# OVERRULED BY IMPLICATION

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#### I. INTRODUCTION

The Supreme Court of the United States has repeatedly stated that it reserves the exclusive "right" to overrule its own precedents.<sup>1</sup> This proposition, as far as it goes, seems fairly unproblematic, as the concept of vertical stare decisis is well established in American jurisprudence.<sup>2</sup> Thus, though some have suggested that lower courts should have some ability to disregard Supreme Court precedent,<sup>3</sup> most would agree that mere disagreement with a prior decision, a belief that a case was wrongly decided, a sense that a case would be decided differently if decided to-day, or even a thought that, for reasons independent of any decision, a holding is likely to be overruled are insufficient reasons for disregarding superior court precedent.<sup>4</sup>

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<sup>1.</sup> See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). A court may be said to "overrule" a precedent when one of its holdings, or some portion thereof, is irreconcilably inconsistent with an earlier holding, or some portion thereof. The effect of such an overruling is that the later holding, rather than the earlier, becomes binding law for that court and those obliged to follow it, at least until the more recent holding is itself overruled or otherwise abrogated. See Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 STAN. L. REV. 953, 1090 n.447 (2005) ("Case B can be thought of as overruling Case A if a holding of Case B and a holding of Case A are inconsistent."). For more on the nature and practice of overruling, see *infra* Parts II.A, III.C.

<sup>2.</sup> See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) ("[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it.") Where the "superior" court is the Supreme Court and the precedent involves the making or interpretation of federal law, "subordinate" courts include not only lower federal courts, but also state courts. *See id.* at 825.

<sup>3.</sup> See, e.g., Gary Lawson, Mostly Unconstitutional: The Case Against Precedent Revisited, 5 AVE MARIA L. REV. 1 (2007).

<sup>4.</sup> See Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."); C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 83 (1990) ("A lower court clearly violates its duty of allegiance to the Su-

A different problem arises when two or more Supreme Court precedents seem to conflict. What if an apparently relevant precedent has been eroded by one or more later decisions? One might expect that, in the event of irreconcilable conflict, the more recent precedent would control.<sup>5</sup> Yet, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>6</sup> the Court stated: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."<sup>7</sup> This statement is troublesome in that it has caused lower courts to follow Supreme Court precedent that has not yet been *expressly* overruled, but has been overruled *by implication*. This Article shows that this statement need not be followed—and indeed, if lower courts are to faithfully comply with their duties under vertical stare decisis, it must not be followed.

The next Part of this Article begins with a discussion of the Supreme Court's longstanding practice of overruling by implication, and it provides as an example the Court's implicit overruling of its holding in *Almendarez-Torres v. United States.*<sup>8</sup> Part II also shows that, notwith-

5. See supra note 1. See also Ashutosh Bhagwat, Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power," 80 B.U. L. REV. 967, 972 (2000) (discussing the "seemingly uncontroversial . . . power of lower court judges to conclude that a Supreme Court precedent has been undermined by later decisions to the point that it has been *implicitly* overruled by the Court itself, and is therefore no longer binding."). Of course, if what seems to be a conflict can be reconciled, the lower court would apply the more relevant precedent, regardless of age.

6. 490 U.S. 477 (1989).

7. Id. at 484.

8. 523 U.S. 224 (1998).

preme Court when, simply because the lower court feels the earlier Supreme Court decision was analytically wrong, it rejects a precedent that the Supreme Court has not questioned."); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5 (1994) ("[T]he overwhelming consensus reflected by judicial and academic discourse holds that lower courts ought to define the law merely by interpreting existing precedents, without considering what their higher courts would likely do on appeal.").

The aforesaid court practices should be distinguished from those situations in which a *party* urges the overruling of some precedent it acknowledges to be binding, a practice generally regarded as legitimate. *See* FED. R. CIV. P. 11(b)(2) (approving (by implication) of "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). Also distinguishable are those instances in which lower courts follow superior court precedent, though criticize the same in dicta, another practice that seems to be regarded as legitimate. *See* Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1299 (1952) ("Where the precedent has not been impaired, the balance is in favor of the trial judge following it in his decree and respectfully stating in his accompanying opinion such reservations as he has. . . . [T]he reservation in the opinion promotes the growth of the law in the court where it most counts. For if the criticism of the precedent be just, the appellate court will set matters straight, and any trial judge worthy of his salt will feel complimented in being reversed on a ground he himself suggested."). For more on the nature and use of dicta in judicial opinions, see *infra* Part III.A.

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standing the overruling of Almendarez-Torres, lower courts continue to follow that precedent, largely because of *Rodriguez de Ouijas*. Part III of this Article consists of a criticism of the Court's statement in Rodriguez de Quijas. Part III shows that this statement is dicta and therefore need not be followed by any lower court. Part III further shows that even if regarded as somehow binding on lower courts, the Court's statement in Rodriguez de Quijas has itself been overruled by implication, thereby obligating the lower courts to disregard contrary authority. Finally, Part III shows that the Court's statement in Rodriguez de Quijas should be expressly overruled, both because it fails to survive the Court's own test for assessing the viability of precedent and because an express overruling would more clearly indicate that the Court's statement in Rodriguez de *Quijas* cannot be read as impeding the lower courts' ability to resolve precedential conflicts. This Article concludes that, regardless of whether the Court expressly overrules Rodriguez de Quijas, lower courts must disregard the Court's statement in that case and consider themselves free to recognize when cases, such as Almendarez-Torres, have been overruled by implication.

### II. THE PRACTICE OF OVERRULING BY IMPLICATION AND THE PROBLEM CREATED BY *RODRIGUEZ DE QUIJAS*

#### A. The General Concept of Overruling by Implication

Though lower federal courts, as well as state courts, are obligated to follow Supreme Court precedent on matters of federal law,<sup>9</sup> the Supreme Court itself is not so bound. Rather, the Supreme Court has the power to overrule its own precedent<sup>10</sup> and has in fact overruled precedent on many occasions.<sup>11</sup> When the Supreme Court does overrule precedent, it often does so expressly.<sup>12</sup> In that situation, lower courts are obliged to follow

<sup>9.</sup> See supra note 2 and accompanying text.

<sup>10.</sup> See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (observing that "it is common wisdom that the rule of *stare decisis* is not an 'inexorable command'"). Though the Court acts as though it is somewhat constrained in its ability to overrule precedent (*see infra* Part III.C), there is little doubt that it has the ability to do so, at least under certain circumstances.

<sup>11.</sup> See, e.g., Payne v. Tennessee, 501 U.S. 808, 828 (1991) (observing that "the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions"). This is not a new phenomenon. See, e.g., William O. Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 743 (1949) ("In the period from 1937-March 28, 1949, the Court in 30 cases overruled earlier decisions."). Some place the total count at more than 200. See CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, 2387–99 (2002).

<sup>12.</sup> See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989) ("For all of these reasons, therefore, we overrule the decision in *Wilko."*). See also Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority sub silentio.").

the overruling decision.<sup>13</sup> But the Supreme Court sometimes overrules prior holdings only by implication.<sup>14</sup> As the Court stated more than a century ago: "Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not."<sup>15</sup> Thus: "Although a lower court is bound by a prior decision of a higher court until that decision is overruled, there are circumstances in which a prior decision will be overruled implicitly rather than explicitly. A lower court is not bound to follow a decision that has been implicitly overruled."<sup>16</sup>

Therefore, it should be apparent that no special language is necessary to overrule a prior decision; the simple existence of some later, irreconcilably inconsistent holding by the same court is sufficient.<sup>17</sup> Indeed, it does not seem particularly important whether the later court intended to overrule its prior holding or whether it was even aware that it was doing so.<sup>18</sup> Thus, at the Supreme Court level, precedent—to the extent it

16. 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 134.05[6], at 134–46 (3d ed. 2008). See also Hugh Baxter, Managing Legal Change: The Transformation of Establishment Clause Law, 46 UCLA L. REV. 343, 445–46 (1998) ("Deciding that the Supreme Court's own cases implicitly have overruled an earlier precedent defers to, rather than defies, the Court's authority.").

17. Conversely, the mere inclusion of language in a Court's opinion that "Case A is hereby overruled," if not supported by a holding to that effect, would not, in fact, result in the overruling of Case A. This is but a corollary of the larger notion that, with respect to precedent, a holding is binding, whereas dicta is not. *See infra* Part III.A.

<sup>13.</sup> See Bradford, *supra* note 4, at 83 ("If the later Supreme Court decision expressly overrules the earlier case, unquestionably the lower court should follow the latest pronouncement. Rejection of the precedent that the Supreme Court has itself overruled is not infidelity to the higher court.").

<sup>14.</sup> See, e.g., Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (recognizing the implicit overruling of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), by the Court in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972)); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J. L. & PUB. POL'Y 947, 953 (2008) (arguing that in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court implicitly overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>15.</sup> Asher v. Texas, 128 U.S. 129, 131–32 (1888). *Accord* John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 759 n.5 (2008) (Stevens, J., dissenting) ("[T]he doctrine [of stare decisis] should not prevent us from acknowledging when we have already overruled a prior case, even if we failed to say so explicitly at the time.").

<sup>18.</sup> See Maurice Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 24 (1967) ("Whichever circumstance accounts for the non-citation, it is generally advisable that the lower courts give effect to the principle expressed in the latest decision."); Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 520 (2003) ("Even when a case does not intend to perform the act of overruling, future cases may deem that the case has done so, when viewing the case retrospectively. In other words, the Justices may choose to overrule a case simply by stating that the case has already been overruled."). In spite of the foregoing, Dunn argues

<sup>[</sup>t]his is not to confuse when the act of overruling actually takes place. As the Court explained in *Hohn v. United States*, "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." Thus, a case is not overruled until we can point to that single,

exists—may be either followed, distinguished, or overruled. There are no other choices.<sup>19</sup> Though it might be possible for a Court to be ignorant of or even to consciously disregard relevant precedent, the resulting holding, unless distinguishable, must be seen as overruling the earlier precedent.<sup>20</sup> If that result was unintended or mistaken, it may of course be corrected in the future, in that the implicit overruling may itself be overruled. But until that time, the later decision must control—the two conflicting precedents cannot co-exist.<sup>21</sup>

Some have criticized the practice of overruling by implication,<sup>22</sup> and certainly, express overruling has some advantages. For one thing, express overruling more clearly informs the consumers of judicial decisions that a prior precedent is no longer good law.<sup>23</sup> Express overruling

19. See Schauer, supra note 18, at 594 n.47.

20. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 98 n.119 (1991) ("Implicit overrulings and distinguishing cases differ in their respective practical effects: an implicitly overruled precedent no longer controls even the fact situation it initially purported to resolve, while a distinguished precedent at least retains sufficient vitality to resolve a fact situation identical to that which it originally settled.").

21. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."). See also Kelman, supra note 18, at 28 ("Absent a fair ground of logic or policy which serves to reconcile later with prior decisions, the lower courts should not shrink from declaring that an implied overruling has taken place and should in that event give full effect to the change.").

22. One such scholar is Christopher J. Peters, who refers to this practice somewhat pejoratively as "under-the-table overruling." Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067, 1068 (2008).

23. See Central Va. Community College v. Katz, 546 U.S. 356, 393 (2006) (Thomas, J., dissenting) ("It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority's action today, by contrast, is difficult to comprehend."); Douglas, *supra* note 11, at 749 ("[I]t would be wise judicial administration when a landmark decision falls to overrule expressly all the cases in the same genus as the one which is repudiated, even though they are not before the Court.

identifiable utterance in which the Court intends the act of overruling. To hold otherwise would violate one of the felicity conditions of the act of ruling—namely, that the author of an opinion must intend for the performative act to take place. Rather, an utterance that implies that a case has been overruled previously is simply a justification for the explicit act that is currently being performed.

*Id.* (footnote omitted) (quoting Hohn v. United States, 524 U.S. 236, 252–53 (1998)). But there are at least two problems with this argument. First, it relies on a case that in turn relied on *Rodriguez de Quijas, see Hohn*, 524 U.S. at 253, and to the extent the latter authority is weakened, this argument would seem to follow. Second, though the Court presumably "intends" to decide a case however it decides it, and ought to know that its decision will likely have certain precedent-related effects, it does not necessarily follow, nor does it seem necessary, that the Court have "intended" those effects. Indeed, the full ramifications of its decisions are probably unknowable, in that they involve the behavior of an indeterminate number of other persons. *Cf.* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) ("[A] pure argument from precedent, unlike an argument from experience, depends only on the *results* of those decisions, and not on the validity of the reasons supporting those results.").

also might cause the issuing court to more carefully consider whether overruling is truly appropriate (or to at least articulate those considerations expressly).<sup>24</sup> Indeed, it might well be that reasons supporting express overruling outweigh those favoring overruling by implication.

