Justices in favor of an expansive Constitution, however, the availability of alternatives should also be considered.

b. Availability of Alternatives

Perhaps the most common rationale for decreasing the force of stare decisis in constitutional cases is that unlike the common law and statutes, the Constitution is extremely difficult to amend.[333] This critique

325. Gely, *supra* note 12, at 133–34.
326. *Id.* at 136–37.
327. *See* discussion *infra* Part IV.A.3.c.
328. *See supra* Part II.C.1.d.
329. Ensign, *supra* note 105, at 1138.
330. *Id.*
331. *Id.* at 1161–62.
332. *Id.* at 1160.
333. Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 617 (2002).

can be traced to Justice Brandeis's dissenting opinion in *Burnet v. Coronado Oil & Gas Co*.[334] To support this proposition, constitutional stare decisis critics point out that only twice have constitutional amendments—the Eleventh and Sixteenth Amendments—directly overruled Supreme Court cases.[335] Justice Brandeis's view, however, is misleading because it fails to distinguish "activist" and "non-activist" constitutional decisions.[336] "Activist" decisions "hold that the Constitution does in fact limit the scope of legislative choice in a particular fashion" and usually create new substantive rights.[337] For example, after *Brown v. Board of Education*, state legislatures and Congress were effectively powerless to allow segregation in U.S. schools.[338] Conversely, "non-activist" decisions, "hold [that] the Constitution does not prevent a branch of government from taking a given action" and usually limit the scope or eliminate substantive rights.[339] In these situations, usually either Congress or state legislatures can expand protection on their own initiative and thereby protect important liberty interests.[340] For example, Title VII, a civil rights statute passed by Congress in 1964, prevents discrimination in contexts well beyond the Supreme Court's Fourteenth Amendment jurisprudence.[341]

Thus, Justice Brandeis's argument against constitutional stare decisis is only legitimate in the context of "activist decisions." The Court can nullify this concern by considering the availability of alternatives in its stare decisis analysis. When alternatives are realistically available, stare decisis should be applied more vigorously; when alternatives are not available, the Court should apply a relaxed version of stare decisis. The availability of alternatives alone, however, would be problematic because it would allow conservative Justices to exploit stare decisis to achieve a narrower interpretation of the Constitution.

c. The Synergy of Impact on Liberty and Availability of Alternatives

When used in unison, the impact of liberty and availability of alternative factors allow stare decisis to be used in a principled and politically neutral manner. When realistic alternatives exist—which is almost always the case for most "non-activist" decisions[342]—the importance of the impact on liberty significantly weakens. If society deems a liberty interest to be compelling, individuals can pressure the more democratic and

334. 285 U.S. 393, 405–13 (1932) (Brandeis, J., dissenting); *see* Lee, *supra* note 333, at 617.
335. *Burnet*, 285 U.S. at 409 n.5.
336. Rehnquist, *supra* note 12, at 352–53.
337. Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 470–71.
338. *Id.* at 471.
339. *Id.*
340. *Id.*
341. Freed, *supra* note 12, at 1176 n.64.
342. Obviously, Congress and state legislatures can only pass legislation within the limits prescribed by the Constitution, but this rarely is an issue. Maltz, *supra* note 337, at 471.

responsive branches of government to achieve desired changes. Furthermore, a constitutional decision that truly needs "correction" because it is out of date with modern society's values or needs will almost always implicate the traditional Rehnquist stare decisis factors without an examination of the merits of the prior decision.[343]

In some circumstances, however, the stare decisis presumption should be weakened because realistic alternatives to protecting important liberty interests will not exist. "Activist" Supreme Court decisions are sometimes a necessity. Segregation might still exist without the intervention of the Supreme Court in *Brown v. Board of Education*.[344] Unpopular minority groups often cannot protect their rights through the democratic avenues of government.[345] For example, politicians are unlikely to protect even compelling liberty interests of sexual offenders.[346] The Supreme Court, as part of the most politically insulated and secure branch of the federal government, was designed to protect the significant liberty interests guaranteed to these individuals by the U.S. Constitution.[347] Thus, appropriately using the impact of liberty factor in conjunction with the availability of alternatives protects the Court's traditional role as the protector of minority rights without obliterating the viability of stare decisis.

4. Eliminating Irrelevant Stare Decisis Considerations

The Court must avoid consideration of factors that distort the objectivity of the stare decisis analysis or decrease judicial efficiency through redundancy. The age of the decision, the margin of the victory, and bad reasoning are factors that the Court should no longer consider.

