HOW SHOULD STATES TREAT *CRUIKSHANK* FOLLOWING *HELLER*? AN ANALYSIS OF A STATE COURT'S ABILITY TO HOLD THAT SUPREME COURT PRECEDENT IS DEAD

Brian P. Wilson[*]

I. INTRODUCTION

Recent developments in case law regarding the incorporation of the Second Amendment raise the issue of whether a state court has the power to disregard the precedent of the Supreme Court of the United States where the court finds the precedent to be sufficiently eroded to be considered dead. Specifically, state courts are faced with deciding whether to treat the Second Amendment as incorporated following the *District of Columbia v. Heller*[1] decision in the face of *United States v. Cruikshank*'s[2] holding that the Second Amendment is not incorporated.[3] The ability of a state court to disregard precedent such as *Cruikshank* and the scope of such a power, if one indeed exists, shape our perception of the role of state courts and may rattle long-held beliefs regarding the relationship between state courts and the Supreme Court.

In *District of Columbia v. Heller*, the Supreme Court found that the Second Amendment secured an individual's right to bear arms for traditional uses such as self-defense.[4] This holding, however, is only the beginning of a larger, and perhaps more vital, Second Amendment conversation—whether the Second Amendment should be understood to have been incorporated into the Fourteenth Amendment. *Heller* stated that the case did not present the issue of incorporation.[5] The Court went on, however, to note that *Cruikshank*,

[*] J.D. Candidate, 2010, Seton Hall University School of Law; B.S. Political Science, 2005, Kean University. I would like to thank my grandfather, Arthur J. Jensen, for his love and support and for his guiding role throughout my life. You will always be with me.

[1] 128 S. Ct. 2783 (2008).

[2] 92 U.S. 542 (1876).

[3] *Id.* at 553.

[4] *Heller*, 128 S. Ct. at 2821–22.

[5] *Id.* at 2813 n.23.

which held that the Second Amendment is not incorporated, "did not engage in the sort of Fourteenth Amendment inquiry required by . . . later cases" but also noted that other cases "reaffirmed that the Second Amendment applies only to the Federal Government."[6] The Court then cited authorities using natural law and pre-existing-rights language, which act as strong support for incorporation.[7] With the conflicting messages from the Court, the *Heller* holding has created and will continue to cause confusion for state courts. For example, New York has seemingly ruled both ways on the issue. In *People v. Abdullah*,[8] a New York court held that "because the District of Columbia is a federal enclave and not a State, *Heller* is distinguishable and its holding does not invalidate New York's gun possession laws or regulations."[9] On the other hand, in *People v. Lynch*,[10] a different New York court apparently assumed that *Heller* applied and found that "the Court specifically stated that this right is not unfettered and that reasonable regulations for possession of a firearm outside of the home shall be allowed."[11]

The question presented is not simply an incorporation issue; the threshold question concerning how a state court should treat *Heller* and *Cruikshank* is whether a state court has the power to disregard Supreme Court precedent, and if such a power exists, when a state court should do so. Prior to 1989, many scholars debated the concept of anticipatory overruling.[12] Anticipatory overruling has been defined as the theory that a lower court should disregard Supreme Court precedent when the lower court believes that the Supreme

---

[6] *Id.*; s*ee also* Miller v. Texas, 153 U.S. 535, 538 (1894) (reaffirming *Cruikshank*); Presser v. Illinois, 116 U.S. 252, 265 (1886) (reaffirming *Cruikshank*); United States v. Cruikshank, 92 U.S. 542, 553 (1876).

[7] *Heller*, 128 S. Ct. at 2792 n.7, 2793.

[8] 870 N.Y.S.2d 886 (N.Y. Crim. Ct. 2008).

[9] *Id.* at 887.

[10] No. 2005-2007, 2008 N.Y. Misc. LEXIS 4587 (N.Y. Sup. Ct. July 16, 2008).

[11] *Id.* at *1–2. Notably, the circuits are now split on the issue of incorporation. The U.S. Court of Appeals for the Ninth Circuit recently held that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments." Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009). Conversely, the U.S. Court of Appeals for the Seventh Circuit has upheld *Cruikshank* on the ground that lower courts are disallowed from overruling Supreme Court decisions. *See* NRA of Am., Inc. v. City of Chicago, 567 F.3d 856, 858 (7th Cir. 2009). This further evinces the confusion among courts on the issue.

[12] Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 504 n.16 (2008).

Court itself would not follow it.[13] In 1989, however, the Supreme Court flatly denied lower federal courts the right to anticipatorily overrule Supreme Court precedent.[14] The Court in *Rodriguez* stated that "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[15] Although this holding prevented lower federal courts from disregarding arguably dead Supreme Court precedent, that a state court is similarly limited does not necessarily follow.

This Comment purposefully avoids addressing the issues of Second Amendment rights and the incorporation of the Second Amendment. Instead, it seeks to establish that a state court has the power to disregard Supreme Court precedent in limited circumstances where a compelling argument demonstrates that the precedent is dead because of more recent, conflicting decisions handed down by the Court. Specifically, this Comment argues that state courts may disregard precedent set forth in *Cruikshank* because of the irrelevance of its outdated incorporation analysis. This proposition has been recently bolstered by the *Heller* decision, which casts further doubt upon the validity of *Cruikshank*. But this line of reasoning is not limited to *Heller*; state courts should in all instances consider the continuing relevance, or lack thereof, of all questionable Supreme Court precedent.

Part II of this Comment sets forth the background information that supports the theory that state courts may disregard Supreme Court precedent when that precedent has been undermined by the Court. It begins by briefly introducing the legal theories of anticipatory overruling and unbound state courts, sets forth and generally analyzes the changes that have occurred during the development of

---

[13] Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 41 (1990). One's position concerning anticipatory overruling is a reflection of one's view of the hierarchy of the courts. Proponents of anticipatory overruling argue that courts should recognize when Supreme Court precedent is dead independent of whether the Supreme Court has acknowledged the death, whereas opponents of anticipatory overruling argue that lower courts must follow Supreme Court precedent until the Court itself overrules it. *See id.* at 40–41. Proponents essentially argue that courts should not be bound by precedent that the Court itself would not follow; opponents argue the firmness of stare decisis and the continuing validity of Supreme Court precedent that has not been overruled. *See id.* at 43–44.

[14] Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989); *see also* Agostini v. Felton, 521 U.S. 203, 237–38 (1997) (following *Rodriguez* and holding that the federal trial court was correct to wait for the Court to reinterpret questionable precedent).

[15] *Rodriguez*, 490 U.S. at 484.

these theories, and finally states where these theories stand today. In Part III, this Comment details the theory of anticipatory overruling and how the theory may better support a state court's ability, rather than a federal court's ability, to disregard dead precedent. Part IV explains the theory of unbound state courts and presents several cases illustrating the point that state courts should indeed be unbound. Part V introduces and analyzes *Roper v. Simmons*, in which the erosive impact on precedent is remarkably similar to that which is found in *Heller*. Then, Part VI, by comparing the conflict between *Heller* and *Cruikshank* to *Roper*, supports a state court's right to find Supreme Court precedent dead. Part VII illustrates when a state court may properly exercise this right and specifically demonstrates that a state court may correctly disregard *Cruikshank* as dead precedent. Finally, Part VIII discusses both the relevant factors of erosion and the standard a state court should apply to those factors and then applies those factors and that standard to *Cruikshank*.

II. THE HISTORY OF COURTS DISREGARDING SUPREME COURT PRECEDENT

Disregarding Supreme Court precedent is not a new proposal, and stare decisis is not absolute.[16] In fact, the Supreme Court's own treatment of stare decisis creates the confusion that leads a lower federal or state court to disregard Supreme Court precedent.[17] Where the Supreme Court issues an opinion that may undermine standing precedent, a lower federal or state court is faced with the decision of whether to follow the older precedent at the risk of rejecting the newer precedent or to follow the newer precedent at the risk of disregarding the older precedent.[18] The question raised is which course of action better conforms to the concept of stare decisis.[19]

[16] The Court does not hold that stare decisis bars the overruling of precedent; rather, it considers the policies promoted by stare decisis before overruling. *See* Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970) (holding that courts must consider that law should (1) be a clear guide for conduct, (2) promote predictability and fairness in the law by reducing the need to relitigate like issues, and (3) maintain faith in the judiciary). *See generally* David C. Bratz, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 90 (1984) (stating that stare decisis promotes (1) certainty in the law's application, (2) fairness and efficiency in the legal system, and (3) maintenance of confidence in the judicial process).

[17] *See* Bradford, *supra* note 13, at 40.