But, while there might be *normative* concerns with overruling by implication, there do not appear to be any *legal* impediments to the use of this practice—i.e., there does not seem to be anything unconstitutional about it, and neither Congress nor the Court itself has repudiated this practice.<sup>25</sup>

Moreover, a consistent practice of express overruling, even if preferable, is not as easy as it might sound. For one thing, a serious com-

24. As Hugh Baxter explains:

Even in ordinary cases, the Court is expected to provide reasoned explanations for its decisions. This expectation increases with a decision to change the law, and particularly with a decision to overrule one of the Court's precedents. At least occasionally, this requirement might deter an overruling or other change in the law. In other cases, it leads the Court to take special care in constructing a plausible justification. Even if not formally enforceable against the Court, the requirement of reasoned explanation, like the norm of stare decisis, channels the course of the Court's law-transforming strategies.

Baxter, *supra* note 16, at 347 (footnotes omitted). *See also* Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 41 (2000) (Thomas, J., dissenting) (suggesting that "*sub silentio* overruling" would "offend *stare decisis* principles"). The stare decisis principles alluded to in these authorities are discussed in greater detail in Part III.C *infra*.

There might well be other advantages. For example, Professor Peters argues that overruling by implication does more damage to the courts' perceived legitimacy. *See* Peters, *supra* note 22, at 1079. And of course, express overruling probably would avoid the problems currently associated with *Rodriguez de Quijas*. But for the reasons stated in the main text, a complete discussion of the pros and cons of express versus implied overruling is unnecessary to the issues raised in this Article.

25. One might similarly observe that although it might be helpful if each act of Congress included a provision explaining which statutes were being amended or repealed, there appears to be no constitutional or statutory requirement that it do so.

Having said that, it might well be that the Court at least purported to repudiate overruling by implication in *Rodriguez de Quijas*, though even if it did, the Court appears to have overruled itself. For a more complete discussion of this possibility, *see infra* Part III.B.

There is candor in that course. *Stare decisis* then is not used to breed the uncertainty which it is supposed to dispel."). *See also* Gerhardt, *supra* note 20, at 98 n.119 ("Sometimes the Court can cause confusion when the Court does not make clear whether it is distinguishing or implicitly overruling precedent."); Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 57 n.22 (1982) ("Lower court judges have disagreed at times as to whether implied overruling has in fact occurred."). Of course, one might keep in mind that "[e]ven an explicit overruling may be difficult to perceive." *Id.* 

Professor Peters describes this phenomenon in somewhat different terms. He states that "if the [Supreme] Court announces in an opinion that it is overruling a constitutional precedent, most Americans will assume that it has in fact overruled a precedent; but if the Court does not announce that it is overruling a precedent, most Americans will assume that it has not in fact done so." Peters, *supra* note 22, at 1090. This statement is probably true, as is his statement that "most Americans' primary source of information about the Court is the media's reporting of what the Court says it does in its opinions." *Id.* But it also seems true that, given the phenomenon of implicit overruling, one—at least if learned in the law—should not make this assumption. In any event, all would probably agree that express overruling is at least somewhat more clear than implied.

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mitment to express overruling would require a search of the relevant reporters for any and all precedents contrary to any aspect of the holding of each later case. Such a search, particularly considering the number of cases the Court might decide in any given year, seems impracticable.<sup>26</sup> And even when express overruling is utilized, a somewhat related problem arises. Specifically, when the Court announces that one of its prior precedents has been overruled, it is probably the rare case in which *every* aspect of that prior holding is no longer good law. More typically, a later Court will only be overruling certain aspects of a prior holding-crucial aspects, to be sure, but less than all. Thus, though the Court typically announces overrulings without qualification,<sup>27</sup> ideally it should be stating that it is overruling only those aspects of its prior holdings implicated by the current holding. Though this too has been done on occasion (at least to some extent),<sup>28</sup> it is probably asking too much to expect courts to perform this exercise in every situation in which it arises. Overruling by implication avoids both of these problems (albeit by placing the burden of ascertaining the precise scope of a court's precedents on future courts and litigants). Thus, not only is overruling by implication permissible and done in fact, it also might be practically necessary, at least to some extent.

<sup>26.</sup> See Kelman, supra note 18, at 17 ("For appellate courts in these circumstances to compile a list of each and every prior case killed off by the major new pronouncement is almost unheard of. To do so goes beyond the needs of the moment and can, it is assumed, be trusted to inference."). See also Kniffin, supra note 23, at 57 n.21 ("Higher courts rarely enumerate all the precedents over-turned when a new principle is announced.").

<sup>27.</sup> See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989).

<sup>28.</sup> One such example can be found in *Payne v. Tennessee*, 501 U.S. 808 (1991), a case in which the Court considered the continuing vitality of *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989). "Reconsidering these decisions now," the Court ultimately concluded, "for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled." *Payne*, 501 U.S. at 830. But the Court then noted:

Our holding today is limited to the holdings of [*Booth* and *Gathers*] that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

# *B. A Case Study in Overruling by Implication: The Implicit Overruling of* Almendarez-Torres v. United States

Though examples of cases that have been overruled by implication are legion, one prominent, recent example can be found in *Almendarez-Torres v. United States*.<sup>29</sup>

*Almendarez-Torres* involved the determination of the elements of a crime with regard to the constitutional rights of a criminal defendant. It is established as a matter of federal constitutional law that the elements of a crime "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."<sup>30</sup> The key question in *Almendarez-Torres* related to the meaning of the term "element." It has long been held that this term consists of "every fact necessary to constitute the crime with which he is charged,"<sup>31</sup> and certainly, it includes what might be regarded as the "traditional" elements of a crime.<sup>32</sup> But does it include more? Specifically, does the Constitution require the inclusion of elements beyond those "facts" more traditionally regarded as the elements of a crime?

In *Almendarez-Torres*, the Supreme Court addressed this question in connection with 8 U.S.C. § 1326 and the crime of Alien in the United States After Deportation.<sup>33</sup> The "base" crime of Alien in the United States After Deportation, defined in § 1326(a), carries a maximum term of imprisonment of two years.<sup>34</sup> Subsection 1326(b) then describes four

<sup>29. 523</sup> U.S. 224 (1998).

<sup>30.</sup> Jones v. United States, 526 U.S. 227, 232 (1999).

<sup>31.</sup> In re Winship, 397 U.S. 358, 364 (1970).

<sup>32.</sup> See 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8(b), at 78 n.13 (2d ed. 2003) (defining "elements of a crime" as "its requisite (a) conduct (act or omission to act) and (b) mental fault (except for strict liability crimes)—plus often, (c) specified attendant circumstances, and sometimes, (d) a specified result of the conduct."). Today, most crimes are statutory, *see id.* § 2.1(a), at 103, and typically, the statute defining the crime sets forth the elements of that crime. But as the above definition indicates, more general principles of criminal law sometimes require the inclusion of elements beyond those expressly provided in the specific crime-defining statute. Still, those additional, non-statutory elements will be regarded as "traditional" elements of that crime.

<sup>33.</sup> See Almendarez-Torres, 523 U.S. at 226.

<sup>34. 8</sup> U.S.C. § 1326(a) (2006) currently provides:

Subject to subsection (b) of this section, any alien who-

<sup>(1)</sup> has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

<sup>(2)</sup> enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

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situations in which the maximum penalty for this crime may be increased. In particular, § 1326(b)(2) provides that a defendant "whose removal was subsequent to a conviction for commission of an aggravated felony" may be sentenced to a term of imprisonment of up to twenty years.<sup>35</sup> In a 5-4 decision, the *Almendarez-Torres* Court held that § 1326(b)(2) "is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the government to charge the factor that it mentions, an earlier conviction, in the indictment."<sup>36</sup> Thus, although the *Almendarez-Torres* Court acknowledged that a prior conviction *could* be an element of a crime, so long as the relevant statute so required (in which case the usual constitutional protections would attach), it held, as a matter of statutory construction, that § 1326 was not such a statute and that the Constitution otherwise did not require the treatment of a "penalty provision" as an element.<sup>37</sup>

The Supreme Court's holding in *Almendarez-Torres* was shortlived, though. Just one year later, the Court decided *Jones v. United States.*<sup>38</sup> The issue in *Jones* was whether a federal carjacking statute "defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict."<sup>39</sup> The Court held that the statute defined three distinct offenses, in part to avoid "serious questions about the statute's constitutionality."<sup>40</sup> Regarding the constitutional question, the Court described what was to become the standard: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."<sup>41</sup>

Though the version of § 1326 at issue in *Almendarez-Torres* was amended after that decision, the changes were slight and do not affect the analysis here.

<sup>35. 8</sup> U.S.C. § 1326(b)(2) (2006).

<sup>36.</sup> *Almendarez-Torres*, 523 U.S. at 226–27. The Court's opinion was delivered by Justice Breyer and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. *See id.* at 226. Justice Scalia filed a dissenting opinion, which Justices Stevens, Souter, and Ginsburg joined. *See id.* 

<sup>37.</sup> See id. at 239. It might be observed that, prior to *Almendarez-Torres*, the United States Court of Appeals for the Ninth Circuit reached the opposite result and held that § 1326(b)(2) defined a separate crime. See United States v. Gonzales-Medina, 976 F.2d 570, 572 (9th Cir. 1992). Indeed, a split among the circuits as to this issue appears to have led to the Court's decision to consider the issue in *Almendarez-Torres*. See Almendarez-Torres, 523 U.S. at 228.

<sup>38. 526</sup> U.S. 227 (1999).

<sup>39.</sup> Id. at 229.

<sup>40.</sup> Id.

<sup>41.</sup> Id. at 243 n.6.

Though the majority in *Jones* attempted to distinguish the Court's recent holding in *Almendarez-Torres*,<sup>42</sup> the dissent was not convinced:

First, the Court suggests that this case is "concerned with the Sixth Amendment right to a jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres." This is not a valid basis upon which to distinguish *Almendarez-Torres*....

The Court has not suggested in its previous opinions . . . that there is a difference, in the context relevant here, between, on the one hand, a right to a jury determination, and, on the other, a right to notice by indictment and to a determination based upon proof by the prosecution beyond a reasonable doubt. The Court offers no reason why the concept of an element of a crime should mean one thing for one inquiry and something else for another. . . .

Second, the Court is eager to find controlling significance in the fact that the statute at issue in *Almendarez-Torres* made recidivism a sentencing factor, while the sentencing fact at issue here is serious bodily injury. This is not a difference of constitutional dimension, and *Almendarez-Torres* does not say otherwise....

In 2000, in *Apprendi v. New Jersey*,<sup>44</sup> the Court squarely addressed the constitutionality issue confronted in *Jones*. In *Apprendi*, the defendant was charged with possession of a firearm for an unlawful purpose, a crime that carried a term of imprisonment of up to ten years.<sup>45</sup> But a separate statute, which applied when the underlying crime was committed "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity," extended the maximum term of imprisonment to twenty years.<sup>46</sup> The question before the *Apprendi* Court was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof

<sup>42.</sup> See id. at 248–49. The Court relied primarily on the "tradition of regarding recidivism as a sentencing factor," and the fact that a prior conviction "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249. The Court further observed that *Almendarez-Torres* did not involve the Sixth Amendment right to a jury trial, but rather only the "rights to indictment and notice." *Id.* at 248.

<sup>43.</sup> Id. at 268-70 (Kennedy, J., dissenting) (citations omitted).

<sup>44. 530</sup> U.S. 466 (2000).

<sup>45.</sup> See id. at 468.

<sup>46.</sup> Id. at 468-69 (quoting N. J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

beyond a reasonable doubt."<sup>47</sup> The Court's answer to this question—which was "foreshadowed by our opinion in *Jones*"—was yes.<sup>48</sup> The Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>49</sup>

As in *Jones*, the *Apprendi* Court distanced itself from its holding in *Almendarez-Torres*, which (it explained) was "at best an exceptional departure from the historic practice that we have described."<sup>50</sup> The Court later added the following:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.<sup>51</sup>

Justice Thomas, in a concurrence joined in part by Justice Scalia, argued "that the Constitution requires a broader rule than the Court adopts."<sup>52</sup> Justice Thomas reiterated that the crucial question in this area is how to determine which facts constitute the elements of a crime.<sup>53</sup> And after reviewing "[a] long line of essentially uniform authority" on this subject, Justice Thomas—who was a member of the *Almendarez-Torres* majority—concluded that this authority

establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravat-

<sup>47.</sup> Id. at 469.