The age of the decision has no relevance for stare decisis purposes. The theoretical concern underlying the age of the decision factor—that the decision is outdated—already is encapsulated by the factors of changed circumstances and new developments in the law.[348] In fact, longevity may prove that the prior decision is workable and increase the likelihood of substantial reliance.[349] It is redundant, however, to consider the age of the decision independently from the reliance factor. Moreover, the age of the decision may not be a perfect proxy for societal reliance because some older decisions may be entirely ignored. Thus, the

343. Justice Kennedy's stare decisis analysis in *Lawrence v. Texas* provides an apt example. *See* Lawrence v. Texas, 539 U.S. 558, 573–79 (2003); *supra* Part II.C.1.b.

344. 347 U.S. 483 (1954).

345. James A. Gardner, *Madison's Hope: Virtue, Self-interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 89 (2000).

346. *See* Catharine Skipp, *A Bridge Too Far*, NEWSWEEK, July 25, 2009 (discussing how Florida's residency restrictions on sexual predators have forced some to live under an overpass).

347. Ensign, *supra* note 105, at 1161.

348. *See supra* text accompanying note 259.

349. South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity.").

Court should not consider the age of the decision in their stare decisis analysis.

Margin of victory is also not an appropriate consideration. To the extent that the decision was an aberration, other stare decisis factors like inconsistency with developments of the law will be present.[350] In the politically divided Supreme Court, many of the most important and divisive issues will be decided by 5-4 margins.[351] Constantly overturning decisions involving these hot-button issues only adds to the notion that "the Court is speaking . . . simply for five or more lawyers in black robes," which stare decisis is designed to minimize.[352]

Finally, the reasoning of the prior decision should not be considered by the Court because this factor destroys the objectivity of the stare decisis analysis. The Justices' view of the reasoning of the prior decision almost inextricably ties into their perception of the merits of the prior decision.[353] All precedents relevant for the purposes of horizontal stare decisis require that at least a majority of the Court agree on a principle of law;[354] these Justices are unlikely to sign a decision without adequate contemplation. Admittedly, the reasoning of an opinion may become archaic or even illogical through the passage of time, but in these circumstances other stare decisis factors such as inconsistency with developments of the law and changed circumstances will almost certainly be present, allowing the decision to be overturned without depreciating the integrity of stare decisis. Thus, including the bad reasoning in the stare decisis analysis destroys objectivity with little cognizable benefit.

B. Addressing Concerns

This Note's proposal clashes with the mainstream scholarly consensus that constitutional horizontal stare decisis should either be significantly weakened or eliminated completely.[355] This Note anticipates that these scholars would have four major concerns with the above proposal and responds in kind. Scholars will most likely challenge the recommended proposal on these points: (1) the ability to adapt the Constitution to modern social and political understandings, (2) legislative inaction, (3) the need for "error" correction, and (4) the words of the Constitution.

350. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573–74 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), a 5-4 decision, in part because the decision was inconsistent with developments in the law).

351. *See* Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900–90*, 21 HOFSTRA L. REV. 667, 710 (1993).

352. Maltz, *supra* note 337, at 484.

353. *Compare* Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009), *with id.* at 1729 (Alito, J., dissenting). *But see id.* at 1725 (Breyer, J., dissenting).

354. EUGENE WAMBAUGH, THE STUDY OF CASES § 48, at 50 & n.1 (Little, Brown & Co., 2d ed. 1894).

355. *See supra* note 12 and accompanying text.

1. Court Reacting to Modern Politics and Social Policies

One objection to stare decisis is that it hampers the Court's ability to react to modern politics and social policies,[356] but this concern is negligible. The traditional stare decisis factors of changed circumstances and new developments of the law already inherently encompass shifts in politics and social policies.[357] Moreover, including the impact of liberty in the stare decisis analysis allows the Court to push forward social and political change in appropriate situations.[358] Thus, strengthening the application of stare decisis in constitutional cases does not prevent the Court from appropriately reacting to modern politics and social policies.

2. Legislative Inaction

Concern over legislative inaction is also overstated.[359] The proposed availability of alternatives factor already accounts for situations involving unpopular minority groups by decreasing the weight of the stare decisis presumption.[360] In other situations where an issue is important to the electorate, state representatives and members of Congress will react with legislation because their jobs depend on it.

A more legitimate argument is that the electorate itself may be unaware of or apathetic toward important Supreme Court decisions implicating their constitutional rights.[361] One possible solution is that scholars and the legal community, in the capacity of concerned citizens to whom Congress and state legislatures are responsible, can more zealously advocate for action. Moreover, it is questionable whether the Court should even address such cases unless traditional stare decisis factors are present if the electorate is not particularly interested in a change. Admittedly, *someone* must care if a case is appealed to the Supreme Court; however, the overall benefits of stare decisis—judicial economy, judicial legitimacy, and stability—outweigh the needs of an individual searching for a theoretically correct result.