[18] *See id.*

[19] *See id.*

Prior to 1989, numerous scholars considered a federal court's ability to anticipatorily overrule the Supreme Court.[20] The Court's assertion in *Rodriguez*, however, that a lower federal court may not overrule the Supreme Court put an end to much of this debate.[21] Curiously, the Court did not provide much explanation for its rejection of a lower federal court's right to anticipatorily overrule Supreme Court precedent, nor did it concern itself with the rights of state courts.[22] Both prior to and following *Rodriquez*, the Court never made a similar assertion regarding state courts.[23] As recently as 2005, in *Roper v. Simmons*, the Supreme Court reviewed a state court's holding that defied the Court's precedent without mentioning the state court's ability to disregard Supreme Court precedent.[24] Thus, *Roper* lends support to the theory that state courts have been effectively unbound by the Supreme Court and may disregard outdated precedent.[25] The "unbound state court" concept, proposed by Frederic Bloom, essentially states that, for better or for worse, the Supreme Court permits state courts to disregard Supreme Court precedent by making that precedent uncertain and establishing a deferential habeas standard.[26] The unbound-state-court concept, however, is seemingly applicable in many situations beyond simple habeas proceedings.[27]

The change in theory from anticipatory overruling to unbound state courts is likely the result of the Supreme Court's rejection of a lower federal court's ability to disregard binding precedent. The

[20] *See* Bloom, *supra* note 12, at 504 n.16.

[21] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989).

[22] *See id.* (referencing only the Court of Appeals). Both the majority and the dissent in *Rodriguez* simply dismissed the right of a federal court to anticipatorily overrule. Justice Stevens, in his dissent, cited this as a "duty of other federal courts to respect our work product." *Id.* at 486 (Stevens, J., dissenting). This specific language binding other federal courts, rather than all courts, may suggest a difference between lower federal and state courts when interpreting precedent.

[23] *See generally* Roper v. Simmons, 543 U.S. 551 (2005); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[24] *See Roper*, 543 U.S. at 559–60.

[25] *See generally* Bloom, *supra* note 12, at 509–10 (discussing the theory of unbound state courts).

[26] *Id.* at 512.

[27] *See* Jason Mazzone, *When the Supreme Court Is Not Supreme* 20 (Brooklyn Law Sch. Legal Studies, Paper No. 131, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348593 (arguing that many circumstances allow state courts to make Constitutional interpretations "with little or no likelihood of review by the Supreme Court").

newer unbound-state-court theory, however, sets itself apart from the theory of anticipatory overruling by focusing on the mechanics of how a state court is unbound by the Supreme Court rather than applying to state courts the rationale behind anticipatory overruling. The unbound-state-court theory is a descriptive, rather than a normative, account of a state court's ability to disregard precedent.[28] This Comment seeks to apply the rationale of anticipatory overruling to state, rather than federal, courts not simply to establish how the Supreme Court allows state courts to be unbound but both to demonstrate that state courts have the power to disregard Supreme Court precedent and to detail when and how state courts should exercise this power.

III. ANTICIPATORY OVERRULING SUPPORTS A STATE COURT'S ABILITY TO DISREGARD DEAD PRECEDENT

For obvious reasons, the theory of anticipatory overruling raises questions regarding the role of a federal court that are particularly related to stare decisis. This theory essentially weighs the benefits of strict adherence to stare decisis and respect for the Supreme Court against the interests of individual justice and making the law more responsive to change.[29] The considerations that likely led the Supreme Court to deny lower federal courts the right to anticipatorily overrule Supreme Court precedent are more serious at the federal level than at the state level; state courts, therefore, should not be similarly limited in their ability to disregard dead law.

A. *Duty to Obey*

Anticipatory overruling suggests that a court is under a duty to anticipate what the Supreme Court would hold rather than to blindly follow the precedent.[30] Courts are expected, if not required, to apply the most current and applicable rule of law to the case before it.[31] Anticipatory overruling, however, is not a way to simply disobey the

---

[28] *See id.*

[29] *See* Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 74–85 (1982).

[30] *Id.* at 74.

[31] Bradley v. School Bd., 416 U.S. 696, 711 (1974) (stating that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice"); United States v. Havener, 905 F.2d 3, 5 (1st Cir. 1990) ("One principle of statutory interpretation urges an appellate court to assume that a . . . new law . . . appl[ies] to cases on appeal, even if the new law leads to a different outcome."). This assumption is implicit in the concept of stare decisis. *See* 1-6 Federal Standards of Review (MB) § 6.01 (2008).

Court; rather, it is premised upon the idea that the newer law may in fact be what the Court would deem the applicable rule of law. The supervisory nature of the Supreme Court over lower federal courts may justify the Supreme Court's rejection of the lower federal courts' ability to overrule the Court's precedent. Basic notions of federalism, however, refute the belief that the Supreme Court has the same supervisory power over state courts.[32] In fact, the Supreme Court explicitly accepts that it holds no general supervisory power over the state courts.[33] Thus, the Court's lack of similar supervisory power over state courts results in a lessened interest, or perhaps even lack of ability, to similarly deny this right to state courts.

Furthermore, a state court serves a different master than a federal court does. Although state law is limited insofar as it must not conflict with federal law, a state court is a creature of the state, and its principal duties and obligations lie with the state.[34] Also, a state court's decision does not bind the federal government but generally would bind the government of that particular state.[35] The difference between state and federal courts is significant in this regard. A state court should have much less of a duty to obey arguably dead Supreme Court precedent that it finds to be irrelevant because the forced following of dead law may injure the state or its citizenry. If a state follows outdated precedent, it runs the risk of enforcing invalid laws and offending individual rights. For example, it could lead to the infringement of individual Second Amendment rights due to an inability to disregard the outdated holding of *Cruikshank*. If a state legislature agrees with *Cruikshank* that the Second Amendment does not apply to the states and decides to pass laws that are offensive to the Second Amendment, then the state courts, if bound by the outdated holding of *Cruikshank*, will have no recourse to defend the state citizenry's Second Amendment rights. Moreover, if state courts are forced to follow dead Supreme Court precedent, then the govern-

---

[32] Federal courts are Article III courts, which are inferior to the Supreme Court. *See* U.S. CONST. art. III, § 1. On the other hand, state courts are creatures of the states in which they are established and bound by the federal courts only insofar as state law may not contradict federal law. *See* U.S. CONST. art. VI.

[33] Dickerson v. United States, 530 U.S. 428, 438 (2000) ("It is beyond dispute that we do not hold a supervisory power over the courts of the several States.").

[34] Although a state court's duty is to interpret the law of the state, it must also respect federal law that is on point; federal law is still the supreme law of the land. *See* U.S. CONST. art. VI.

[35] Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361 (1952) ("State laws are not controlling in determining what the incidents of this federal right shall be.").

ments of the several states will be left with little to no recourse to correct any dead rule of law until the Supreme Court decides to explicitly overrule itself; a single state's legislature and executive branch have little control over federal law even where such law has a direct impact on the state. The federal government is not similarly situated because it has the ability to effectively overrule law by either passing statutes that supersede judicial decisions or even amending the Constitution.[36] This is evident in the aggressive congressional reaction to Supreme Court decisions during and following the Civil Rights Movement where Congress legislatively overrode Supreme Court decisions that were repugnant to Congress's view of civil rights.[37]

Moreover, Congress has provided to the federal courts statutory tools by which they may deal with precedential ambiguities and dead law even in the absence of the right to anticipatorily overrule Supreme Court precedent; state courts are not afforded similar tools. For example, a federal district judge may certify an order for appeal to the court of appeals where the issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[38] In addition, a federal appellate court may certify a question of law to the Supreme Court.[39] The combination of these two statutory options eliminates the need for any lower federal court to anticipatorily overrule Supreme Court precedent because the lower federal courts have a means by which to send the issue to the Supreme Court. No similar tool exists in the state courts. Consequently, a state court must rule on the issue and is faced with the decision of whether to follow the dead law.[40] Because state courts may not avoid dead law like lower federal courts can, state courts should be afforded the ability to disregard dead precedent where justice so requires.

---

[36] *See* U.S. CONST. art. V.

[37] *See generally* William N. Eskridge Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 624–41 (1991) (detailing civil rights related legislative overrides of Supreme Court decisions from 1972 through 1990).

[38] 28 U.S.C. § 1292(b) (2006).

[39] *Id.* § 1254(2). The Supreme Court, however, has discouraged such upward certification and stated that certification in this regard should be reserved for rare instances. *See* Wisniewski v. United States, 353 U.S. 901, 902 (1957).

[40] The district court, however, may not dodge the issue entirely; the issue must be certified under 28 U.S.C. § 1292(b). Nevertheless, the district court does have a means by which to push the issue upward for review.

B. Duty to Promote Justice

Perhaps the most convincing argument in favor of anticipatory overruling is a court's duty to promote justice.[41] At both the federal and state level, a judge's application of precedent that may be perceived to be outdated would be inherently unjust.[42] Even though judges might be opposed to binding precedent, they are nevertheless bound by that precedent. No judge, however, should be bound by law that is unconvincing in the face of newer law. To be bound by the older law would be to undermine the justice sought by the application or creation of a newer law. For example, ignoring in the name of stare decisis a 2008 Supreme Court holding that undermines a 1908 Supreme Court holding would defeat both the modern progression of the law and the justice sought by the newer decision.