<sup>48.</sup> Id. at 476.

<sup>49.</sup> *Id.* at 490. In so holding, the Court clearly rejected the structural argument relied upon in part by the *Almendarez-Torres* majority. *See id.* at 494 ("Despite what appears to us the clear 'elemental nature' of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). Incidentally, the Court's opinion, which was delivered by Justice Stevens, was joined by Justices Scalia, Souter, Thomas, and Ginsburg. *See id.* at 468. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer dissented. *See id.* 

<sup>50.</sup> Id. at 487.

<sup>51.</sup> *Id.* at 489–90 (footnote omitted).

<sup>52.</sup> Id. at 499 (Thomas, J., concurring).

<sup>53.</sup> See id. at 500.

ing fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny.<sup>54</sup>

Two years later, in *Ring v. Arizona*,<sup>55</sup> the Court considered the application of *Apprendi* to the Sixth Amendment right to a jury trial in capital proceedings.<sup>56</sup> Specifically, Arizona had a scheme whereby the trial court judge, "following a jury adjudication of a defendant's guilt of first-degree murder," was permitted to determine "the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty."<sup>57</sup> The Supreme Court, in an opinion delivered by Justice Ginsburg, held that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."<sup>58</sup>

Justice Scalia, in an opinion joined by Justice Thomas, concurred:

[A]s I wrote in my dissent in *Almendarez-Torres*, and as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls

*Id.* at 518–21 (citations omitted).

55. 536 U.S. 584 (2002).

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<sup>54.</sup> Id. at 501. Justice Thomas also added:

The consequence of the above discussion for our decision[] in *Almendarez-Torres*...should be plain enough, but a few points merit special mention.

First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment (often within extremely broad ranges).

Second, and related, one of the chief errors of Almendarez-Torres-an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment-for establishing or increasing the prosecution's entitlement—it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in Almendarez-Torres, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction.

<sup>56.</sup> See id. at 588.

<sup>57.</sup> Id.

<sup>58.</sup> *Id.* at 589. Justices Stevens, Scalia, Kennedy, Souter, and Thomas joined Justice Ginsburg's opinion. *See id.* at 587. Only Chief Justice Rehnquist and Justice O'Connor dissented from the Court's judgment. *See id.* 

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them elements of the offense, sentencing factors, or Mary Jane must be found by the jury beyond a reasonable doubt.<sup>59</sup>

Justice Kennedy, though still of the view that *Apprendi* was "wrongly decided," also concurred in the Court's opinion because *Apprendi* "is now the law, and its holding must be implemented in a principled way."<sup>60</sup> Finally, though Justice O'Connor dissented, even she acknowledged that the rule articulated in *Apprendi* "directly contradicts several of our prior cases," including *Almendarez-Torres*.<sup>61</sup>

Just two years later, in *Blakely v. Washington*,<sup>62</sup> the Supreme Court addressed the constitutionality of Washington's sentencing guidelines.<sup>63</sup> Despite the fact that the term of imprisonment imposed did not exceed the statutory maximum for the crime at issue, the Court reversed the judgment of the Washington Court of Appeals.<sup>64</sup> In so holding, the Court explained:

Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.<sup>65</sup>

The Court then continued:

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

<sup>59.</sup> Id. at 610 (Scalia, J., concurring) (citation omitted).

<sup>60.</sup> Id. at 613 (Kennedy, J., concurring).

<sup>61.</sup> Id. at 619 (O'Connor, J., dissenting).

<sup>62. 542</sup> U.S. 296 (2004).

<sup>63.</sup> According to the *Blakely* Court, the defendant

pleaded guilty to the kidnapping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." We consider whether this violated [the defendant's] Sixth Amendment right to trial by jury.

Id. at 298 (citation omitted).

<sup>64.</sup> *See id.* at 314. The Court's opinion was delivered by Justice Scalia and joined by Justices Stevens, Souter, Thomas, and Ginsburg. *See id.* at 297.

<sup>65.</sup> Id. at 303-04 (citations omitted).

Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid.<sup>66</sup>

In *United States v. Booker*<sup>67</sup>—which dealt with the United States Sentencing Guidelines—the Court again reaffirmed the *Apprendi* holding: "Any fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."<sup>68</sup> More recently, in *Cunningham v. California*,<sup>69</sup> the Court applied this rule to California's determinate sentencing law.<sup>70</sup>

Taken together, the preceding line of cases leads to two conclusions. First, the Court's holding in *Apprendi* has been applied broadly and in a wide variety of contexts, to the point where the Court's holding in *Almendarez-Torres* cannot fairly be reconciled with its holdings in similar cases decided since *Almendarez-Torres*.<sup>71</sup>

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<sup>66.</sup> *Id.* at 305 (footnote omitted). *See also id.* at 328 (Breyer, J., dissenting) ("The Court makes clear that it means what it said in *Apprendi*. In its view, the Sixth Amendment says that 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.") (citation omitted) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

<sup>67. 543</sup> U.S. 220 (2005).

<sup>68.</sup> Id. at 244.

<sup>69. 549</sup> U.S. 270 (2007).

<sup>70.</sup> See id. at 274. The Cunningham majority consisted of the Apprendi majority plus Chief Justice Roberts. See id. at 273. Justice Alito, along with Justices Kennedy and Breyer, dissented. See id.

It must be conceded that, in *Oregon v. Ice*, 129 S. Ct. 711 (2009), the Supreme Court declined to extend its holding in *Apprendi* beyond the proposition stated above. Instead, the Court held—in another 5-4 decision—that such considerations do not govern the decision whether a defendant convicted of multiple offenses may be given consecutive (rather than concurrent) sentences. *See id.* at 715. But the Court has never retreated from its holding in *Apprendi* in any "offense-specific context" and indeed recently reaffirmed that "it is within the jury's province to determine any fact . . . that increases the maximum punishment authorized for a particular offense." *Id.* at 714.

<sup>71.</sup> See also Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("Almendarez-Torres . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence . . . .").

It is true that the Court has never *directly* confronted the issue of whether *Almendarez-Torres* survived *Apprendi*; if it had, there would be no dispute along these lines. But as the Court itself has recognized, such a crabbed approach to precedent is not the law. For example, in *United States v. Gaudin*, 515 U.S. 506 (1995), the Court recognized that one of its precedents, *Sinclair v. United States*, 279 U.S. 263 (1929), was

not controlling in the strictest sense, since it involved the assertion of a Sixth Amendment right to have the jury determine, not 'materiality' under § 1001, but rather "pertinency" under that provision of Title 2 making it criminal contempt of Congress to refuse to answer a "question pertinent to a question under congressional inquiry."

*Id.* at 519 (citation omitted). Nonetheless, the Court concluded that "while *Sinclair* is not strictly controlling, it is fair to say that we cannot hold for respondent today while still adhering to the reasoning and the holding of that case." *Id.* at 519–20. And so it is here.

Second, a majority of the members of the Court has rejected the reasoning in *Almendarez-Torres*.<sup>72</sup> *Almendarez-Torres* was decided by a 5-4 margin,<sup>73</sup> and one member of the *Almendarez-Torres* majority, Justice Thomas, has since recanted and suggested that he would now vote with the dissent.<sup>74</sup> Moreover, the remaining four members of the *Almendarez-Torres* majority have conceded that "there is no rational basis for making recidivism an exception" in this context.<sup>75</sup> Two of those justices have recognized that "*Apprendi*'s rule that any fact that increases the maximum penalty must be treated as an element of the crime . . . directly contradicts" the Court's holding in *Almendarez-Torres*.<sup>76</sup>

There is, therefore, little doubt that *Almendarez-Torres* has been overruled,<sup>77</sup> at least by implication.<sup>78</sup> Although the Court has not yet expressly overruled *Almendarez-Torres*, its holding in that case has been completely eviscerated to the point where it has been rendered irreconcilably inconsistent with not one, but several subsequent holdings. And there is no indication that the Court intends to retreat from its more recent doctrine.<sup>79</sup>

<sup>72.</sup> See Shepard, 544 U.S. at 27 (Thomas, J., concurring in part and concurring in the judgment) ("[A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

<sup>73.</sup> See Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998).

<sup>74.</sup> See Apprendi v. New Jersey, 530 U.S. 466, 520-21 (2000) (Thomas, J., concurring).

<sup>75.</sup> Jones v. United States, 526 U.S. 227, 270 (1999) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor and Breyer, JJ., dissenting) (quoting *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting)).

<sup>76.</sup> Ring v. Arizona, 536 U.S. 584, 619 (O'Connor, J., joined by Rehnquist, C.J., dissenting).

<sup>77.</sup> Based on the discussion in Part II.A, *supra*, it would probably be more accurate to say that that portion of the holding in *Almendarez-Torres* case discussed herein has been overruled. But this shorthand way of expressing overruling is commonly used, and will be used here.

<sup>78.</sup> The scholarly commentary supporting this proposition is overwhelming. *See, e.g.*, Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973, 979 (2004) (arguing that "the logic of *Apprendi* . . . indicate[s] that the Constitution guarantees jury determination, beyond a reasonable doubt, of the existence of a prior conviction"). *See also* Brent E. Newton, Almendarez-Torres *and the* Anders *Ethical Dilemma*, 45 HOUS. L. REV. 747, 776–77 n.141 (2008) (collecting additional authorities).

<sup>79.</sup> Though several of the decisions in the *Apprendi* line have been close, the majority in each has been steadfast, and all of the Justices comprising those majorities remain on the Court. Moreover, in *Oregon v. Ice*, 129 S. Ct. 711 (2009), Chief Justice Roberts (also a member of the *Cunningham* majority) was willing to extend the reasoning in *Apprendi* to the consecutive sentence context (*see* 129 S. Ct. 720 (Scalia, J., dissenting)), strong evidence that he supports the less radical holding of *Apprendi* itself. By contrast, two longstanding dissenters in this line of cases, Chief Justice Rehnquist and Justice O'Connor, are no longer with the Court. And although Justice Alito agreed with the majority in *Ice*, so did Justices Ginsburg and Stevens, two long-time *Apprendi* supporters. *See id.* at 714. Thus, there is every indication that the *Apprendi* majority will continue to hold sway. Though future Court departures and additions obviously would change the dynamic to some degree, the minority viewpoint now bears the added burdens imposed by the doctrine of stare decisis. *See infra* Part III.C (discussing stare decisis doctrine generally).

# C. The Lower Courts' Failure to Recognize the Implicit Overruling of Almendarez-Torres

Because *Almendarez-Torres* has so clearly been overruled, one would expect lower federal courts, as well as state courts, to disregard *Almendarez-Torres* and treat recidivism as an element of a crime wherever appropriate. Surprisingly, though, the results to date have been precisely the opposite; in fact, it is not even close. Overwhelmingly, lower courts that have dealt with this issue post-*Apprendi* have held that *Almendarez-Torres* continues to apply where recidivism is used to increase the maximum penalty for a crime.<sup>80</sup>

There appear to be two main reasons why lower courts continue to follow the Supreme Court's holding in *Almendarez-Torres*.<sup>81</sup> First, courts continue to follow *Almendarez-Torres* because of the Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*<sup>82</sup> The precise issue before the Court in *Rodriguez de Quijas* was "whether a predispute agreement to arbitrate claims under the Securities Act of 1933 is unenforceable, requiring resolution of the claims only in a judicial forum."<sup>83</sup> The district court had held that such claims were not subject to arbitration pursuant to the Court's holding in *Wilko v. Swan.*<sup>84</sup> However, the court of appeals reversed, "concluding that the arbitration agreement is enforceable because th[e Supreme] Court's subsequent decisions have reduced *Wilko* to 'obsolescence."<sup>285</sup>

The Supreme Court, in substance, agreed with the court of appeals and held that "*Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbi-

<sup>80.</sup> See Shepard v. United States, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental 'imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.") (quoting Harris v. United States, 536 U.S. 545, 581–82 (2002) (Thomas, J., dissenting)); Newton, *supra* note 78, at 784 n.192 ("In the federal circuit courts alone, over 5,200 federal defendants have filed appeals ultimately seeking to have *Almendarez-Torres* overruled.").