Legislative modification of constitutional rules also limits unfair surprise. Overturning precedent implicates fairness concerns because the litigants will have taken actions relevant to their legal proceeding while the prior precedent was still good law.[362] For example, the police

356. Barnhart, *supra* note 12, at 1921.

357. *See supra* Part IV.A.2.

358. *See supra* Part IV.A.3.c.

359. *See* Freed, *supra* note 12, at 1771–75 (arguing that the "congressional acquiescence theory" is illogical).

360. *See supra* Part IV.A.3.c.

361. Countless polls indicate that the general public does not possess even minimal knowledge regarding the Supreme Court. *See, e.g.*, William Ford, *The Polls – Supreme Court Awareness*, EMPIRICAL LEGAL STUDIES (Feb. 23, 2006, 02:00 AM), http://www.elsblog.org/the_empirical_legal_studi/2006/02/supreme_court_a.html (indicating that a recent FindLaw poll showed that over half of Americans cannot name a single Supreme Court Justice).

362. Maltz, *supra* note 337, at 472.

officers in *Gant* performed a *Belton* search pursuant to their training while *Belton* still governed the search incident to arrest exception.[363] Thus, the *Gant* decision gave Rodney Gant an unexpected windfall in the form of evidence suppression, while ignoring the reasonable expectations of the government.[364]

3. "Error" Correction

William Shakespeare once wrote, "'[t]will be recorded for a precedent, [a]nd many an error by the same example [w]ill rush into the state."[365] Shakespeare's quote captures the concern of modern legal scholars who worry that stare decisis will prevent the Court from overturning "illegitimate and unconstitutional holdings" and replacing them with "correct decisions that will stand the test of time."[366] The erratic history of the search incident to arrest exception proves the fallacy of this argument. Over the past ninety-five years, the Court itself has overturned or modified its search incident to arrest doctrine seven times, unable to agree on the correct interpretation of the Fourth Amendment.[367] The error correction objection to stare decisis is premised on the fact that human beings are fallible; however, are the correcting Justices not equally human and fallible? Plainly, what is "right" and "constitutional" depends on which Justice you ask.

The principled use of stare decisis is not a straightjacket that prevents the Court from correcting all errors. The Rehnquist Court's stare decisis factors with the additional factors of impact of liberty and availability of alternatives instead merely add objectivity and consistency to deciding which precedents must be overturned. This Note's proposal to strengthen horizontal stare decisis merely stops the Court from overturning a prior decision because it *subjectively* disagrees with the merits of the prior decision. Interference with the subjective decision making of the Justices leads to a predictable related objection to stare decisis: the traditional role of the Court.

4. The Traditional Role of the Court

The most powerful objection to stare decisis is the common understanding of the traditional role of the Supreme Court. It is the Supreme Court that has "ultimate interpretive power" over the Constitution.[368] Unlike common law and statutory cases, in constitutional cases "the effects of an adjudication flow directly from an interpretation of the Con-

363. Arizona v. Gant, 129 S. Ct. 1710, 1722 (2009).

364. *Id.* at 1722–24.

365. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1; *see* Freed, *supra* note 12, at 1767.

366. Barnhart, *supra* note 12, at 1921–22.

367. *See supra* Part III.A.

368. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

stitution itself."[369] In other words, any constitutional decision must faithfully encompass and "square[] with . . . [the] language, values and structure" of the Constitution itself instead of simply the Court's view on the best new rule.[370] Scholars argue that because the words of the Constitution trump any prior interpretation of those words in a judicial decision, the Court would be abandoning its duty as ultimate arbiter by strictly adhering to stare decisis.[371]

This objection oversimplifies the role of the Court. The Court has not always tried to definitively interpret incurably ambiguous constitutional provisions. Recognizing that other branches of government play a role in constitutional interpretation, the Court has often set broad constitutional guidelines and deferred to other branches to fill in the details. For example, in *Barker v. Wingo*, the Court recognized that it could not quantify the Sixth Amendment's speedy trial right and held that Congress and the states "are free to prescribe a reasonable period consistent with constitutional standards."[372] Congress responded by enacting the Speedy Trial Act of 1974.[373]

Furthermore, *Marbury v. Madison* does not require the Court to constantly reanalyze its own decisions for constitutionality.[374] The principles of horizontal stare decisis were recognized and valued by the Marshall Court.[375] Although the Framers purposefully wrote the Constitution broadly to ensure it could endure in perpetuity,[376] the Constitution was also supposed to provide the stability and consistency that the Articles of Confederation lacked.[377] The principled use of horizontal stare decisis fits within this framework. Stare decisis does not prevent the Court from modifying its prior interpretation forever; it merely recognizes that any change should occur slowly and with sufficient justification.[378] In the words of Justice Powell, it is doubtful that the Framers intended "the Constitution [to mean] nothing more than what five Justices say it [does]."[379]

369. Rehnquist, *supra* note 12, at 368.

370. *Id.* at 368–69. *But see* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 740 (1998).