C. The Need for Uniformity

While perhaps disregarding the need for individual justice in specific cases, the concept of stare decisis promotes and strives to achieve uniformity among judicial decisions.[43] A stable judicial system demands respect for stare decisis; "longstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it."[44] To provide stability in the law, courts must respect precedent.[45] At the federal level, a strong argument can be made that federal courts should strictly adhere to stare decisis. Where a federal court strays from precedent, the predictability of the law is questioned and so is the respect for decisions of the Supreme Court.[46] But the lack of uniformity that already exists at the Supreme Court level often gives rise to a lower federal or state court's desire to disregard precedent. For example, in regard to *Heller* and *Cruikshank*, courts may be tempted to disregard the precedent set forth by the Court in *Cruikshank* because of the Court's language in *Heller* that

---

[41] Kniffin, *supra* note 29, at 75.

[42] *Id.*

[43] *Id.* at 80–85.

[44] Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994).

[45] *See, e.g.*, CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1961 (2008) ("Principles of stare decisis, after all, demand respect for precedent . . . . Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.").

[46] *See id.*

seemingly undermines *Cruikshank*.[47] Such lack of uniformity in the Court's decisions creates the need for state courts to essentially choose which line of reasoning to follow.

Further, the uniformity argument weakens when applied to the states as opposed to the federal government. Historically, the states have been regarded as laboratories for new ideas and have been encouraged to experiment.[48] Admittedly, the *Heller* and *Cruikshank* cases are concerned with federal, not state, law.[49] Therefore, the question arises whether the states-as-laboratories theory can be extended to a state court's interpretation of federal law.[50]

The states-as-laboratories theory is perhaps most effective in areas that are traditionally state responsibilities, such as health care and crime.[51] Where federal law, however, is in a state of uncertainty—such as where federal precedent has been eroded—the underlying concept of the states-as-laboratories theory supports the notion that state courts should have the ability to disregard precedent where the Supreme Court itself has created the uncertainty, especially with regard to interpretation of the Second Amendment, which directly affects both serious crime and gun control.[52] On occasion, the Supreme Court itself creates uncertainty in an area of law by issuing conflicting holdings. Providing state courts the ability via the states-as-laboratories theory to disregard one precedent during the period of time that the Court has not finalized the issue by explicitly overruling either of the conflicting precedents may benefit both the Court and the several states.[53]

---

[47] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2821 n.23 (2008) (stating that *Cruikshank* did not undergo a modern incorporation analysis); United States v. Cruikshank, 92 U.S. 542, 553 (1876) (holding that the Second Amendment is not incorporated into the Fourteenth Amendment and is therefore not applicable to the States).

[48] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as laboratories).

[49] The cases concern the Second Amendment. *Heller*, 128 S. Ct. at 2788; *Cruikshank*, 92 U.S. at 553.

[50] Indeed, Jason Mazzone argues that early state courts freely applied the Bill of Rights to state action. Jason Mazzone, *The Bill of Rights in the Early State Cases*, 92 MINN. L. REV. 1, 3 (2007).

[51] David C. Mangan, Note, Gonzales v. Raich*: The "States as Laboratories" Principle of Federalism Supports Prolonging California's Experiment*, 51 ST. LOUIS U. L.J. 521, 543 (2007).

[52] *See generally id.* at 543–44 (noting the advantages of using states as laboratories in areas such as crime).

[53] *Cf.* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 699, 716 (1984) (dis-

Where subsequent Supreme Court decisions erode the validity of prior decisions, uniformity is already offended. The lower federal courts and state courts are not asked whether to follow uniformity; they are faced with the issue of how to deal with the pre-existing lack of uniformity that surrounds the issue at hand. For example, with regard to incorporation, a lower federal or state court is faced with the decision of whether to follow *Cruikshank*'s perhaps outdated holding that the Second Amendment is not incorporated[54] or to follow *Heller*'s declaration that the modern incorporation doctrine set forth in *Duncan v. Louisiana*[55] is required in all cases.[56] The courts are asked whether it is worse to disregard reasoning set forth within a modern decision than to dismiss the holding of an older, perhaps eroded, decision. Indeed, a state or federal court could do great harm to the institutions of justice by following dead precedent.[57]

The Court has expressed its concern about the dangers of lower federal courts anticipatorily overruling Supreme Court precedent and has stated that lower federal courts may not do so.[58] Notions of federalism and the understanding of the states as laboratories for changing ideas, however, may undermine the uniformity argument as it applies to state courts.[59] Having advanced the argument that the theory of anticipatory overruling strongly supports a state court's ability to disregard dead precedent, this Comment continues to consider how state courts remain, in many circumstances, free to do so.

IV. STATE COURT HISTORY OF DISREGARDING DEAD PRECEDENT

Although it appears to be a commonly held assumption that the Supreme Court is never challenged by other courts, lower federal and state court expressions of willingness to overrule Supreme Court precedent do, though perhaps uncommonly, occur.[60] In fact, state

---

cussing the theory of percolation and the importance of allowing courts to independently decide issues before the Supreme Court rules on the issue).

[54] *Cruikshank*, 92 U.S. at 553.

[55] 391 U.S. 145, 164, 171 (1968).

[56] District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

[57] *See infra* Part IV.B.

[58] Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989).

[59] *See generally* Gregory v. Ashcroft, 501 U.S. 452 (1991) (providing a thorough discussion of federalism and dual sovereignty).

[60] *See* Bradford, *supra* note 13, at 43 n.19.

courts have disregarded Supreme Court precedent in several landmark cases as recently as 2007.[61]

A. *The Theory of Unbound State Courts Coupled with the Concept of Anticipatory Overruling*

Although a state court's decision to disregard Supreme Court precedent may simply be deemed a misinterpretation of the law on review by the Court, it sometimes succeeds.[62] This success has been explained by the theory of unbound state courts.[63] The theory in its basic form states that the Supreme Court has given some of its interpretive authority to the states through an unbinding process.[64] This unbinding process has two steps: first the Court creates uncertainty in the law, and then the deferential habeas standard shields even incorrect rulings.[65] Frederic Bloom analyzes unbound state courts in the context of habeas review,[66] but habeas review is only one of many areas in which state courts may avoid review by the Supreme Court.[67] For example, Jason Mazzone cites to several circumstances that allow for state authority on matters of Constitutional interpretation that the Supreme Court is unlikely to review, including (1) "rules of preclusion"; (2) "the role of state courts in adjudicating criminal cases"; and (3) "the possibility of state decisions flying below the radar."[68]

This unbound-state-court theory is interesting in several regards. First, it approaches a state court's ability to disregard Supreme Court precedent in a much different manner than the way in which the anticipatory-overruling theory interpreted the right of lower federal courts to do the same. The desire to set the unbound-court theory apart from the anticipatory-overruling theory may be attributed, at least in part, to the Supreme Court's denial of a lower federal court's right to anticipatorily overrule Supreme Court precedent.[69] This is

[61] *See generally* Smith v. Texas, 550 U.S. 297 (2007); Roper v. Simmons, 543 U.S. 551 (2005); Lockyer v. Andrade, 538 U.S. 63 (2003).

[62] *See generally Roper*, 543 U.S. 551.

[63] *See generally* Bloom, *supra* note 12 (explaining the mechanics of the unbound state theory).

[64] *Id.* at 506.

[65] *Id.* at 512.

[66] *See generally* Bloom, supra note 12.

[67] Mazzone, *supra* note 27, at 20.

[68] *Id.*

[69] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989) (holding that the Court of Appeals should leave the prerogative of overruling Supreme Court decisions to the Supreme Court).

doubtlessly a valid concern, but the unbound-state-court theory does not acknowledge the validity of the arguments in support of anticipatory overruling as they relate to state courts. Second, the unbound-state-court theory is a descriptive, rather than a normative, explanation of the unbinding process.[70] It thoroughly analyzes the way in which the Supreme Court has unbound state courts but does not provide the same thorough analysis of a state court's interest in being unbound.[71] For these reasons, this Comment accepts the theory of unbound state courts but expands upon it by applying the underlying themes of anticipatory overruling to state courts. As a result, cases of lower federal courts engaging in anticipatory overruling as well as arguments generally in favor of anticipatory overruling provide support for a state court's right to disregard dead Supreme Court precedent.

B. *The Dangers of Denying the Right to Disregard Dead Precedent Illustrated*

If a court is bound by arguably dead precedent, new holdings will be effectively infertile until the Supreme Court expressly overrules the older precedent. But modern, emerging rules of law that clearly undermine precedent should not be overlooked in the name of stare decisis. Two particular instances in the Court's history may illustrate the crippling effect a strict view of stare decisis would have on the nation.[72]

1. *Brown* and *Plessy*: The Civil Rights Movement

In 1954 the Supreme Court issued an opinion in *Brown v. Board of Education*[73] that many regard to be its most crowning achievement; the Supreme Court rejected the separate-but-equal doctrine and held public-school racial segregation to be unconstitutional.[74] The language of *Brown*, however, rejected the separate-but-equal doctrine only as it applied to public education.[75] Prior to that decision, the Supreme Court established in *Plessy v. Ferguson*[76] that public-transportation segregation was constitutionally permitted. Following

[70] Bloom, *supra* note 12, at 502 (noting that "the Court willingly permits state courts to disregard Supreme Court precedent").