<sup>81.</sup> There might well be more. For example, it might well be that some judges simply like, or prefer, the rule expressed in *Almendarez-Torres*. Moreover, some might be concerned about the effect an overruling of *Almendarez-Torres* might have on the rate of reversals in criminal cases (including, perhaps, those involving collateral review), particularly post-*Booker*. Nonetheless, this Article assumes that lower courts at least attempt to follow Supreme Court precedent regardless of any judge's personal views or concerns.

<sup>82. 490</sup> U.S. 477 (1989).

<sup>83.</sup> Id. at 478.

<sup>84. 346</sup> U.S. 427 (1953). See Rodriguez de Quijas, 490 U.S. at 479.

<sup>85.</sup> Rodriguez de Quijas, 490 U.S. at 479 (quoting Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1299 (5th Cir. 1988)).

tration agreements in the setting of business transactions."<sup>86</sup> Accordingly, the Court expressly overruled *Wilko*<sup>87</sup> and ultimately affirmed the judgment of the court of appeals.<sup>88</sup> Nonetheless, the Court added the following:

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.<sup>89</sup>

Second, lower courts continue to apply *Almendarez-Torres* because of language included in more recent Supreme Court decisions that suggests that its holding in *Almendarez-Torres* retains some vitality. Such language first appeared in *Jones*, wherein the Court, in its tentative, constitutional definition of "element," excluded prior convictions.<sup>90</sup> Similar language has been included in several Supreme Court opinions since.<sup>91</sup>

Although one cannot be certain why the Supreme Court included these statements in its opinions, in *Rodriguez de Quijas*, it seems fairly clear that the Court was concerned about the lower courts' ability to correctly ascertain the nature and scope of seemingly conflicting Supreme

*Id.* at 486 (Stevens, J., dissenting) (citations and footnote omitted). The dissent went on to cite additional examples of "judicial activism" in the form of "numerous" district court decisions that similarly "deviated from the rule established in *Wilko*." *Id.* at 486 n.1.

Incidentally, the Court's statement in *Rodriguez de Quijas* (or versions thereof) has been repeated by the Supreme Court in several later cases, including *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), and *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

91. See, e.g., Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). It might be observed, though, that this "prior conviction" exception was *not* mentioned in other discussions of this rule in later decisions. See, e.g., Cunningham v. California, 549 U.S. 270, 281 (2007) ("This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."); Ring v. Arizona, 536 U.S. 588, 589 (2002) ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Indeed, some of the cases in this line recite this rule both in this more general form and as supposedly qualified by *Almendarez-Torres*. It is unclear why greater recognition has not been given to these more general statements and to this apparent contradiction.

<sup>86.</sup> Id. at 484.

<sup>87.</sup> See id. at 485.

<sup>88.</sup> See id. at 486.

<sup>89.</sup> *Id.* at 484. Though four justices dissented, the dissent was, if anything, even more strident in its criticism of the court of appeals:

The Court of Appeals refused to follow *Wilko*, a controlling precedent of this Court. As the majority correctly acknowledges, the Court of Appeals therefore engaged in an indefensible brand of judicial activism. We, of course, are not subject to the same restraint when asked to upset one of our own precedents.

<sup>90.</sup> See Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

Court precedents.<sup>92</sup> As for the reason behind the prior conviction "exception," in *Jones*, it might not yet have been entirely clear whether Justice Thomas was completely on board with a broader definition of "element," his recantation of his position in *Almendarez-Torres* not coming until later, in *Apprendi*.<sup>93</sup> And as for why this language was repeated in *Apprendi* and certain later decisions, the most obvious explanation is that the Court was simply quoting *Jones* as written and without further reflection. To the extent the Court thought about the inclusion of this language at all, it might have been because the precise issue in *Almendarez-Torres* has yet to be revisited,<sup>94</sup> and though the Court presumably was aware of the scope of its holdings, it also was aware of the impact those decisions would have on the criminal law<sup>95</sup> and might have been in no hurry to see those holdings fully implemented. It also seems possible that, in some instances, this language was included by a justice who remains hostile to the new regime.<sup>96</sup>

Regardless, as a result of these cases, every court of appeals that has considered this issue has held that *Almendarez-Torres* remains "good law."<sup>97</sup> Typical of such cases is *United States v. Pacheco-Zepeda*,<sup>98</sup> wherein the Court of Appeals for the Ninth Circuit opined:

94. See, e.g., Ring, 536 U.S. at 597 n.4:

<sup>92.</sup> A more detailed discussion of the various possible interpretations of this statement can be found in Part III.B *infra*.

<sup>93.</sup> See supra notes 52-54 and accompanying text.

Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravated circumstances asserted against him. No aggravating circumstances related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.

<sup>95.</sup> See, e.g., Apprendi, 530 U.S. at 549-52 (O'Connor, J., dissenting).

<sup>96.</sup> One possible example might be found in *James v. United States*, 550 U.S. 192 (2007), wherein the Court (through Justice Alito) noted in dicta that it had "held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes." *James*, 550 U.S. at 214 n.8 (citing *Almendarez-Torres*). Of course, it is not yet clear whether and to what extent Justice Alito will adhere to *Apprendi*; in *Ice*, he voted with the majority, but so did Justices Ginsburg and Stevens, both staunch *Apprendi* supporters. Even Justice Alito's dissent in *Cunningham, see* 550 U.S. at 297, can be read as being consistent with the main thrust of *Apprendi*.

<sup>97.</sup> See, e.g., United States v. Webb, 255 F.3d 890 (D.C. Cir. 2001); United States v. Gomez-Estrada, 273 F.3d 400 (1st Cir. 2001); United States v. Anglin, 284 F.3d 407 (2d Cir. 2002); United States v. Weaver, 267 F.3d 231 (3d Cir. 2001); United States v. Sterling, 283 F.3d 216 (4th Cir. 2002); United States v. Barrera-Saucedo, 385 F.3d 533 (5th Cir. 2004); United States v. Aparco-Centeno, 280 F.3d 1084 (6th Cir. 2002); United States v. Morris, 293 F.3d 1010 (7th Cir. 2002); United States v. Kempis-Bonola, 287 F.3d 699 (8th Cir. 2002); United States v. Pacheco-Zepeda, 234 F.3d 411 (9th Cir. 2001); United States v. Cooper, 375 F.3d 1041 (10th Cir. 2004); and United States v. Marseille, 377 F.3d 1249 (11th Cir. 2004).

<sup>98. 234</sup> F.3d 411 (9th Cir. 2001).

Because *Apprendi* preserves *Almendarez-Torres* as a "narrow exception" to *Apprendi*'s general rule, we can conclude, at most, that *Apprendi* casts doubt on the continuing viability of *Almendarez-Torres*. If the views of the Supreme Court's individual Justices and the composition of the Court remain the same, *Almendarez-Torres* may eventually be overruled. But such speculation does not permit us to ignore controlling Supreme Court authority. Unless and until *Almendarez-Torres* is overruled by the Supreme Court, we must follow it.<sup>99</sup>

# III. A CRITIQUE OF *RODRIGUEZ DE QUIJAS* AND THE SUPREME COURT'S ATTEMPTED LIMITATION OF OVERRULING BY IMPLICATION

The Supreme Court's statement in *Rodriguez de Quijas* regarding the lower courts' supposed duty to "follow the case which directly controls"<sup>100</sup> is problematic for a number of reasons. For one thing, the Court's statement—which, "at least in its modern, implacable form, is of relatively recent vintage"<sup>101</sup>—was unaccompanied by any explanation or even citation to any other authority. Be that as it may, there are more serious, even fatal, problems with the Court's statement. First, the Court's statement in *Rodriguez de Quijas* is dicta and is not binding either on the Court or on any lower court. Second, the Court's statement in *Rodriguez de Quijas* has itself been overruled by implication. Lower courts should—indeed, they must—ignore this statement even in cases where it might apply, including those thought to be controlled by *Almendarez-Torres*.

## A. The Supreme Court's Statement Regarding Overruling by Implication Was Dicta and Need Not Be Followed

Before considering the precise meaning of the Supreme Court's statement in *Rodriguez de Quijas*,<sup>102</sup> one might consider some preliminary questions regarding the nature of that statement. Why the Court might have made this statement has already been discussed.<sup>103</sup> But even if the "why" is clear, one still might fairly ask what made the Court think it could make such a statement. In other words, what was the *basis* for

<sup>99.</sup> Id. at 414 (footnote and citations omitted).

<sup>100.</sup> Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

<sup>101.</sup> Bhagwat, *supra* note 5, at 970. *See also* Newton, *supra* note 78, at 799–800 ("Before 1989, most lower courts believed they possessed the authority to disregard Supreme Court decisions that appeared to have lost their precedential value (although never directly overruled by the high Court).").

<sup>102.</sup> The meaning of this statement is discussed in greater detail in Part III.B infra.

<sup>103.</sup> See supra note 92 and accompanying text.

making this statement, which the Court seems to regard as some sort of binding rule of law?

There seem to be two broad possibilities. The first, and perhaps most obvious possibility, is that the Supreme Court was simply announcing a rule of law in the course of deciding a case.<sup>104</sup> The Court undoubtedly is empowered to decide "Cases" and "Controversies,"<sup>105</sup> and in the course of deciding cases, it may announce rules of law—even novel rules of law—that serve not only as the basis for deciding that case, but also as precedent in future cases.<sup>106</sup> Thus, one might argue that, in the course of deciding *Rodriguez de Quijas*, the Court issued an opinion that included this statement, and for this reason this statement must be followed by lower courts.

The problem with this argument is that the mere inclusion of language in a Supreme Court opinion does not necessarily transform that language into law. Courts, including the Supreme Court, have long recognized a distinction between a holding and dicta<sup>107</sup> and have consistently held that only the former is binding.<sup>108</sup> Although the Court has yet to clearly demarcate the boundary between these concepts, Michael Abramowicz and Maxwell Stearns, in what might be the definitive treatment of this subject, conclude: "A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta."<sup>109</sup>

<sup>104.</sup> The other broad possibility—that the Court might have been engaging in supervisory court rulemaking—is discussed in Part III.A.2 *infra*.

<sup>105.</sup> U.S. CONST. art. III, § 2.

<sup>106.</sup> See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 838 (2003) [hereinafter Shannon, *Retroactive*].

<sup>107. &</sup>quot;The term dicta typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court." Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994). "A dictum is usually contrasted with a holding, a term used to refer to a rule or principle that decides the case." *Id.* 

<sup>108.</sup> As stated by the Court in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821): It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.

See also United States v. Gaudin, 515 U.S. 506, 522 (1995) (recognizing that obiter dicta "may properly be disregarded"); Kastigar v. United States, 406 U.S. 441, 454–55 (1972) (observing that language "unnecessary to the Court's decision" "cannot be considered binding authority"); Dorf, *supra* note 107, at 2000 ("It is commonplace that holdings carry greater precedential weight than dicta, 'which may be followed if sufficiently persuasive but which are not controlling.") (quoting Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935)).

<sup>109.</sup> Abramowicz & Stearns, supra note 1, at 1065. Professor Dorf adds:

Upon applying the foregoing test to the *Rodriguez de Quijas* Court's statement regarding the lower courts' supposed obligation to follow "the case which directly controls," it is clear that this statement is dicta. This statement had absolutely nothing to do with the manner in which the Court reached its decision in that case; indeed, the Court *affirmed* the judgment of the very court it was criticizing.<sup>110</sup> And, as dicta, this statement is not binding on any court. Thus, though a court may follow this statement, no court is obligated to do so.<sup>111</sup>

The same is true, incidentally, of any statements made by the Court that purport to exclude prior convictions from the constitutional definition of an "element." In *Jones*—the case in which this purported exception was first suggested—the Court was clear that its definition of "element" was only tentative, that precise issue having not been decided.<sup>112</sup> More importantly, *Jones* did *not* involve the use of a prior conviction to increase a defendant's sentence.<sup>113</sup> The same is true in *every* case decided by the Court in which this language has been repeated.<sup>114</sup> The

An aside is considered dictum because it forms no essential part of either the decision reached in the case or the rationale for the decision. Even if we assume that the court takes the opposite position on the issue addressed in the aside, neither the governing standard of law announced nor the outcome in the specific case will be changed.

Dorf, supra note 107, at 2008.

<sup>110.</sup> See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 486 (1989). Recall also that the *dissent* likewise agreed with this statement—often a clue that a statement cannot be considered part of the Court's holding. *See id.* at 486 (Stevens, J., dissenting).