371. Rehnquist, *supra* note 12, at 366.

372. 407 U.S. 514, 523 (1972).

373. 18 U.S.C. §§ 3161–3174 (2006).

374. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing authority for judicial review on legislative and executive actions).

375. Lee, *supra* note 33, at 670–74.

376. Rehnquist, *supra* note 12, at 369.

377. *See* Steven G. Calabresi & Livia Fine, *Original Ideas on Originalism: Two Cheers for Professors Balkin's Originalism*, 103 NW. U. L. REV. 663, 685 (2009).

378. Dickerson v. United States, 530 U.S. 428, 443 (2000).

379. Powell, *supra* note 114, at 288.

V. CONCLUSION

The Supreme Court has reached a critical fork in the road. Past misuse of horizontal stare decisis in constitutional cases has severely limited the credibility and viability of the doctrine,[380] resulting in the Roberts Court's increasingly cavalier attitude about stare decisis in its jurisprudence.[381] Scholars have attacked stare decisis as "nothing but the rhetorical ally of those in favor of yesterday's decisions."[382] Yet stare decisis is vital to the administration of justice because it protects the legitimacy of the judiciary, provides stability, and increases judicial efficiency.[383]

To protect the doctrine of stare decisis from withering away into obscurity, decisive action must be taken. This Note urges the Court to adopt a rebuttable presumption in favor of applying stare decisis in constitutional cases. By considering certain factors—workability, reliance, changes in circumstances, new developments in the law, impact of liberty, and availability of alternatives—the Court can principally and consistently apply stare decisis to disparate cases in a manner that is palatable to Justices of all political leanings.

The use of horizontal stare decisis means compromise. Although stare decisis prevents the Justices from accomplishing all the changes they may deem desirable, it helps ensure that their own opinions are treated with equal deference and respect in the future.[384] This Note responds to critics of horizontal stare decisis by recognizing that the strengthened use of constitutional stare decisis is not an insurmountable roadblock to modifying or overruling past decisions. The traditional stare decisis factors are designed to encompass decisions that are incongruent with the values of modern legal philosophy or the desires of modern society. For "non-activist" constitutional decisions, the legislative branch provides a viable alternative to protecting civil liberties, allowing liberty to be expanded slowly and democratically.[385] The impact on liberty factor protects the Court's traditional role as ultimate arbiter of the Constitution and allows the Court to counter popular sentiment in compelling situations.[386] This principled approach to constitutional stare decisis merely makes judicial activism more difficult. Individual Justices will no longer be able to quickly shape the Constitution in their own view of what is "right." Any potential drawbacks are more than outweighed by the compelling purposes underlying the doctrine of stare decisis, including protecting the integrity and legitimacy of the judiciary, promot-

380. *See* Consovoy, *supra* note 12, at 55–56; *see also supra* Part II.C.1.b.

381. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 920–25 (2010) (Roberts, C.J., concurring).

382. Rehnquist, *supra* note 12, at 376.

383. Consovoy, *supra* note 12, at 54.

384. *Id.* at 54–56.

385. Maltz, *supra* note 337, at 471.

386. Ensign, *supra* note 105, at 1160–61.

ing judicial economy and providing stable and predictable laws that society can rely on.[387]

Arizona v. Gant and the Court's erratic search incident to arrest history exemplify the necessity and desirability of adopting this Note's approach to applying horizontal stare decisis in constitutional cases.[388] The *Gant* majority ignored compelling reliance interests and the workability of the *Belton* rule in favor of imposing their own personal views of the right outcome, resulting in confusion in a once settled area of the law.[389]

Although the *Gant* decision arguably reaches an imperfect result,[390] the history of the search incident to arrest exception underscores how seeking the "right result" in this area may not best serve principal values of justice including reliability and stability.[391] Inevitably, litigants will ask the Court to reconsider *Gant*; however, the Court should use this opportunity to adopt a strengthened horizontal stare decisis test allowing Congress and state legislatures to make any necessary tweaks within appropriate constitutional limits. It is finally time to stop the swinging pendulum.[392]

387. Consovoy, *supra* note 12, at 54.
388. *See supra* Part III.D.
389. *See supra* Part III.D.
390. *See supra* Part III.D (discussing many of the negative implications of the *Gant* decision).
391. *See supra* Part III.D.
392. *See* Chimel v. California, 395 U.S. 752, 758 (1969).