[71] *Id.* at 548–50.

[72] *See infra* Part IV.B.1.

[73] 347 U.S. 483 (1954).

[74] *Id.* at 495.

[75] *Id.*

[76] 163 U.S. 537, 551 (1896).

Brown, the separate-but-equal doctrine was on shaky ground at best, but *Plessy* had not been explicitly overruled.

Under the *Rodriguez* view, lower federal courts would still have been bound by *Plessy* until it was explicitly overruled;[77] however, this was not the case. Lower federal courts actively anticipatorily overruled *Plessy*, and the Supreme Court affirmed the anticipatory overrulings in per curiam decisions.[78] In fact, in *Dawson v. Baltimore City*,[79] the U.S. Court of Appeals for the Fourth Circuit noted that the authority of segregation cases like *Plessy* had been "swept away by the subsequent decisions of the Supreme Court."[80] Indeed, the Supreme Court affirmed this holding with no criticism of the lower federal court's decision to disregard the precedent.[81]

Aside from illustrating that the Supreme Court did not criticize the lower federal courts for dismissing *Plessy* as dead law, a greater lesson may be learned: the anticipatory overrulings played a considerable, if not vital, role in the progression of the civil-rights movement in the American judicial system. The Supreme Court affirmed the anticipatory overrulings of *Plessy* but only insofar as the courts below addressed the issue. For example, through Supreme Court affirmances of lower federal court anticipatory overrulings, the separate-but-equal doctrine was found to be inapplicable to beaches, then buses, and then public parks.[82] Had the lower federal courts not chipped away at *Plessy*, the civil rights movement arguably might have suffered. In fact, not until 1967, thirteen years after *Brown*, did the Supreme Court clearly state that "equal application does not immunize [a] statute from the very heavy burden of justification . . . required of state statutes drawn according to race."[83] In this setting, the possible implications of the federal courts failing to anticipatorily overrule

[77] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989) (holding that the Court of Appeals should leave the prerogative of overruling Supreme Court decisions to the Supreme Court).

[78] *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122, 123 (5th Cir. 1958), *aff'd*, 358 U.S. 54 (1958) (per curiam); Browder v. Gayle, 142 F. Supp. 707, 717 (D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956) (per curiam).

[79] 220 F.2d 386 (4th Cir. 1955).

[80] *Id.*

[81] Mayor of Baltimore v. Dawson, 350 U.S. 877, 877 (1955) (per curiam).

[82] *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 54 (1958) (per curiam) (public parks); Gayle v. Browder, 352 U.S. 903, 903 (1956) (per curiam) (buses); *Dawson*, 350 U.S. at 877 (per curiam) (beaches).

[83] Loving v. Virginia, 388 U.S. 1, 9 (1967).

Plessy are frightening: minorities would have had to wait as long as thirteen years after *Brown* to receive the relief that they deserved.[84]

2. *Barnette v. West Virginia State Board of Education*[85]: A Strong Argument for Disregarding Dead Precedent

Barnette involved the enforcement of a regulation that required students to salute the flag.[86] This requirement was challenged as a violation of the students' religious liberty as protected by the First Amendment, which is applicable to the states through the Fourteenth Amendment.[87] Prior to *Barnette*, the Court held in *Minersville School District v. Gobitis*[88] that such a regulation did not offend the Constitution.[89] The district court in *Barnette*, however, found that the Supreme Court had since undermined *Gobitis* as precedential authority.[90] The court expressed that it would ordinarily "feel constrained to follow an unreversed decision of the Supreme Court of the United States" regardless of whether it agreed with the Court but that recent developments illustrated that the Court itself had impaired that authority.[91] Specifically, the court held that it "would be recreant to our duty as judges . . . [to] blind[ly] follow[ ] a decision which the Supreme Court itself has thus impaired as an authority."[92] On that basis, the court disregarded *Gobitis* as dead precedent.[93]

The Supreme Court affirmed the *Barnette* decision and did not deny the lower court's strong language supporting the ability to disregard the questioned precedent.[94] This illustrates that anticipatory overruling has benefitted the judicial process where the Court's subsequent decisions have eroded precedent.

---

[84] *See supra* notes 83–84 and accompanying text.

[85] 47 F. Supp. 251 (S.D. W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

[86] *Id.* at 252.

[87] *Id.*

[88] 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[89] *Id.* at 599–600.

[90] *Barnette*, 47 F. Supp. at 252–53 (noting that members of the Court referred to *Gobitis* as "public expression . . . that it is unsound" and noting the Court's decision to avoid it as precedential authority in a subsequent related case).

[91] *Id.*

[92] *Id.* at 253.

[93] *See id.*

[94] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943).

V. *ROPER V. SIMMONS*[95]: A MODERN EXAMPLE OF A STATE COURT'S RIGHT TO DISREGARD SUPREME COURT PRECEDENT

Prior to *Roper*, the Supreme Court held in *Stanford v. Kentucky*[96] that the Constitution does not prohibit the execution of minors.[97] Simmons, at seventeen years of age, committed a murder.[98] His guilt was not questioned; he even bragged that he could get away with the murder because he was a minor.[99] Simmons was tried as an adult and the State successfully sought the death penalty.[100] The Missouri Supreme Court affirmed the death sentence.[101] Subsequently, in *Atkins v. Virginia*,[102] the Supreme Court held that the Eighth and Fourteenth Amendments prohibited the execution of mentally retarded persons.[103] Following the *Atkins* decision, Simmons filed for state relief, and the Missouri Supreme Court granted it.[104] The court held that

> a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.[105]

On that basis, the state court disregarded *Stanford*, which was Supreme Court precedent.[106]

The Supreme Court affirmed the holding of the state court with no criticism of the state court's decision to disregard the Court's precedent, even though the dissent in the state court's decision, quoting *Rodriguez*, explicitly argued against the state court's right to

---

[95] 543 U.S. 551 (2005).
[96] 492 U.S. 361 (1989).
[97] *Id.* at 380.
[98] *Roper*, 543 U.S. at 556.
[99] *Id.*
[100] *Id.* at 557–58.
[101] *Id.* at 559.
[102] 536 U.S. 304 (2002).
[103] *Id.* at 321.
[104] *See* State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003), *aff'd*, 543 U.S. 551.
[105] *Id.* at 399.
[106] *Id.* at 400.

make such a decision.[107] And even though the parties presented the issue to the Court,[108] no discussion was provided as to either a state court's right to interpret the constitution or anticipatorily overrule the Court.[109] Instead, in reaching its affirmance, the Court considered and analyzed state trends regarding the Eighth Amendment and the execution of both the mentally retarded and juveniles.[110]

VI. *DISTRICT OF COLUMBIA V. HELLER*[111] AND THE POWER TO HOLD THAT SUPREME COURT PRECEDENT IS DEAD

A. *History:* United States v. Cruikshank[112]

Cruikshank was heard during the horrors of a nation influenced by the Ku Klux Klan. The case concerned what has been remembered as the Colfax Massacre, during which a group of whites banded together and killed a large group of blacks on Easter Sunday by burning down the building in which they had assembled and shooting those who tried to escape.[113] Several counts were brought against the conspirators, including conspiracy to hinder persons' right to assemble and their right to bear arms.[114] The Supreme Court dismissed the indictment and held that because neither the First nor Second Amendments were incorporated into the Fourteenth Amendment, those Amendments only protected against federal action.[115]

This holding is plainly outdated because it found the First Amendment to be unincorporated.[116] Furthermore, *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required

[107] Roper v. Simmons, 543 U.S. 551, 578–79 (2005); *Simmons*, 112 S.W.3d at 421 (Price, J., dissenting).

[108] Brief for Petitioner at 11, *Roper*, 543 U.S. 551 (No. 03-633) (arguing that a state court may not overrule Supreme Court precedent no matter how antiquated or questionable the ruling may be).

[109] *Roper*, 543 U.S. at 560.

[110] *Id.* at 565–67.

[111] 128 S. Ct. 2783 (2008).

[112] 92 U.S. 542 (1876).

[113] Timothy Sandefur, *Can You Get There from Here?: How the Law Still Threatens King's Dream*, 22 LAW & INEQ. 1, 12 (2004); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2151–52 (1993). *See generally* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

[114] *Cruikshank*, 92 U.S. at 551–53.

[115] *Id.* at 551–54.

[116] District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

by . . . later cases."[117] The *Duncan* case quite clearly illustrates the difference between a modern incorporation analysis and incorporation analyses undertaken by the Court prior to *Duncan*: "Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection."[118] Subsequent to *Duncan*, the Court asks if a protection is "necessary to an Anglo-American regime of ordered liberty."[119] *Duncan* essentially discredits the *Palko* method of incorporation, which required courts to use the "civilized system" method.[120] But *Cruikshank* did not even conduct a *Palko* analysis; it applied the *Slaughter-House* reasoning by conducting a privileges-and-immunities analysis rather than a due process analysis.[121] Essentially, *Cruikshank* is two steps removed from modern incorporation. This creates a strong probability that the precedential value of *Cruikshank* is questionable.