It should be recognized, though, that one reaches the same conclusion when the lower court's judgment is *reversed* (or "vacated"), as it was in *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997). In *Khan*, the court of appeals was commended for following *Rodriguez de Quijas* and applying (misapplying, as it turned out) a Supreme Court precedent that appeared to have been implicitly overruled. *See id.* at 20. But nothing about the Court's statement in *Rodriguez de Quijas* led to the *Khan* Court's holding that the precedent in question had been effectively overruled. *See id.* at 21 ("With the views underlying *Albrecht* eroded by this Court's precedent, there is not much of that decision to salvage.").

The same is true of the Court's invocation of this statement in *Agostini*. See Agostini v. Felton, 521 U.S. 203, 235–38 (1997). Indeed, the *Agostini* Court all but acknowledged the same. See *id*. at 237–38 ("Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality."). See also Baxter, supra note 16, at 436 n.493 ("[T]he Court will affirm or reverse the lower court's judgment based on the Court's view of the substantive legal issue, not the lower court's obedience to the *Rodriguez de Quijas* principle. In fact, . . . the Court will affirm when the lower court disobeys the *Rodriguez de Quijas* stricture, and reverse when the lower court obeys.").

<sup>111.</sup> One might appreciate the irony, though, of the Court's attempts to compel the disregard of a holding, which is binding, through the use of dicta, which is not binding.

<sup>112.</sup> See Jones v. United States, 526 U.S. 227, 243 n.6 (1999) ("Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.").

<sup>113.</sup> See id. at 230 (describing the statute at issue in that case).

<sup>114.</sup> As Professor Murphy explains:

The extended discussion in *Apprendi* qualifying *Almendarez-Torres* suggests that the "other than the fact of a prior conviction" language in *Apprendi* is read too broadly if in-

holdings in *Apprendi* and later cases must be construed, then, without reference to any sort of prior conviction exception—an exercise that results in a rule of law that is irreconcilably inconsistent with any such exception.<sup>115</sup>

Though it is unclear why a lower court would so faithfully follow such dicta, two possibilities come to mind.<sup>116</sup> First, lower courts might lack a firm understanding of the distinction between a holding and dicta.<sup>117</sup> There is, after all, evidence that the Supreme Court itself does not fully understand this distinction,<sup>118</sup> and there is little reason to think that lower courts understand these concepts any better.<sup>119</sup> The chief difficulty

Another possibility, already alluded to, might be that some courts have invoked the rule in *Rodriguez de Quijas* as cover—i.e., as support for some particular, desired result. This seems at least plausible in the case of *Almendarez-Torres*, as many have voiced dissatisfaction with the *Apprendi* line of cases, and some might welcome a means of avoiding the application of that precedent as to convicted recidivists.

A third possibility might be that lower court judges are simply trying to curry favor with the justices on the Supreme Court or at least are hoping to avoid their wrath should they "err" (as the Fifth Circuit Court of Appeals did in *Rodriguez de Quijas*, making the "mistake" of being right for the wrong reasons). But however plausible these and other similar theories might seem, they are difficult to prove and, frankly, unpleasant to consider. Accordingly, this Article will focus only on the possibilities discussed in the main text.

117. This is a less extreme form of the theory set forth in note 116 *supra*.

118. See Dorf, supra note 107, at 2003 (observing that "no universal agreement exists as to how to measure the scope of judicial holdings").

119. Professor Dorf explains:

Judges often appear to take for granted that discerning the difference between holding and dictum is a routine, noncontroversial matter. Yet an examination of the kinds of statements that courts label dicta reveals gross inconsistencies. . . . [W]e would find consensus for the judgment that everything that is not holding is dictum and everything that is not dictum is holding, but little in the way of a substantive definition of either term.

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terpreted to create an exception to the general rule that any fact that increases the statutory maximum is subject to the jury trial and reasonable doubt guarantees. Read in context, the language seems merely to acknowledge that the issue of prior convictions was not before the *Apprendi* Court.

Murphy, *supra* note 78, at 990 (footnote omitted). This conclusion is not altered by the fact that this additional language was buried in the holding in those cases. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1257 (2006) ("A dictum is not converted into holding by forceful utterance, or by preceding it with the words, "We hold that . . . .") (ellipsis in the original).

<sup>115.</sup> Accord Murphy, supra note 78, at 979 (concluding that "both the logic of Apprendi and considerations distinct to the right to jury trial and the burden of proof indicate that the Constitution guarantees jury determination, beyond a reasonable doubt, of the existence of a prior conviction," and thus that lower courts "typically have misread Almendarez-Torres and Apprendi on this matter").

<sup>116.</sup> Actually, there might be other possibilities. For example, it might be that lower courts do not understand the distinction between a holding and dicta. In its extreme form, though, this theory seems implausible, for American judges undoubtedly have some understanding of this distinction and have some ability to separate a holding from dicta. (A less extreme form of this theory—and one that seems much more plausible—is discussed in the main text *infra*.)

with this theory, though, is that *no* court seems to be treating the Court's statement in *Rodriguez de Quijas* as dicta; to the contrary, every court seems to be taking it quite seriously.

This leads to a second possibility: At the Supreme Court level, perhaps the distinction between a holding and dicta no longer matters, or at least does not matter much. There is some evidence that this also is now largely true.<sup>120</sup> But this only raises more questions. *Why* has this distinction apparently been obliterated? And is this merging of a holding with dicta proper or a cause for concern?

Regarding the first question, perhaps part of the reason the distinction between a holding and dicta seems to have been blurred is because of the usefulness—and even legitimacy<sup>121</sup>—of at least one type of dicta. Though there might be many reasons why the Supreme Court might want to include dicta in its opinions,<sup>122</sup> one reason is to signal how it might resolve an issue it has not yet decided.<sup>123</sup> After all, the Court lately has shown little interest in resolving more than a handful of the cases brought before it,<sup>124</sup> and one way of dealing with the remainder is to indicate how

120. As summarized by Charles A. Sullivan:

The Supreme Court and the federal circuits, without erasing the distinction entirely, have moved away from [the] traditional view that only the holding of a case has precedential power. At least with respect to vertical precedent, there is an increasing tendency to hold inferior courts bound not merely by what the higher court *did* but by what it *said*.

Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1152 (2006) (footnote omitted); *see also* Bhagwat, *supra* note 5, at 994 ("[T]he traditional judicial distinction between dictum and a holding seems to play an increasingly insignificant role in the Court's opinions formulating the 'rule' that they create, and subsequently in lower courts' decisions analyzing and applying those rules."); Lev-al, *supra* note 114, at 1250 ("The distinction between dictum and holding is more and more frequently disregarded."). Indeed, *Black's Law Dictionary* now defines "dictum" simply as "[a] statement of opinion or belief considered authoritative because of the dignity of the person making it." BLACK'S LAW DICTIONARY 485 (8th ed. 2004).

121. See Dorf, supra note 107, at 2005–09 (discussing "legitimate" dicta); Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 HARV. L. REV. 603, 648 (1992) ("It is clear that dicta—whether or not courts deem it to constitute an 'advisory opinion'—run afoul of no constitutional or jurisdictional barrier."); Leval, supra note 114, at 1253 ("What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.").

122. See Neal Kumar Katyal, Judges As Advicegivers, 50 STAN. L. REV. 1709, 1800–03 (1998) (discussing possible functions of "advicegiving" in judicial opinions).

123. See id. at 1714 ("Advice in judicial decisions acts as a compromise—such language does not have the binding force of a holding yet provides some guidance and predictability for the future while simultaneously undermining some of the reliance interests that would mandate future application of stare decisis.").

124. For example, during the October 2007 Term, though 8,241 cases were filed in the Supreme Court, *see* 2008 Year-End Report on the Federal Judiciary 10, http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf, the Court issued only seventy-three opinions.

Dorf, *supra* note 107, at 2003–04. *See also* RICHARD A. POSNER, THE FEDERAL COURTS 377 (1996) ("[R]emarkably—considering how fundamental the distinction is to a system of decision by precedent—the distinction [between holding and dicta] is fuzzy not only at the level of application but also at the conceptual level.").

they might be decided in the future.<sup>125</sup> To the extent such dicta turns out to be prophetic—i.e., helps lower courts reach the results the Court itself would reach—one can see why lawyers and judges might give it the level of respect it seems to be receiving.<sup>126</sup> This is particularly true when the dicta in question appears to have been well-considered.<sup>127</sup>

The difficulty, though, is that not all dicta appear to be of the signaling variety, and some do not seem particularly well-considered. Instead, some seem much more gratuitous. Take once again the Court's statement in *Rodriguez de Quijas*: In commanding lower courts to follow "the case which directly controls," the Court was not even purporting to decide any *future* case. Following the Court's statement in *Rodriguez de Quijas* also might not help a lower court reach the correct result; indeed, if the court of appeals in that case would have followed "the case which directly controls," its judgment would have been reversed—and that only in the event the Supreme Court accepted review.<sup>128</sup> The problem, then, might not be so much a failure to distinguish a holding from dicta as it is a failure to distinguish between *types* of dicta.<sup>129</sup> And, passing statements unsupported by any authority or even extended discussion are entitled to nothing but disregard.<sup>130</sup>

129. As Professor Taylor again explains:

While this practice of following Supreme Court dicta is acceptable, it is not universally desirable. Most courts, while suggesting that Supreme Court dicta is highly persuasive, nevertheless recognize that dicta should be disregarded in some cases. That is, while some dicta deserves precedential respect, other dicta, for a variety of reasons, does not. The courts, however, . . . have not developed a cohesive or adequate measure of this distinction. Instead, the criteria employed to assess whether a particular dictum should be disregarded are scattered and mostly without instruction.

Taylor, supra note 125, at 106-07.

130. The same is true of the Supreme Court's post-Almendarez-Torres "prior conviction" language. Like the Court's statement in *Rodriguez de Quijas*, such language must not be viewed in isolation, but rather in the context in which it appears. And when viewed in context, it is clearly

See Supreme Court of the United States, 2007 Term Opinions of the Court, http://www.supreme courtus.gov/opinions/07slipopinion.html (last visited Aug. 20, 2009).

<sup>125.</sup> See Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75, 105–06 (2008) (arguing that "[t]he seemingly pervasive practice of treating Supreme Court dicta as binding is palatable when viewed from this perspective.").

<sup>126.</sup> See Taylor, supra note 125, at 105–06 (arguing that "even if the Court's statements are not technically binding, they might in some circumstances offer informed insight as to how the Court might rule if it faced that issue."); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 53 (2008) ("The most persuasive nongoverning case authorities are the dicta of governing courts . . . .").

<sup>127.</sup> See Taylor, supra note 125, at 104 ("[M]ost courts agree that lower courts should give some degree of respect to Supreme Court dicta if the Court dedicated sufficient consideration to such matters.").

<sup>128.</sup> The Court's statement in *Rodriguez de Quijas* also does not appear to have been particularly well-considered; in fact, it does not appear to have received much consideration at all. *Cf.* Cent. Va. Comm. Coll. v. Katz, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

With respect to the second question raised above—whether the merging of a holding with dicta proper is a cause for concern—the answer is clear. There are both accuracy- and legitimacy-based justifications for distinguishing a holding from dicta, and although neither is unassailable as a justification for giving less weight to dicta than to holdings, "both the adversary system and the premise that courts have less authority to prescribe general-purpose rules than legislatures are so firmly rooted in American legal practice as to rank as axiomatic."<sup>131</sup>

In summary, Supreme Court precedents are what they are, and they are not what they are not. In particular, the mere inclusion of words in a Court's opinion does not elevate those words to the level of law.<sup>132</sup> In some situations, dicta might merit some attention by those concerned with predicting the future course of the law. But in other situations, dicta may be fairly ignored.<sup>133</sup> The Court's statement in *Rodriguez de Quijas*, as well as any qualification of its holding in *Apprendi* relating to *Almendarez-Torres*, falls into the latter category.

Leval, *supra* note 114, at 1274 n.78. *See also* Abramowicz & Stearns, *supra* note 1, at 1019 (similarly justifying this distinction). Thus, if the members of the Supreme Court were to stand on the courthouse steps and announce some particular rule of law, completely un-tethered to any case currently before it, such a rule (unless a proper exercise of its rulemaking power; *see infra* Part III.A.2) presumably would have no effect, regardless of how impressive the delivery. The same presumably would be true if the rule in question was issued on Supreme Court letterhead and signed by each of the Justices. Why, then, do such statements take on any more importance simply because they are buried inside of some Supreme Court opinion?

132. As Professors Abramowicz and Stearns explain:

<sup>(</sup>and irreconcilably) inconsistent with the holdings of the very cases in which it appears. It is difficult to understand how such language—which here also is never explained—could be construed as signaling anything.

<sup>131.</sup> Dorf, *supra* note 107, at 2002–03. Judge Leval explains the rationale behind this distinction in more constitutionally based terms:

Congress is also entitled to respect. If all the members of Congress were to subscribe to a resolution, not following the procedures necessary to enact statutory law, the resolution would not be law because it was not promulgated in the manner in which Congress is permitted to make law. The same should be true when the Supreme Court or any other court makes pronouncements in a manner that is not within its constitutional power to make law.

<sup>&</sup>quot;Actually decided" does not mean "expressly stated." The "actually decided" requirement is broader in the sense that it includes implicit holdings that the court never quite explicitly announces. But it is narrower in that it excludes some statements that figure in the reasoning of the case, but that a fair construction of the opinion would not find to lie on the path from case facts to case disposition.

Abramowicz & Stearns, *supra* note 1, at 1070. *See also* Bradley Scott Shannon, *Responding to Summary Judgment*, 91 MARQ. L. REV. 815, 825 (2008) ("Supreme Court decisions are not like papal bulls; not everything the Court says matters.").

<sup>133.</sup> *Cf.* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.").

#### 1. May the Court's Statement be Regarded as Decisional Methodology?

Some might argue that the above discussion of holding is unreasonably narrow in that it fails to capture what might be termed decisional methodology. In other words, perhaps a court's holding should be regarded as including not only the rule of law used to decide the case, but also analytical methods used by the court to reach that decision. Thus, for example, a holding involving the interpretation of a statute might include the particular theory of statutory interpretation used to reach the result. By similar reasoning, the Supreme Court's holding in *Rodriguez de Quijas* might be thought of as including not only the enforceability of an arbitration agreement but also the Court's statement regarding the duty of a lower court to "follow the case which directly controls," even when that case "rest[s] on reasons rejected in some other line of decisions."<sup>134</sup>

But, there are at least two problems with this argument. First, while some believe that decisional methodology may count as a holding,<sup>135</sup> some do not,<sup>136</sup> and the Court itself has yet to clearly resolve this issue.<sup>137</sup> Second, even if one presumes that decisional methodology may some-

<sup>134.</sup> Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). For example, Professor Baxter seems to presume that the Court's statement in *Rodriguez de Quijas* qualifies as decisional methodology, and therefore not dicta, though he does not analyze the issue. *See* Baxter, *supra* note 16, at 436 n.493.

<sup>135.</sup> For example, Justice Scalia has written:

<sup>[</sup>W]hen the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (arguing that courts should give doctrines of statutory interpretation stare decisis effect); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodologies*, 108 COLUM. L. REV. 681 (2008) (similarly arguing that stare decisis should attach to a court's decision-making methodology).

<sup>136.</sup> See, e.g., Abramowicz & Stearns, *supra* note 1, at 1071 (arguing that "a judge's selection of a particular interpretive methodology will not necessarily credit that methodological choice as a holding").

<sup>137.</sup> Indeed, it might be that the Supreme Court generally *may not* dictate the decisional methodology used by lower federal courts, the argument being that the choice of decisional methodology is an inseparable component of the Article III judicial function. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2145 n.267 (2002) (asking whether one's "choice of interpretive methodology" is "not merely... an inalienable component of the judicial power but rather ... an inalienable prerogative of each individual Article III judge"). *Cf.* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 214 (2001) ("The principle of departmental independence ... entails an independent judicial power to ascertain, interpret, and apply the relevant law. Congress cannot tell courts how to reason any more than it can tell courts how to decide."). If this is true, then this is yet another reason why the Court's statement in *Rodriguez de Quijas* is not binding.

times count as a holding, it still does not seem that the Court's statement in *Rodriguez de Quijas* qualifies. The problem, again, relates to the fact that the Court's statement in no way led to its decision in that case. For, unlike the application of a particular theory of statutory interpretation which, if followed by lower courts in similar cases, might lead to better decision making (at least in terms of fewer reversals)—the Court's statement in *Rodriguez de Quijas* has no such effect. In fact, if anything, a faithful following of this "rule" has the opposite effect and actually results in a higher probability of reversal.<sup>138</sup> The decisional methodology argument therefore fails for the same reason that the more general holding argument fails: the Court's statement in *Rodriguez de Quijas* is pure dicta, an aside with no relevance to the decision in that case.

# 2. May the Court's Statement be Regarded as an Exercise of Supervisory Rulemaking Authority?

Another possibility is that the Court's statement in *Rodriguez de Quijas* might be regarded as an exercise of the Court's supervisory rulemaking power. It is well accepted that the Supreme Court possesses some power of this nature.<sup>139</sup> Could this provide authority for binding the lower courts in this manner?

Almost certainly not. For one thing, most, if not all, of the Court's supervisory rulemaking inheres in Congress and reaches the Court only via the Rules Enabling Act.<sup>140</sup> An exercise of rulemaking power pursuant to that Act requires compliance with the formal, statutory rulemaking process<sup>141</sup>—something that obviously was not done here. Furthermore, the Court's statement in *Rodriguez de Quijas* would not be regarded as procedural because it has nothing to do with the manner in which a case is adjudicated; rather, the statement would be regarded as affecting substantive rights, as it relates only to the determination of the appropriate

<sup>138.</sup> See supra note 128 and accompanying text. This might be another way of saying that the *act* of overruling itself (as opposed to the *decision* to overrule) cannot be regarded as decisional methodology. Certainly, as part of the judicial decision-making process, a court must ascertain the relevant law, a process that might include the overruling of precedent. But once that law is ascertained and applied and the case has been decided, the court's work is at an end. Whether the court has, in fact, overruled precedent is largely irrelevant to this process.

<sup>139.</sup> See, e.g., Dickerson v. United States, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.").

<sup>140.</sup> See Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 328 (2006) ("Congress can decide to give the Supreme Court [supervisory] power through enabling legislation, but it seems exceedingly unlikely that the Constitution confers it.").

<sup>141.</sup> See 28 U.S.C. §§ 2071-2077 (2006).

substantive law.<sup>142</sup> Thus, this "rule" also could not properly be the product of that process.<sup>143</sup>

Alternatively, one might argue that the Court's statement in *Rodri*guez de Quijas is justifiable as an exercise of the Court's "inherent" supervisory power—i.e., power it derives by virtue of being the "supreme" court described in Article III of the United States Constitution. It is also generally agreed that the Court possesses some inherent rulemaking power.<sup>144</sup>

This argument, though, also fails. Most, if not all, of the Court's inherent rulemaking power is "local" in nature—i.e., binding on the Court itself, but not necessarily on any other court.<sup>145</sup> Moreover, even if proper as an exercise not of "local," but rather "supervisory" rulemaking power, it seems that any such "rule" would have to be the product of adjudication, the resolution of "Cases" or "Controversies"<sup>146</sup> being the manner by which the Article III power must be exercised.<sup>147</sup> But in order to count as "law" through adjudication, the "law" in question would

<sup>142.</sup> Consider also that the Court's statement presumably is binding on state courts as well something that clearly would be beyond the formal rulemaking power. For a similar argument reaching the same conclusion with respect to the court of appeals' "unpublished" decision rules, see Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 658–71 (2006).

<sup>143.</sup> See 28 U.S.C. § 2072(a)–(b) (2006) (providing that the Supreme Court is empowered to prescribe only "general rules of practice and procedure" that do not "abridge, enlarge or modify any substantive right").

<sup>144.</sup> See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

<sup>145.</sup> See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 817 (2008) ("[A]ny procedural authority conferred by Article III is entirely local. In other words, Article III empowers a court to regulate its own proceedings, but it does not empower a reviewing court to supervise the proceedings of a lower court by prescribing procedures that the lower court must follow.") (footnote omitted).

That is so because Article III vests "the judicial Power" in *each* Article III court. To the extent that "the judicial Power" carries with it the power to regulate procedure in the course of adjudicating cases, each court possesses that power in its own right. To be sure, an appellate court can set aside a rule adopted by a lower court on the ground that the rule exceeds the bounds of the lower court's authority. But, the content of any procedure adopted pursuant to inherent procedural authority lies fundamentally within the discretion of the adopting court. As a result, inherent procedural authority does not enable the development of procedural doctrines that are uniform across jurisdictions.

*Id. See also* Bank of Nova Scotia v. United States, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("I do not see the basis for any direct authority to supervise lower courts.").

<sup>146.</sup> U.S. CONST. art. III, § 2.

<sup>147.</sup> See Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress,* 79 NOTRE DAME L. REV. 1677, 1682 n.11 (2004) (questioning "how the exercise of a power to promulgate prospective, legislative-like rules can be squared with the grant of judicial power in Article III," and distinguishing the "procedure fashioned (or applied as precedent) in the context of deciding a case"). See also Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation,* 81 IOWA L. REV. 1267, 1273 (1996) ("The judicial power is the power to decide cases or controversies in accordance with governing law.").

again have to appear as a holding.<sup>148</sup> And so for this reason also, any appeal to supervisory rulemaking authority likewise seems unavailing.

### B. The Supreme Court's Statement Regarding Overruling by Implication Has Itself Been Overruled by Implication

The preceding section dealt with the *nature* of the Supreme Court's statement in *Rodriguez de Quijas* without considering the precise *meaning* of that statement. But what exactly was the *Rodriguez de Quijas* Court saying, or trying to say?

As simple as the Court's statement might seem, there actually appear to be several possibilities. For example, the Court might have been simply rejecting the concept of anticipatory overruling,<sup>149</sup> rather than overruling by implication.<sup>150</sup> This interpretation makes some sense, in that anticipatory overruling is widely regarded as inappropriate, and thus its rejection by the Court would neither be surprising nor controversial. This reading also accounts for the word "appears"—i.e., the Court did not speak of precedent that "rest[s] on reasons rejected in some other line of decisions," but rather only precedent that "*appears* to rest on reasons rejected in some other line of decisions."<sup>151</sup> Moreover, the Court spoke

<sup>148.</sup> Consider (again) that the Court in *Rodriguez de Quijas* undoubtedly intended that its statement be binding on state courts also, and yet it has stated that "[i]t is beyond dispute that we do not hold a supervisory power over the courts of the several States." Dickerson v. United States, 530 U.S. 428, 438 (2000). Of course, the *Dickerson* Court avoided this result by proclaiming the rule at issue in that case (*Miranda* warnings) to be constitutionally based. *See id.* at 437–42. But that the Court's statement in *Rodriguez de Quijas* is constitutionally based seems extremely doubtful. *See* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 520 (2000) (observing that the *Rodriguez de Quijas* Court "made no attempt to ground [its statement] in the Constitution" and arguing that "it is not clear where in the Constitution one would point in order so to ground it"). Whether adherence to Supreme Court precedent is to any extent constitutionally compelled is a subject of considerable debate, and certainly the notion that this particular permutation of that doctrine is derived from that authority represents a remarkable proposition— and one that the Court has never recognized.

<sup>149.</sup> See Baxter, *supra* note 16, at 444 ("Doubtless, one reason [for the Court's statement in *Rodriguez de Quijas*] is the fear that 'rogue' district judges otherwise might disregard a Supreme Court precedent simply because they, for whatever reasons, find it incorrect or unattractive.").

<sup>150.</sup> Regarding the distinction between overruling by implication and anticipatory overruling, Professor Kniffin explains:

Departure by a court of appeals from a precedent impliedly overruled by the Supreme Court should not be confused with anticipatory overruling. Implied overruling occurs when the Supreme Court, without mentioning that it is overturning its previous decision, determines that the rule of law that the precedent enunciated is no longer correct. The precedent therefore no longer exists as such, and a lower court should not follow it... Anticipatory overruling, by contrast, occurs when a lower court departs from a higher court's decision embodying a rule of law that the higher court has not repudiated either explicitly or by implication.

Kniffin, supra note 23, at 57 (footnotes omitted).

<sup>151.</sup> Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (emphasis added).

of the "prerogative of overruling its own decisions"<sup>152</sup>—an assertion that makes little sense if the decision in question has already been overruled.

If this interpretation of *Rodriguez de Quijas* is correct, then the lower courts have badly—very badly—misinterpreted the Court's message. But that is also the chief criticism of this interpretation. Few seem to believe that the Court was speaking only of anticipatory overruling because the precedent with "direct application" in *Rodriguez de Quijas*— as well as in *Khan* and *Agostini*—had not just been rendered suspect by subsequent Supreme Court decisions; it had been eviscerated.