B. District of Columbia v. Heller[122]

Heller challenged a handgun prohibition in the District of Columbia on the basis that it was an infringement of his Second Amendment right to bear arms.[123] The Supreme Court interpreted the Second Amendment to protect an individual's "inherent right of self-defense."[124] Although the Supreme Court found that an individual's right to bear arms may not be infringed by the federal government, it noted that the question of incorporation was not presented in *Heller*.[125] The Court, however, went on to note that *Cruikshank* similarly held the First Amendment to be unincorporated and did not engage in a modern incorporation analysis.[126]

Insofar as incorporation of the Second Amendment is concerned, the language in *Heller* creates confusion by commenting that *Cruikshank* did not undertake the required modern incorporation

---

[117] *Id.*

[118] Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

[119] *Id.* at 150 n.14.

[120] *Id.*; Palko v. Connecticut, 302 U.S. 319, 327 (1937).

[121] United States v. Cruikshank, 92 U.S. 542, 553 (1876) (stating that the Second Amendment only applies to Congress); *see generally* Slaughter-House Cases, 83 U.S. 36 (1873) (conducting a privileges-and-immunities analysis).

[122] 128 S. Ct. 2783 (2008).

[123] *Id.* at 2788.

[124] *Id.* at 2818.

[125] *Id.* at 2813 n.23.

[126] *Id.*

analysis yet not overruling *Cruikshank*.[127] *Heller* sets forth reasons why precedent, such as *Cruikshank*, which holds the Second Amendment to be unincorporated, is questionable.[128] State courts are left to decide whether they should defer to Supreme Court precedent that the Court itself has questioned or, alternatively, disregard precedent that the Supreme Court explicitly decided not to overrule.

C. *A Comparison of* Roper v. Simmons[129] *with the State Incorporation Issue Raised by* Heller

Roper and *Heller* are comparable in several regards. First, the cases are only three years apart; *Roper* was decided in 2005 and *Heller* in 2008. The proximity in time between the cases likely leads to a reasonably certain conclusion that the Supreme Court would treat the cases similarly if they raise similar issues. The less time between cases, the less likely it is that the Court will change its reasoning.

Second, both cases concern the interpretation of the Bill of Rights: *Roper* concerns the Eighth Amendment, and *Heller* concerns the Second Amendment.[130] This also may lead to an assumption that the two issues will be treated similarly. Although the *Heller* issue may be further complicated by Fourteenth Amendment incorporation issues, both cases concern the way in which a provision of the Bill of Rights will affect state law.

Third, the judiciary is considered by many to be the champion of the minority and the protector of civil liberties because of its counter-majoritarian role.[131] Therefore, if this argument holds merit, the Court might be more likely to affirm a state's expansion of the Bill of Rights than to affirm a restriction. Notably, in *Michigan v. Long*,[132] Justice Stevens stated in dissent that the Court should not review state court decisions in which the state "simply provided greater protection

---

[127] *Id.*

[128] *Heller*, 128 S. Ct. at 2812–16.

[129] 543 U.S. 551 (2005).

[130] *Heller*, 128 S. Ct. at 2788; *Roper*, 543 U.S. at 559–60.

[131] This view dates back to the Federalist Papers, in which Alexander Hamilton stated that "the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society." THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (J. Cooke ed., 1961). This assumption, however, is not at all uncontested: *Cruikshank* and *Dred Scott* both exemplify the Court's denial to protect minority rights in past decisions. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1876); Scott v. Sandford, 60 U.S. 393 (1857).

[132] 463 U.S. 1032 (1983).

to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country."[133]

Fourth, both cases deal with state-court action. *Roper* was a ruling of a state court interpreting the Eighth Amendment;[134] state courts following *Heller* will also tackle the incorporation issue.

Fifth and finally, both cases concern precedent that is outdated and questioned by the Supreme Court. In *State ex rel. Simmons v. Roper*,[135] the Missouri Supreme Court stated that "the rationale for the Supreme Court's determination that the execution of juveniles was not cruel and unusual punishment has disappeared, and that the Eighth Amendment bars [a juvenile's] execution."[136] The Supreme Court in *Roper* confirmed the Missouri Supreme Court's reasoning by noting that a majority of states now reject the death penalty for minors and holding that such bans are required by the Eighth Amendment.[137] That finding in *Roper* was brought about by the state court's rejection of *Stanford*, which held that the execution of a juvenile did not offend the Eighth Amendment, and the expansion of *Atkins*, which held the execution of mentally retarded persons to be offensive to the Eighth Amendment.[138] Similarly, state courts faced with the incorporation issue raised by *Heller* must decide whether to follow the outdated law and reasoning of *Cruikshank* or adopt principles set forth in more recent precedent engaging in a modern Fourteenth Amendment analysis.[139]

---

[133] *Id.* at 1068 (Stevens, J., dissenting); *see also* Mazzone, *supra* note 27, at 70–71 (analyzing Justice Stevens's position on Supreme Court review of state court decisions that expand Constitutional protection).

[134] *See* Roper v. Simmons, 543 U.S. 551, 555–56 (2005).

[135] 112 S.W.3d 397 (Mo. 2003), *aff'd*, 543 U.S. 551.

[136] *Id.* at 399.

[137] *Roper*, 543 U.S. at 568.

[138] *Id.* at 555–56, 564; Atkins v. Virginia, 536 U.S. 304, 321 (2002); Stanford v. Kentucky, 492 U.S. 361, 380 (1989); *see* Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (stating that "the Court held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime"); *see generally* Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785 (2009) (detailing the diminished capacity/responsibility rule set forth by *Atkins* and *Roper*).

[139] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008) (noting that *Cruikshank* did not engage in the modern incorporation analysis that is required today). Seemingly, if a state court were able to find *Stanford*, a 1989 case, to no longer be binding, then *Cruikshank*, an 1876 case, could just as easily be held by a state court to be dead law.

Although *Roper* and *Heller* have many common features, several distinct differences between the cases also exist. First, the cases concern different constitutional amendments—*Roper* concerns the Eight Amendment and *Heller* concerns the Second Amendment. While both cases deal with the Bill of Rights, this does not automatically result in equal treatment. For example, in *Slocum v. New York Life Insurance Co.*,[140] the Supreme Court held that the Seventh Amendment is not applicable to the states.[141]

Also, a difference may exist in the degree to which the precedent in question has been damaged. When *Roper* disregarded *Stanford* as precedential authority, the *Atkins* court had already delivered what may be considered a fatal blow to *Stanford*'s holding.[142] *Atkins* was binding Supreme Court precedent that touched directly on the evolving standards of decency concerning cruel and unusual punishment under the Eighth Amendment.[143] *Atkins* found that the execution of the mentally retarded offended our standards of decency and easily made a case for questioning the execution of juveniles; *Roper* cited to the similarities of the two issues in stating that "[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded."[144]

On the other hand, the *Heller* holding did not contradict *Cruikshank*; it did not address the issue of incorporation.[145] Furthermore, much of the language in *Heller* that may be read to discredit *Cruikshank* is mere footnote dicta.[146] But notably, the dicta is indeed a powerful argument against *Cruikshank* because the dicta expressly states that the *Cruikshank* reasoning is outdated.[147]

Despite the several distinctions between *Heller* and *Roper*, the cases are similar enough to be treated alike. A supportable argument can be made that the Supreme Court would affirm a state court's finding that *Cruikshank* is dead law and may therefore be disregarded just as the Court in *Roper* disregarded *Stanford*. Furthermore, the

---

[140] 228 U.S. 364 (1913).
[141] *Id.* at 376–77.
[142] *See* Roper v. Simmons, 543 U.S. 551, 564 (2005).
[143] *See* Atkins v. Virginia, 536 U.S. 304, 312 (2002).
[144] *Roper*, 543 U.S. at 564.
[145] District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).
[146] *Id.*
[147] *Id.*

Court would affirm even if it found that the state court was wrong to anticipatorily overrule but was correct on the merits. In both instances, the state court is relying on Supreme Court precedent that undermined the analysis and holding in the questioned precedent. The cases both concern a state court's interpretation of the Bill of Rights and the expansion of those respective rights. Additionally, the cases are very close in time, which indicates that the Supreme Court may treat them similarly.[148] Just as the Supreme Court did not take issue with *Roper*'s defiance of dead Supreme Court precedent, the Court is not likely to take issue with a state court disregarding *Cruikshank* on almost identical grounds. But it does not necessarily follow that the Court will accept such reasoning. The Court may overrule a state court's interpretation of the Constitution,[149] and it could find that *Cruikshank* still stands when applying a modern Fourteenth Amendment analysis. The issue at hand, however, is not whether a state court's interpretation will stand as constitutional law; the issue is whether the state court has the right to engage in the sort of analysis that allows the state court to decide whether arguably dead precedent may be disregarded. The answer to this question seems to be in the affirmative.