This leaves at least two other possibilities. It could be that the Supreme Court, through its statement in *Rodriguez de Quijas*, was essentially establishing two different lines of authority—one for the Court, and one for lower courts—in which overruling by implication remains a possibility with respect to the former, but not as to the latter. Such a reading is conceivable; again, the precedent with "direct application" in *Rodriguez de Quijas* certainly appeared to have been overruled, at least implicitly, and yet the lower court in that case was chastised for having so concluded.<sup>153</sup> But such an interpretation raises knotty questions regarding the relationship between horizontal and vertical stare decisis, for it means that there might exist a body of law that is binding on the Court itself but not on any lower court.<sup>154</sup> This interpretation also ignores the fact that in *Rodriguez de Quijas*, *Khan*, and *Agostini*, the Court proceeded to expressly overrule a precedent that, if overruled by implication, would not be in need of overruling, for it would already be quite dead.<sup>155</sup>

Bhagwat, supra note 5, at 1001 (footnote omitted).

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<sup>152.</sup> Id.

<sup>153.</sup> See also Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

<sup>154.</sup> As Professor Bhagwat explains (with respect to the Court's decision in *Agostini*): This leads to a very peculiar conclusion: that the "law" in effect at the time the motion was brought was *different* for the Supreme Court and for all other courts, because the effect of precedent varied in the Supreme Court as opposed to other courts. If the reasoning and underpinnings of the precedent had been weakened, the precedent was no longer valid in the Court itself, but it retained its validity for the rest of the judiciary.

<sup>155.</sup> As Professor Dorf observes:

The appeals court in *Rodriguez* concluded that *Wilko* had been overruled sub silentio by subsequent cases. It did not *predict* that the Supreme Court *would* overrule *Wilko*, but reasoned that the Court had *already* done so, basing this determination entirely on impersonal materials. Since, in my view, such a determination represents conventional legal reasoning, it ought to be a permissible choice for a lower court. The contrary view adopted by the Supreme Court in *Rodriguez* appears to confuse the power to declare a precedent dead with the power to kill it.

Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 676–77 n.87 (1995) (citations omitted).

And this leads to a third possibility: perhaps the *Rodriguez de Quijas* Court was, in essence, overruling the concept of overruling by implication. This might seem somewhat radical, in that this might not have been quite what the Court intended.<sup>156</sup> But precedents are what they are, and in this context, the intent of the precedent-setting court is largely irrelevant.<sup>157</sup> Such a reading also explains the Court's perceived need in *Rodriguez de Quijas* and later cases to expressly overrule the "problem" precedent in question. In other words, perhaps the Court was not simply afraid that lower courts might guess wrong; perhaps it truly believed that an irreconcilably inconsistent holding alone was insufficient to effect an overruling of that earlier precedent.

If this reading is correct, and if this statement somehow counts as a holding,<sup>158</sup> then overruling by implication is no more *unless* that "precedent" *itself* has been overruled. Has it? The Supreme Court has yet to expressly overrule this portion of *Rodriguez de Quijas*.<sup>159</sup> But has it been overruled by implication?

Before answering this question, one must consider whether a precedent rejecting overruling by implication may itself be overruled by implication. Though a complete exploration of this question might prove interesting, the tentative the answer would seem to be yes.<sup>160</sup> For if this were not true, it would mean that the Supreme Court has the power to prevent a later Supreme Court from overruling at least some of its prior precedents, and that seems highly unlikely; among other problems, it is difficult to see how such a "holding" might be enforced.<sup>161</sup> Accordingly,

<sup>156.</sup> It also would be somewhat ironic, in that this would mean that the Court overruled by implication overruling by implication.

<sup>157.</sup> See supra Part II.A. Consider also the prominent, recent example of an attempt by the Supreme Court to limit the scope of its holding found in *Bush v. Gore*, 531 U.S. 98 (2000). Near the end of its opinion, the Court added: "Our consideration is limited to the present circumstances . . ." *Id.* at 109. Many have rejected the notion that future, otherwise indistinguishable cases should be rendered distinguishable solely on the basis of this language. *See, e.g.*, Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 401 (2007) (arguing that the Court's attempt to limit the effect of its holding in that case was "at best dicta, at worst circular, relying on the principle [it] purport[s] to modify").

<sup>158.</sup> Part III.A of this Article argued that the Court's statement in *Rodriguez de Quijas* was *not* a holding but rather was dicta that fairly may be disregarded. But to the extent that this conclusion is incorrect, the remainder of this Article becomes relevant.

<sup>159.</sup> But for a glimpse of what such an opinion might look like, see infra Part III.C.

<sup>160.</sup> This assumes that the doctrine of stare decisis itself is constitutional. Some have argued that it is not, at least in certain forms and in certain contexts. *See, e.g.,* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis*, 86 N.C. L. REV. 1165, 1166–67 n.3 (2008) (collecting authorities). To the extent that this doctrine is unconstitutional, the answer to the question posed above would definitely be yes.

<sup>161.</sup> See Hertz v. Woodman, 218 U.S. 205, 212 (1910) (asserting that whether stare decisis "shall be followed or departed from is a question entirely within the discretion of the court"); Albert

this Article assumes that overruling by implication remains a possible means of overruling precedent, even within the Supreme Court.

The question then becomes, again, whether the Court has overruled this prohibition as to overruling by implication. The answer to this question also appears to be yes. For, in order to find proof, one need only to find a later case in which *any* precedent has been overruled by implication, the idea again being that the Court could not decide a case in a manner irreconcilably inconsistent with a prior holding without overruling that holding. And there appears to be at least one case, *Apprendi*, that overruled, by implication, another, *Almendarez-Torres*.

As a result, the Court's statement in *Rodriguez de Quijas* regarding overruling by implication has itself been overruled by implication in *Apprendi*. And for this reason also, lower courts should consider themselves free to apply the holdings in *Apprendi* and its progeny to their logical limits.

### C. The Supreme Court's Statement Regarding Overruling by Implication Should Be Expressly Overruled

It should now be clear that, for at least two reasons, the Supreme Court's attempted repudiation of overruling by implication should be ignored. Still, some lower courts might be hesitant to deviate from that instruction without more definitive guidance. It therefore would be help-ful if the Court were to expressly overrule the *Rodriguez de Quijas* Court's mandate that lower courts follow the case which "directly controls," when that case itself has been overruled by implication.<sup>162</sup>

In deciding whether to overrule precedent, the primary question, of course, is whether that precedent is in some significant sense "wrong," or is at least substantially inferior to whatever might replace it.<sup>163</sup> And here, the idea that lower courts should adhere to overruled Supreme Court precedent simply because that overruling was not made expressly is wrong. Again, almost everyone agrees that the Supreme Court alone is

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P. Blaustein & Andrew H. Field, "Overruling" Opinions in the Supreme Court, 57 MICH. L. REV. 151, 166 (1958) ("There are no legal limits to the 'right' to overrule.").

<sup>162.</sup> The need to overrule this portion of *Rodriguez de Quijas* of course presupposes that it constitutes a holding, and as has already been explained, it arguably does not. But, because lower courts seem to be treating this language as if it was a holding, express direction from the Court (again) would be helpful. Thus, this section assumes that this portion of *Rodriguez de Quijas* constitutes precedent in the strong sense of the term.

<sup>163.</sup> See Paulsen, supra note 160, at 1210 ("The primary inquiry . . . is whether a prior decision (or line of decisions) is *right* or *wrong*, on independent . . . criteria one thinks are correct on grounds other than precedent."). Indeed, this might well be the *only* relevant question. See *id.*; but see Rangel-Reyes v. United States, 547 U.S. 1200, 1201 (2006) (Stevens, J., respecting the denial of the petitions for writs of certiorari) ("While I continue to believe that *Almendarez-Torres* was wrongfully decided, that is not a sufficient reason for revisiting the issue.").

empowered to overrule decisions of the Supreme Court. But lower courts must be given the opportunity to determine whether and to what extent Supreme Court precedent has been overruled, either expressly or implicitly, and then to disregard that precedent as appropriate. Only then can lower courts fulfill their obligation under our system of vertical stare decisis. At least to this extent, *Rodriguez de Quijas* should be expressly overruled.<sup>164</sup>

One might further observe that there is precedent, in a sense, for doing what is sought to be accomplished here—namely, the express overruling of precedent that has already been overruled by implication. That precedent, ironically enough, is *Rodriguez de Quijas*, for in that case, the Court did precisely that. And as indicated in Part III.B, the "rule" at issue here has been overruled by implication, for it is irreconcilably inconsistent with the Court's continuing practice of overruling by implication. It would seem, then, that there is little left to do in order to nudge this aspect of *Rodriguez de Quijas* over the edge other than to expressly recognize that this has already occurred.

Still, it has become almost routine Supreme Court practice to discuss, expressly, the propriety of overruling as a prelude to the act of overruling itself.<sup>165</sup> In *Planned Parenthood v. Casey*,<sup>166</sup> the Court set forth what seems to have become the standard for assessing the propriety of overruling its own precedent:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; 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; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>167</sup>

<sup>164.</sup> It might be that *Rodriguez de Quijas* stands for some broader proposition, and that the broader proposition also should be overruled, but that is beyond the scope of this Article.

<sup>165.</sup> See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 479–85 (1989); Dunn, *supra* note 18, at 518 ("Many times, before the Court overrules a case, it acknowledges the doctrine of stare decisis, as if to prove that it is not making the decision to overrule arbitrarily.").

<sup>166. 505</sup> U.S. 833 (1992).

<sup>167.</sup> Id. at 854-55 (citations omitted).

Under this standard, then, the Court's statement in *Rodriguez de Quijas* should be expressly overruled if, in addition to being "wrong," the "rule" announced in that case has defied workability; has not generated substantial reliance interests; is a remnant of abandoned doctrine; or has been weakened due to changed facts.<sup>168</sup>

Before engaging in this analysis, a few observations might be in order. First, though the Court today often includes such an analysis in its overruling decisions, there does not seem to be any *requirement* that the Court do so, at least insofar as the precedential effect of the overruling decision is concerned. As with express overruling itself, it might be *preferable*, for various reasons, that the Court engage in this discussion. But a bare holding that is irreconcilably inconsistent with an earlier holding, particularly if accompanied by language indicating that the earlier holding is indeed overruled, accomplishes such an overruling no less completely than does a similar opinion accompanied by a protracted *Casey*type analysis.<sup>169</sup>

Moreover, there also does not seem to be any requirement that the Court engage in this *particular* type of analysis. Again, it might be desirable, for normative reasons, that the Court consider the ramifications of its decisions and whether it has formulated the best rules of law possible. But a *Casey*-type analysis, at best, represents decisional methodology, and even if considered binding, this methodology itself presumably could be overruled by a later decision.<sup>170</sup> More to the point, even a poorly reasoned decision has precedential force,<sup>171</sup> and as previously dis-

<sup>168.</sup> See id. A further reading of *Casey* reveals a fifth factor: whether the overruling would impair judicial integrity. See Paulsen, supra note 160, at 1198–99.

Incidentally, though Professor Paulsen answers the question raised in the title of his article (i.e., whether the doctrine of stare decisis requires adherence to the doctrine of stare decisis) in the negative, *see id.* at 1167, it would seem that one could not rely on that determination (however correct it might be) until the Court so holds, implicitly if not expressly. And even assuming that that is possible—e.g., that this is a matter that may be encapsulated by a holding (*see supra* Part III.A.1)— it does not appear (at least not clearly) that this has yet occurred.

<sup>169.</sup> And of course, the absence of such analysis does not necessarily mean that the Court did *not* engage in that analysis. *See* Foster, *supra* note 135, at 1875 ("In theory, the Court might conduct this [Casey] analysis implicitly rather than explicitly, but in practice the norm is to conduct such doctrinal analysis explicitly, and, consistent with this norm, changes in doctrine in the substantive law context are frequently accompanied by such analysis.").

<sup>170.</sup> Justice Scalia has argued that "*stare decisis* ought to be applied even to the doctrine of *stare decisis*." *Casey*, 505 U.S. at 993 (Scalia, J., concurring in the judgment in part and dissenting in part). But even if true, even he would agree that this doctrine is not an "inexorable command," meaning that the doctrine itself might be subject to revision. *Id.* at 854 (opinion of the Court).

<sup>171.</sup> Such a decision might be more susceptible to subsequent overruling, though, and those affected thereby should be aware of this possibility. This is also not to say that poorly reasoned decisions do not cause problems. For example, it might be that poor judicial reasoning is at least partly behind the prospective-application movement, the idea being that the retroactive application

cussed, even a lack of intent that any precedent be overruled would not prevent such overruling from occurring in fact.<sup>172</sup>

Be that as it may, it appears that the Court prefers to perform something like a *Casey*-type analysis prefatory to an express overruling. So how does *Rodriguez de Quijas* fare?

Not well. The *Casey* Court began its stare decisis analysis by considering whether the rule in question had defied practical workability.<sup>173</sup> According to Professor Paulsen, "the inquiry into workability appears to ask whether the rule of a precedent decision, besides being wrong, has tended to generate inconsistent applications, fostered unclarity and uncertainty, or proven difficult to manage in any kind of principled way and on such account should be regarded as intolerable."<sup>174</sup>

One might guess that the Court's statement in Rodriguez de Quijas has not proven unworkable, for the lower courts in Khan and Agostini seemed to get it "right" and have been unanimous in their continued adherence to Almendarez-Torres. But a closer look at the precise language used by the Court reveals some difficulties. The Rodriguez de Quijas Court stated: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."<sup>175</sup> In order to apply this "rule," a lower court has to make at least two determinations. First, it must determine whether there exists a Supreme Court precedent that has "direct application" to the case under consideration. Second, should there exist other relevant Supreme Court precedents, and in particular, precedents that appear to reject the reasoning used in the "directly applicable" precedent, the lower court must determine which among those various precedents "directly controls."

This exercise is not as easy as it might sound. For one thing, reasonable jurists might differ as to which precedents, if any, have "direct application."<sup>176</sup> Moreover, the Court in *Rodriguez de Quijas* failed to instruct the lower courts as to what they should do in the event that more than one Supreme Court precedent has "direct application." And what if

of a decision that fails to adequately account for the precedential effects of that decision is more likely to lead to unfair results. *See* Shannon, *Retroactive, supra* note 106, at 851–59.

<sup>172.</sup> See supra notes 17-21 and accompanying text.

<sup>173.</sup> Casey, 505 U.S. at 854.

<sup>174.</sup> Paulsen, supra note 160, at 1175.

<sup>175.</sup> Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

<sup>176.</sup> Cf. David C. Bratz, Comment, Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent, 60 WASH. L. REV. 87, 89 n.10 (1984) ("What is meant by 'directly on point' is a question of considerable controversy; the question turns on what it is about a precedent that lower courts must follow.").

the earlier case does not simply "appear" to rest on reasons rejected in some other line of decisions? What if, as in the case of *Almendarez-Torres*, the reasoning of the earlier decision has been flatly and undeniably rejected by some other line of decisions?

The bottom line is that the "rule" announced in *Rodriguez de Quijas* is not so amenable to mechanical application as the *Rodriguez de Quijas* Court might have imagined. In fact, the more one thinks about this "rule," the more indeterminate and incoherent it becomes.<sup>177</sup> A lower court certainly could not be faulted for misapplying this "rule" or for determining that *Rodriguez de Quijas* simply does not apply in the great many cases in which Supreme Court precedents might seem to conflict.

On the other hand, lower courts seem fairly adept at determining whether Supreme Court precedent has been overruled by implication.<sup>178</sup> For example, in *Rodriguez de Quijas* itself, the court of appeals got it right. In the rare event that a lower court misreads Supreme Court precedent, the Court may correct the problem through a grant of certiorari and reversal of the erroneous lower court judgment.<sup>179</sup> Such a regime is much more likely to ensure lower court adherence to Supreme Court precedent than is the regime created by *Rodriguez de Quijas*.<sup>180</sup>

Kelman, *supra* note 18, at 15. *Accord* Bradford, *supra* note 4, at 85 ("Courts are entrusted with a variety of judgment calls. If they can be trusted to apply precedent properly and faithfully and to interpret statutes and determine their constitutionality, they can also be trusted to decide honestly whether a Supreme Court precedent is so obviously injured that it should be disregarded.").

179. Indeed, this leads to a second "workability" problem with the Court's statement in *Rodriguez de Quijas*: "the Supreme Court is without means of enforcing this requirement." Harrison, *supra* note 148, at 520 n.53. For "[1]ower courts that violate the rule but guess right about what he Supreme Court will do will be affirmed, while perhaps at the same time being told that they misbehaved by deciding the case correctly." *Id.* 

180. As Professor Bhagwat explains:

There is an inefficiency . . . in requiring litigants to go all the way to the Supreme Court to overturn a precedent which is widely acknowledged to be moribund . . . . Furthermore, one consequence of the rule of *Rodriguez de Quijas* is that when the Court adopts a new approach in an area of law, especially constitutional law, it takes much longer for that approach to be fully adopted and implemented by the rest of the judiciary. The lower courts remain obliged to follow extant, narrow, and older precedents that are directly on point, even if their reasoning and result is clearly inconsistent with the Court's recent decisions. Bhagwat, *supra* note 5, at 975. Similarly, Professor Bradford argues:

[S]hould not the lower court also follow the later case where the rejection is implicit rather than explicit? If the goal is allegiance to the Supreme Court, it is sophistry to require the lower court to follow doctrine that the Court has rejected, simply because the Su-

<sup>177.</sup> Accord Bhagwat, supra note 5, at 975–76 (observing that, "if taken literally (as the Court seems to indicate it should be), the rule of *Rodriguez de Quijas* can lead to extreme and absurd results").

<sup>178.</sup> As Professor Kelman observed more than forty years ago:

The lower judge is required to determine not only the relevancy of past decisions but to pass on their current precedential force. This latter task varies in difficulty and sometimes involves a sophisticated process of doctrinal analysis yielding the conclusion that a decision has or has not been overruled by implication.

The second *Casey* factor is reliance—specifically, "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."<sup>181</sup> Here, the reliance interests seem low. The "persons" most affected by *Rodriguez de Quijas* are the lower courts, which presumably would have little trouble adjusting to the new regime. Indeed, they would simply be returning to the manner in which lower courts dealt with conflicting precedents prior to 1989 (and, presumably, in which American courts other than those bound by the Supreme Court currently resolve such conflicts).<sup>182</sup>

Of course, some might argue that this focus on the nature of this "rule" does not fully capture the cost of repudiating Rodriguez de Quijas. For, the "rule" in Rodriguez de Quijas is actually something of a metarule, meaning that the full cost of overruling Rodriguez de Quijas also could be considered as including the associated costs of finally disregarding precedent (such as Almendarez-Torres) that has been overruled by implication. But notice how this "cost" differs from the costs typically associated with the overruling of Supreme Court precedent. In the more typical overruling situation, the law is in some sense changing. By contrast, if the Court were to overrule Rodriguez de Quijas, the lower courts would simply be applying that which has already become the law. If one assumes that the Court is generally aware that there might be costs associated with overruling precedent, and if the Court adequately accounts for those costs in making the decision to overrule-both reasonable assumptions<sup>183</sup>—then the costs associated with the overruling of *Rodriguez* de Quijas would again seem to be minimal.

The third *Casey* factor is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of

Paulsen, supra note 160, at 1203.

preme Court has not ruled on the particular issue confronting the lower court. How is fealty served when the lower court is clearly convinced that its ruling is contrary to the choice the Supreme Court itself would make? To disregard the current doctrine and apply the discredited case is the greater violation of the duty of loyalty.

Bradford, supra note 4, at 83.

<sup>181.</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

<sup>182.</sup> As Professor Paulsen explains regarding the doctrine of stare decisis generally: The current doctrine . . . does not seem like the kind of legal formulation that causes persons to invest resources or otherwise sink costs. It is not the type of legal rule or standard to which society has become accustomed (as *Miranda* is claimed to be, in *Dickerson*) or around which people have ordered their lives or thinking (as *Roe* is claimed to be, in *Casey*). . . . The doctrine is not a substantive one. It is second-order "lawyer's law" . . . .

<sup>183.</sup> See Shannon, *Retroactive, supra* note 106, at 858 ("[B]ecause the idea that a court's decision . . . will have certain impacts not only on the parties then before that court but also on all others affected by that precedent is so familiar as a matter of American jurisprudence, it is difficult to imagine that a law-changing court . . . would fail adequately to consider possible reliance interests.").

abandoned doctrine."<sup>184</sup> Here, the answer appears to be yes, in that the Court, post-*Rodriguez de Quijas*, continues to overrule precedent by implication, a practice that it has never expressly repudiated (and probably could not repudiate even if it wanted to). And, as discussed previously, the concept of overruling by implication is wholly incompatible with the "rule" expressed in *Rodriguez de Quijas*.<sup>185</sup>

Fourth, the *Casey* Court instructs that it should consider "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."<sup>186</sup> This is a difficult factor to apply with respect to *Rodriguez de Quijas*, for it does not appear that the Court's concern that lower courts adhere to Supreme Court precedent was based on facts to begin with.<sup>187</sup> If the precedent at issue in that case had been overruled by implication, the court of appeals' failure to adhere to that precedent cannot be considered incorrect, meaning there was no problem for the Supreme Court to address. Though this criticism might be more of an argument as to why the Court's statement in *Rodriguez de Quijas* is bad "law" as opposed to whether that "law" ought to be overruled, there also does not seem to be any factual impediment to the overruling of the Court's statement in that case.

The final *Casey* factor "goes by various names, but might usefully, if imprecisely, be termed 'judicial integrity."<sup>188</sup> According to Professor Paulsen, the judicial integrity factor asks

whether, even if a precedent is thought erroneous, it would seem arbitrary, capricious, or fickle for the Court to be changing its mind too often or too readily (especially if its decisions change along with personnel changes) or to be changing its interpretation in response to public, or political, or even scholarly criticism or pressure.<sup>189</sup>

Like the other *Casey* factors, this factor also weighs in favor of overruling, or at least does not stand in its way. There would be nothing arbitrary, capricious, or fickle about overruling the Court's statement in *Rodriguez de Quijas* (aside from the question as to why the decision took so long). There would be no public outrage; indeed, one could confidently say that the public, as well as much of the bar, is oblivious to the exis-

<sup>184.</sup> Casey, 505 U.S. at 855.

<sup>185.</sup> See supra Part III.B. Indeed, the very consideration of this factor seems to result in something of an acknowledgement of the concept of overruling by implication.

<sup>186.</sup> Casey, 505 U.S. at 855.

<sup>187.</sup> Professor Paulsen says the same thing with respect to the doctrine of stare decisis itself. *See* Paulson, *supra* note 160, at 1167.

<sup>188.</sup> Id. at 1198.

<sup>189.</sup> Id.

Overruled by Implication

tence of this "rule." And though the Court perhaps could be seen as bowing to scholarly criticism, it would be for all of the right reasons.

So should the Court expressly overrule its statement in *Rodriguez de Quijas*? According to the Court's own criteria, the answer is clearly yes. Is the Supreme Court likely to ever engage in this analysis? Almost certainly not. To the contrary, the Court seems to relish having "the pre-rogative of overruling its own decisions"<sup>190</sup>—which the Court seems to interpret as meaning the prerogative of *expressly* overruling its own decisions, including decisions that have already been overruled by implication, decisions lower courts must follow only because the Court has said they must. This is yet another reason why lower courts should simply ignore the Court's statement in *Rodriguez de Quijas*, for not only are they more likely to reach correct results, but such an action is also more likely to provoke the reconsideration of this doctrine.

#### IV. CONCLUSION

Case law interpretation and synthesis are at the core of the judicial process.<sup>191</sup> In particular, courts have the ability—and must be given the opportunity—to determine when a superior court has overruled an earlier precedent and then to apply the overruling precedent. This is true regardless of whether the overruling was express or implied.

Against this backdrop stands the Supreme Court's statement in *Rodriguez de Quijas* commanding the lower courts to follow whichever of its decisions "directly controls," so long as that decision has not been expressly overruled. With all due respect to that body, this statement, which appears as dicta and contradicts the Court's longstanding, and even necessary, practice of overruling by implication, may and must be ignored. Rather than wait for the Court to expressly repudiate this statement—something that does not seem likely to occur—lower courts must follow that precedent that fairly may be regarded as binding, even if, in some sense, that precedent might appear less "applicable" than some earlier but now defunct precedent.

<sup>190.</sup> Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

<sup>191.</sup> See Kelman, *supra* note 18, at 12 ("Part of the required equipment of judges of all ranks is the ability to sift obiter from ratio, essential facts from inessential, and plausible from persuasive analogy.").