VII. THE STATE COURT STANDARD FOR DISREGARDING SUPREME COURT PRECEDENT

A state court should exercise its power to disregard Supreme Court precedent where (1) the precedent in question has been eroded by the Supreme Court itself, and (2) the state court is nearly certain that the Supreme Court would overrule the eroded law. Saying that a state court may disregard Supreme Court precedent is one thing, but saying that a state court should do so is quite another. Specifically, finding that a state court may disregard *Cruikshank* in light of *Heller* is not the end-all solution concerning whether a state court should take such action. When deciding whether a state court should disregard Supreme Court precedent, a court should consider a culmination of factors, none of which is dispositive, and be nearly certain that those factors would lead the Supreme Court to overrule that precedent.

[148] *See* Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970) (stating that predictability of law is an important concept of stare decisis).

[149] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816) (holding that the Supreme Court may review state court decisions).

A. *Factors that Illustrate the Supreme Court's Erosion of the Questioned Precedent*

Ultimately, the states are free to set their own standards concerning whether the state courts should consider the precedent dead. But this Comment argues that when assessing the continued validity of Supreme Court precedent, state courts should limit their inquiry to Supreme Court action. The specific factors set forth are mere examples of Supreme Court action that may be persuasive to state courts; they are not intended to be all inclusive. The states may place more weight on certain factors than others and are in fact encouraged to do so. For example, a state court would be wise to consider a holding to be more persuasive than dicta, but this is not to say that Supreme Court dicta may not erode a prior holding. State courts are well equipped to balance the persuasiveness of these various factors in deciding whether Supreme Court precedent is dead.

Undeniably, the most important factor in considering whether a court should disregard Supreme Court precedent is the status of that precedent. A court must consider whether subsequent Supreme Court decisions have eroded the rule of law set forth by the case in question.[150] A state court should look to the Supreme Court's decision when deciding whether precedent has been eroded.[151] *Roper* clearly supports this line of reasoning by holding *Stanford* insufficient in light *Atkins*'s holding.[152]

Precedent may be eroded by subsequent holdings that are contrary to the rule in question. For example, in *Roper*, the questioned precedent was undermined by the subsequent *Atkins* decision, which held, in direct conflict with the prior holding, the execution of the mentally retarded to be cruel and unusual punishment.[153] Thus, the *Atkins* decision not only overruled the precedent that the mentally retarded may be executed, but it also damaged and eroded precedent that held that the execution of minors did not offend the Eighth Amendment.[154] Many of the arguments set forth in *Atkins* that overruled the precedent allowing for the execution of the mentally retarded also damaged the precedent allowing the execution of minors,

---

[150] *See* Kniffin, *supra* note 29, at 53–54 (stating factors to be considered when deciding whether to anticipatorily overrule Supreme Court precedent).

[151] *Cf.* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 79 (1994) (discussing the consideration of dicta in court decision making).

[152] Roper v. Simmons, 543 U.S. 551, 564 (2005).

[153] *Id.* at 559.

[154] *Id.*

such as the growing national consensus against the death penalty for both the mentally retarded and juveniles.[155]

Another way that Supreme Court precedent may be eroded is through changing trends in Supreme Court decisions. This may occur if a holding is grounded in a certain rule of law and the Supreme Court moves away from that rule of law.[156] For example, in *Spector Motor Service, Inc. v. Walsh*,[157] the U.S. Court of Appeals for the Second Circuit anticipatorily overruled the Court and noted that "perhaps most important of all, are the broad trends in favor of [a new doctrine] shown of late by the present Court."[158]

Although perhaps less persuasive, awareness that the Supreme Court is waiting to overrule the precedent may erode that precedent.[159] This factor may be less persuasive than the previous factors because awareness that the Court seeks to overrule a precedent does not bind any court. Nevertheless, a court may conclude that the Supreme Court's desire to overrule sufficiently erodes the precedent in question. The Supreme Court may have indicated that it is awaiting a particular type of case to overrule the questioned precedent.[160] A court may properly interpret such action to be an invitation to find that precedent to be dead.[161] On the other hand, a court may feel bound by the decision and compelled to await the Court's decision to overrule that precedent. Perhaps the best course of action would be for state courts to consider the Supreme Court's desire to overrule as supplementary support for finding that precedent to be dead law.[162] State courts, however, should not disregard Supreme Court

[155] *Id.*

[156] Kniffin, *supra* note 29, at 63.

[157] 139 F.2d 809 (2d Cir. 1943).

[158] *Id.* at 816.

[159] Kniffin, *supra* note 29, at 65 (outlining the U.S. Court of Appeals for the Fifth Circuit's anticipatory overruling based on the prediction that the Supreme Court was awaiting the proper case to overrule the precedent in question).

[160] *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 657 n.14 (1965) (holding that the decision did not overrule the precedent in controversy and that the Court would wait for a proper case in which to do so).

[161] *See, e.g.*, Andrews v. Louisville & Nashville R.R., 441 F.2d 1222, 1224 (5th Cir. 1971) (finding that the case before it was "precisely the case for which the Supreme Court [had] been waiting"), *aff'd*, 406 U.S. 320 (1972).

[162] *See* Kniffin, *supra* note 29, at 66 ("In some instances . . . the likelihood of a particular Supreme Court action is used as a supporting factor after another reason for anticipatory overruling . . . .").

precedent simply to force the Supreme Court to reconsider the issue where the Court has not indicated a desire to do so.[163]

Similarly, Supreme Court dicta is not binding on any court but may be very persuasive in deciding whether the precedent in question is dead.[164] A statement in dicta made by a Supreme Court majority that questions the validity of prior precedent sheds much light on the precedential value of that holding. Related to that point, dissenting Supreme Court authority may perhaps to a lesser degree serve as supporting authority for finding questionable Supreme Court authority to be dead.

By way of example, in *Saenz v. Roe*,[165] Justice Thomas, in his dissenting opinion, stated, "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case."[166] A state court would be hard-pressed to hold that Justice Thomas's willingness to reevaluate the Privileges or Immunities Clause alone sufficiently erodes the validity of the Court's Fourteenth Amendment jurisprudence. But if Justice Thomas's dissent were accompanied by a later change in the Court's interpretation of the Privileges or Immunities Clause, then perhaps a state court might find the dissent to be particularly persuasive. Had Justice Thomas spoken for a unanimous Court, even if mere dicta, this statement would be far more persuasive, but it does not follow that a dissent can therefore never support a finding that precedent is dead. The state courts must decide the persuasiveness of such factors.

Not all Supreme Court activity, however, should be considered when deciding whether Supreme Court precedent is dead. For example, a change in the Court's membership does not invite a state court to disregard otherwise valid precedent. Such a practice has the potential to compromise the stability of the judicial system.[167] A judicial system where the precedential value of every Supreme Court decision could be undermined and disregarded by any court in the

---

[163] *See* Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB, 459 F.2d 1143, 1150 n.7 (D.C. Cir. 1972) (stating that a lower court's "function" was not to overrule Supreme Court precedent to force reconsideration of the issue).

[164] Commonwealth v. Reaves, 923 A.2d 1119, 1135 (Pa. 2007) (Baldwin, J., dissenting) (arguing that dicta serves to undermine precedent).

[165] 526 U.S. 489 (1999).

[166] *Id.* at 527–28 (Thomas, J., dissenting).

[167] *But see* Kniffin, *supra* note 29, at 67.

United States based on the current membership of the Court would prove disastrous to judicial stability.

For example, if a Justice of the Supreme Court who took part in the majority opinion in *Roe v. Wade*[168] retires and is replaced by a Justice who is of the opinion that it was wrongly decided—resulting in the erosion of the precedential value of that case and an invitation for state courts to disregard it as a precedential matter—the state courts would effectively be adjudging the precedential value of *Roe v. Wade* based simply on the number of Justices who signed off on the opinion. The fact that the decision of a divided court is still binding precedent is well established.[169] If the change in membership, however, were to be followed by a Supreme Court opinion, whether majority or dissent, that asserted the invalidity of *Roe v. Wade*, then an analogy could be made to Justice Thomas's dissent discussed above, and such an opinion could perhaps serve as valid supplemental authority in a finding that *Roe v. Wade* is dead precedent. But such authority would likely not be sufficient on its own. In other words, the perception that the Court may now be more conservative than it once was should not entice a conservative state court to disregard *Roe v. Wade*. A state court must wait for the Court to take affirmative steps to erode the precedent. Similarly, state courts should not disregard Supreme Court precedent simply to force the Supreme Court to reconsider the issue.

A state court never has the duty or even the right to disregard otherwise binding Supreme Court precedent without Supreme Court action. Rather than predict whether the Court will overrule the questioned precedent of its own volition, a state court should decide whether the Court has already taken steps that have eroded the holding of the questioned precedent. In the judicial branch of government, only Supreme Court precedent can undermine Supreme Court precedent; state courts may only derive the ability to disregard that precedent where the Supreme Court itself has called its precedential value into question.

[168] 410 U.S. 113 (1973).

[169] *See* United States v. Girouard, 149 F.2d 760, 763 (1st Cir. 1945) ("It is true that these decisions were by a divided court but . . . we are bound to accept the law as promulgated by these decisions.").

B. The Standard in Determining the Degree to Which the Supreme Court Has Eroded the Precedent in Question

Once a court has recognized the proper factors to be considered, it must then weigh the persuasiveness of those factors and decide whether those factors support a conclusion that the Supreme Court would overrule that precedent. Courts have been torn when attempting to define the proper standard by which a court should find Supreme Court precedent dead.[170] Notably, the federal cases that set forth the standards below all pre-date *Rodriguez* because that case rejected the concept of anticipatory overruling; consequently, lower federal courts were denied any right to disregard Supreme Court precedent after 1989.[171]

1. Differing Standards Set Forth by Courts

Three standards have been established by which courts have decided whether the Supreme Court would overrule the precedent in question. The most rigid, and this Comment argues the most proper, standard is the "near certainty" standard. This standard reflects a fear of abuse by lower federal or state courts as well as a reverence for stare decisis. A court applying this standard is hesitant to disregard Supreme Court precedent unless Supreme Court opinions "already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom."[172]

Another standard set forth by courts is the "high probability" standard. Invoking perhaps a less rigid standard, other courts have indicated that the correct analysis of whether disregarding Supreme Court precedent is proper turns on whether a high probability exists that the Court would overrule the decision in question.[173] Other courts have used the terms "powerfully convinced," "convinced," or "strong evidence" as standards for when the Court would overrule a decision.[174]

[170] *See* Bradford, *supra* note 13, at 45–46.

[171] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989).

[172] Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970); *see also* Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986).

[173] *See, e.g.*, Levine v. Heffernan, 864 F.2d 457, 461 (7th Cir. 1988).

[174] *See, e.g.*, Miller v. United States, 868 F.2d 236, 241 (7th Cir. 1989) ("strong evidence"); Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987) ("powerfully convinced"); Indianapolis Airport Auth. v. Am. Airlines, Inc., 733 F.2d 1262, 1272 (7th Cir. 1984) ("convinced").

The least rigid standard proposed by courts is the "preponderance" standard. A minority of courts have taken the position that a court may disregard Supreme Court precedent if it is more likely than not that the Supreme Court itself would overrule the questioned precedent.[175] This standard may be an overly relaxed vision of the concept of stare decisis.[176] If a court is simply predicting whether it is probable that the Supreme Court may overrule a questioned decision, the court gives little weight to the precedent. Such a practice could be very detrimental to stare decisis and the stability of the judicial system.[177]

2. Judge Posner's Analysis

Judge Posner, prior to *Rodriguez*, had endorsed the right of a court to disregard arguably dead Supreme Court precedent and in fact wrote the opinions in several of the above cited cases.[178] At first glance, Judge Posner's analysis of the standard applicable to questionable Supreme Court precedent seems confusing. Further analysis, however, relieves this confusion and supplies a single standard to be applied.

Judge Posner argued that lower courts have the right to disregard Supreme Court precedent where utilizing that precedent would be to apply dead law.[179] He never referred to such a decision as anticipatory overruling. In contrast, when engaging in what has since been labeled anticipatory overruling, Judge Posner stated that

> [the court is] not "overruling" [Supreme Court precedent] . . . . Constitutional law is very largely a prediction of how the Supreme Court will decide particular issues when presented to it for decision. Ordinarily the best predictor of how the Court will decide an issue in a future case is how it decided the same issue in a past case, and when that is so the law is what is stated in the earlier decision. But sometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the

[175] *See, e.g.*, Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 814 (2d Cir. 1943).

[176] *See* Bradford, *supra* note 13, at 46–47.

[177] *Cf.* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 715 (2005) (stating that "prediction . . . undermines the rule of law by over-emphasizing the role of individual judges").

[178] *See Colby*, 811 F.2d at 1123; Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986);
Indianapolis Airport Auth. v. Am. Airlines, Inc., 733 F.2d 1262, 1272 (7th Cir. 1984); Minority Police Officers Ass'n. v. South Bend, 721 F.2d 197, 201 (7th Cir. 1983).

[179] Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982).

next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.[180]

Judge Posner seemed to believe that analyzing the continuing validity of Supreme Court precedent is not only the right but the duty of a court when considering the applicable law concerning the case before it.[181]

In subsequent opinions, Judge Posner addressed the right to disregard dead precedent and used varying terms, which may have caused confusion as to what standard should be applied. In *Norris*, Judge Posner stated that a court may disregard precedent where it is "very probable" that the Supreme Court will no longer follow the questioned precedent.[182] One year later, in *Minority Police Officers Ass'n v. South Bend*,[183] he described the standard as "strong evidence" that the Supreme Court would overrule the precedent if it had the chance.[184] Yet another year later, in *Indianapolis Airport Authority v. American Airlines, Inc.*,[185] Judge Posner described the standard simply as "convinced" that the Court would overrule if given the opportunity.[186] Although one may interpret a convinced standard to be less rigid than either very probable or strong evidence, further analysis of the language leads to the inevitable conclusion that the standard remains the same. When defining the standard as "convinced that the Court would overrule the decision if it had the opportunity to do so," Judge Posner cited directly to *Norris*, which defined the standard as very probable.[187] Judge Posner did not intend to alter the standard set forth in his previous opinions; if he did have such intent, he would not have provided a direct citation to those standards when articulating his opinion.

Next, in *Olson v. Paine, Webber, Jackson & Curtis, Inc.*,[188] Judge Posner described the standard as "almost certain."[189] Again, when defining the standard, Judge Posner provided a direct citation to *Nor-*

[180] *Id.*
[181] *See id.*
[182] *Id.* at 904.
[183] 721 F.2d 197 (7th Cir. 1983).
[184] *Id.* at 201.
[185] 733 F.2d 1262 (7th Cir. 1984).
[186] *Id.* at 1272.
[187] *Id.* (citing *Norris*, 687 F.2d at 902–04).
[188] 806 F.2d 731 (7th Cir. 1986).
[189] *Id.* at 734.

ris.[190] Finally, in *Colby v. J.C. Penney Co.*,[191] Judge Posner articulated the standard as "powerfully convinced that the Court would overrule it at the first opportunity."[192] This quotation directly cites to *Olson*, which in turn directly cites to *Norris*.[193]

The result of this chain of opinions that cite to one another for direct support is simple—Judge Posner sets forth but one standard for courts analyzing whether Supreme Court precedent is dead law. Whether Judge Posner calls the standard very probable, strong evidence, convinced, almost certain, or powerfully convinced, his view of the standard remains the same. A court should consider whether applying of the precedent in question would constitute applying dead law. According to Posner's analysis, this takes more than a balancing of the scale or a "more probable than not" analysis; a court must exhibit a strong degree of certainty that likely mirrors the most rigid standard discussed above.[194] Supreme Court law is dead where the precedent has been eroded by subsequent Supreme Court holdings and the application of that law would be contrary to the more recent holding or rule of law. If the precedent is severely eroded, a state court should be nearly certain that the Court would overrule the precedent before pronouncing its death.[195] Essentially, the analysis that a state court should undertake before disregarding Supreme Court precedent is a two-step test: the court should (1) decide if the precedent in question has been eroded by the Supreme Court and (2) be nearly certain that the Court would overrule the eroded law.

3. State Courts Should Apply Judge Posner's Standard

Judge Posner's standard appears to express both a need for certainty and a high probability that the Court would overrule its precedent.[196] These standards were set forth separately above to illustrate the confusion that has plagued courts and scholars alike in determining when a court should disregard what it perceives to be outdated precedent. An analysis of Judge Posner's opinions, however, seems to lead to the conclusion that the standards are one and the same. A high probability that a particular event will occur axiomati-

---

[190] *Id.* (citing *Norris*, 687 F.2d at 902–04).

[191] 811 F.2d 1119 (7th Cir. 1987).

[192] *Id.* at 1123.

[193] *Id.* (citing *Olson*, 806 F.2d 731).

[194] *See Norris*, 687 F.2d at 904.

[195] *See id.* (discussing dead law); *see also* Kniffin, *supra* note 29, at 61–64 (discussing erosion).

[196] *See Norris*, 687 F.2d at 904; *Olson*, 806 F.2d at 734.

cally nears certainty that it will indeed happen. Furthermore, it is unlikely that any case will ever present a formula for determining the probability that the Supreme Court would overrule. Therefore, a court should not concern itself with the differing definitions of high probability and near certainty; it should simply look to the Supreme Court opinion that erodes the precedent in question and determine if the newer decision creates a high degree of certainty that the questioned precedent is dead law.[197]

VIII. THE POSNER STANDARD APPLIED TO ALL FACTORS CONCERNING *HELLER*

State courts have been and will continue to be faced with the dilemma of whether to treat *Cruikshank* as dead law. Thus far, New York has been faced with a legal issue that resulted in a *Heller* analysis without addressing the issue of incorporation.[198] Specifically, the court considered whether a New York gun regulation violated the Second Amendment.[199] The court rejected the argument and noted that *Heller* allows for reasonable regulations.[200] The fact that the New York court did not address incorporation can be viewed in one of two ways. One possibility is that the court found that *Heller* provided an on-point analysis of the issue that was sufficient to support the judgment even assuming incorporation and therefore did not need to address the incorporation issue. On the other hand, the court possibly took incorporation for granted. The New York court could have simply issued a ruling that held that *Heller* did not apply to New York law. Such a decision, however, may be a red flag for Supreme Court review; the court's holding was much safer because the court did not engage in an incorporation analysis. Where a court's finding is consistent with *Heller's* regulation analysis, a court may not want to address *Cruikshank* or incorporation; however, where a state gun regulation may not be consistent with *Heller*, a state court may be forced to discuss the incorporation issue.

Prior to *Heller*, *Cruikshank*'s validity may have been undermined when the Supreme Court decided to adopt the selective-incorporation doctrine.[201] Indeed, the court in *Nordyke v. King*[202]

[197] *See Norris*, 687 F.2d at 904.

[198] *See* People v. Lynch, No. 2005-2007, 2008 N.Y. Misc. LEXIS 4587, at *1–2 (N.Y. Sup. Ct. July 16, 2008) (holding that *Heller* allows for reasonable regulation of firearms).

[199] *Id.* at *1.

[200] *Id.* at *1–2.

[201] *See, e.g.*, Gideon v. Wainright, 372 U.S. 335, 342 (1963).

noted that "*Cruikshank* and *Presser* involved direct application and incorporation through the Privileges or Immunities Clause, but not incorporation through the Due Process Clause."[203] The Ninth Circuit then went on to hold the Second Amendment to be incorporated through the Due Process Clause of the Fourteenth Amendment.[204] Modern incorporation doctrine may lead the Court to reach an outcome contrary to that of *Cruikshank*, just as the Ninth Circuit did.[205] Also, the validity of *Cruikshank* has been undermined because it stated that both the First and Second Amendments were not incorporated. The First Amendment has since been incorporated, which calls into question both the reasoning and holding of *Cruikshank*.[206] Moreover, although *Heller* declined to address the issue of incorporation, the Court noted that *Cruikshank* did not engage in a modern incorporation analysis and did not incorporate the First Amendment.[207] Finally, *Heller* cited to several authorities that use natural-rights language that may be a nod to incorporation.[208]

A. *Incorporation of the First Amendment Undermines* Cruikshank*'s Reasoning*

As early as 1925, the Supreme Court undermined the holding of *Cruikshank* by incorporating the First Amendment in *Gitlow v. New York*.[209] *Gitlow* arguably overruled *Cruikshank* insofar as the First Amendment is concerned and casts a shadow of doubt upon *Cruikshank*'s reasoning regarding the Second Amendment.[210] A court, however, may overrule any portion of an opinion while leaving the remainder of the opinion intact.[211]

[202] Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

[203] *Id.* at 448.

[204] *See id.* at 457.

[205] *See id.*

[206] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[207] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

[208] *See id.* at 2792 n.7, 2793.

[209] *See Gitlow*, 268 U.S. at 666.

[210] *Gitlow* may have assumed incorporation arguendo, but subsequent Supreme Court opinions confirmed the First Amendment's incorporation. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment from invasion by state action.").

[211] *See, e.g.*, Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 663 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961), "insofar as it holds that local governments are wholly immune from suit").

B. *Modern Incorporation Doctrine Undermines* Cruikshank

Although *Gitlow* in and of itself may not render *Cruikshank* dead law, further doubt is cast upon *Cruikshank* by the rise of modern incorporation doctrine. In *Duncan v. Louisiana*, the Court endorsed the selective-incorporation doctrine.[212] *Cruikshank* did not engage in a modern incorporation analysis; the Court simply announced that the Second Amendment only applies to the national government.[213] Courts now engage in an incorporation analysis and decide whether a constitutional protection is made applicable to the states through the Fourteenth Amendment.[214]Undoubtedly, a change in doctrine calls into question a decision based on the older doctrine. This change in doctrine, however, does not itself undermine *Cruikshank*'s holding that the Second Amendment is not incorporated if subsequent decisions affirming *Cruikshank* apply the relevant doctrine. Although unlikely, the case may be that under modern incorporation doctrine, *Cruikshank* still stands. Cases since *Cruikshank* have also held that the Second Amendment is not incorporated.[215] The cases that support *Cruikshank*'s non-incorporation of the Second Amendment, however, suffer from the same flaw from which *Cruikshank* suffers; they predate the incorporation era and therefore do not engage in the incorporation analysis now required by the courts.[216]

Cruikshank mentions the Second Amendment but once and does not give the concept of incorporation any thought or analysis whatsoever. The Court simply states that "[t]he second amendment . . . means no more than that [the right to bear arms] shall not be infringed by Congress."[217] Therefore, *Cruikshank* has been eroded by a change in doctrine; it did not engage in the incorporation analysis now required by the courts nor did the subsequent cases that support it.[218] Erosion of the precedent by a change in legal doctrine may or may not be enough for a state court to consider *Cruikshank* to be dead law. For example, the Ninth Circuit found that *Cruikshank* was

---

[212] *See* Duncan v. Louisiana, 391 U.S. 145, 163–71 (1968).

[213] *See* United States v. Cruikshank, 92 U.S. 542, 553 (1876).

[214] *See Duncan*, 391 U.S. at 147–49.

[215] *See* Miller v. Texas, 153 U.S. 535, 538 (1894); Presser v. Illinois, 116 U.S. 252, 265 (1886).

[216] District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008) (stating that the Fourteenth Amendment inquiry set forth by later cases is now required). *Compare Miller*, 153 U.S. at 538, *and Presser*, 116 U.S. at 265, *with* Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).

[217] United States v. Cruikshank, 92 U.S. 542, 553 (1876).

[218] *See Miller*, 153 U.S. at 538; *Presser*, 116 U.S. at 265; *Cruikshank*, 92 U.S. at 553.

dead law because it did not conduct a modern incorporation analysis,[219] whereas the Seventh Circuit found that such a change in doctrine is insufficient.[220]

C. Heller *Directly Undermines* Cruikshank

Heller states that "[w]ith respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."[221] *Cruikshank* did not engage in a detailed analysis of the Second Amendment nor did it supply the required Fourteenth Amendment incorporation analysis.[222] Although *Heller* consciously chose not to overrule *Cruikshank*, it clearly damaged its precedential value.[223] *Cruikshank*'s dismissive analysis of incorporation would be unlikely to satisfy modern incorporation doctrine. Furthermore, *Heller* directly damaged the continuing validity of *Cruikshank* by noting its lack of a modern incorporation analysis.[224] Therefore, with little left for the *Cruikshank* decision to rest on, a state court could rightfully find *Cruikshank* to be dead law.

IX. CONCLUSION

A state court indeed has the ability to disregard Supreme Court precedent that it finds to be dead law. This is supported by the underlying concepts of both anticipatory overruling and unbound state courts, which illustrate that stare decisis is not simply blind adherence to precedent. The ability of a state court to disregard Supreme Court precedent, however, is also not absolute. Before exercising this ability, a state court should come to a conclusion that the precedent in question is dead law. This would mean that because of Supreme Court action a court would be applying law that the Supreme Court itself has undermined. This erosion of precedent coupled with a high degree of certainty that the eroded precedent will no longer be

---

[219] *See* Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009).

[220] *See* NRA of Am., Inc. v. City of Chicago, 567 F.3d 856, 860 (7th Cir. 2009) ("How arguments of this kind will affect proposals to 'incorporate' the [S]econd [A]mendment [is] for the Justices rather than a court of appeals.").

[221] District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

[222] *See Cruikshank*, 92 U.S. at 553.

[223] *See Heller*, 128 S. Ct. at 2813 n.23.

[224] *See id.*

followed by the Supreme Court authorizes state courts to disregard the dead law.

The question of how a state court should treat *Cruikshank* in the face of *Heller* is an excellent illustration of the scope of a state court's right to disregard Supreme Court precedent. *Cruikshank* was undermined by many different factors that are all relevant to the scope of this power. The Court's treatment of *Cruikshank* in *Heller* indicates direct erosion of precedent and the changing trends of Supreme Court doctrine.[225] In the end, a combination of those factors demonstrates that a state court may treat *Cruikshank* as dead law in light of *Heller* and therefore may disregard the precedent.

Surely the analysis set forth in this Comment is not limited to *Cruikshank*. State courts should conduct this analysis whenever Supreme Court precedent seems questionable. The analysis protects the interests of stare decisis by limiting proper erosion to Supreme Court action while also considering the need for a state to keep its laws in line with current decisions of the Court. Notions of federalism and the idea of states as laboratories may support this right more readily for state courts than for federal courts; therefore, the Court's denial of a federal court's ability to overrule Supreme Court precedent possibly cannot and should not extend to a state court's ability to disregard dead law. Stare decisis is not offended where the precedent is dead and the death is caused by the Supreme Court itself.

[225] *See id.*