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The doctrine of stare decisis, or the idea that prior decisions should stand as precedent, is a pretty conservative idea. Indeed, many historians date its origins back to the early thirteenth century, the result of Bracton keeping a notebook of judicial decisions.1 William Blackstone notes in his Commentaries on the Laws of England, published just a decade before the American Revolution, that “it is an established rule to abide by former precedents, where the same points come again in litigation.”2

The full Latin phrase has even more of a conservative feel about it: “Stare decisis et non quieta movere,” or “to stand by matters that have been decided and not to disturb what is tranquil.”3 What could be more conservative than tranquility? In its vertical form,4 which means the obligation of lower courts to follow the decisions of higher courts, the doctrine serves as a necessary underpinning of the entire federal court system envisioned by Article III of the Constitution. Article III, after all, provides for a Supreme Court and such inferior courts as Congress may establish.5 Congress has established many lower courts;6 without some form of stare decisis, the Supreme Court would simply be incapable of keeping the law uniform throughout the country, and the very idea of law itself would be seriously undermined.

Even in its horizontal form—the obligation or at least the propensity of one court to follow its own precedents—the doctrine serves to make the system of judicial review workable. Without it, every single issue would forever be open to debate. Such inefficiency would make the task of managing even a discretionary Supreme Court docket unmanageable and, more importantly, the law itself would take on a vastly unsettled character. Efficiency, consistency, manageability, the ability to rely on settled law—all of these by-products of stare decisis—appeal to the conservative mind.
The point of this chapter, however, is to emphasize what may be an obvious point. After the advent of progressivism, the continued adherence to the doctrine of stare decisis by conservatives ends up being anything but conservative. The so-called progressives do not adhere to precedent as a matter of their principle, but rather view stare decisis as amounting only to the rule that “precedents ought always to be followed except when they should not.” Indeed, precedent is one of the things to be overcome, because in the progressive view, precedent stands in the way of the inevitable march of history and progress. It is therefore no accident that liberal or progressive courts account for most of the overruling cases in the Court’s history (i.e. those cases that have explicitly overruled prior precedent). A recent empirical study by political scientist Christopher Banks identified 201 decisions between the Court’s inception and 1991 in which the Supreme Court explicitly overruled prior precedent. That’s an average of one case per year, yet 118 of those decisions—nearly 60 percent—were produced by the post–1937 New Deal court and the Warren and Burger courts of the 1960s and 1970s. In its heyday, the Warren court was explicitly overruling prior cases at the rate of five or six a year, and in 1967 alone, it overruled eight—eight times above the historical average.

A wonderful example of this is evident in a couple of cases Murray Dry discusses in his chapter earlier in this book. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc. was decided by a unanimous court in 1995, Justice David Souter writing the opinion for the Court. In that case, the Court upheld the right of a privately organized parade to exclude groups who wished to convey a message about the morality and normalcy of homosexuality that the parade organizers did not wish to convey. The parade organizers had this right, according to the unanimous Court, despite the fact that the parade was not otherwise organized around any kind of coherent or even consistent message, and despite the fact that it had no purpose—express or otherwise—to foster a message contrary to that which the organization sought to convey, and even despite the fact that the parade organizers had not previously had a position opposing the group’s message. It was enough, according to the Court, in reliance on long-established precedent, that the private organization did not wish to convey the group’s message at the time.

Five years later, James Dale’s challenge to the Boy Scouts—to Troop 73 of the Boy Scouts, to be more precise (coincidentally the troop in which I began my own career as a cub scout back in Matawan, New Jersey in 1968)—raised precisely the same issues as were addressed and fully resolved in Hurley. The same issues, that is, if you accept the nearly self-evident proposition that allowing an open and active homosexual to don a Boy Scout uniform and serve as an adult leader in the organization sends an unmistakable message about the morality and normalcy of homosexuality that was 180 de-
gresses at odds with the message the Boy Scouts organization itself wished to convey. With *Hurley* on the books, and with no intervening changes in the law or even in the people occupying the seats at the bench, *Boy Scouts of America v. Dale* should have been an easy case. In fact, if vertical stare decisis had been followed, the New Jersey Supreme Court could not have issued the ruling that forced the Boy Scouts to take the case to the Supreme Court in the first place. As the trial court correctly ruled at the first step of the vertical stare decisis ladder, there was no option under *Hurley* but to conclude that the Boy Scouts have a right to exclude James Dale because of the message his very presence would convey, a message with which the Boy Scouts organization disagreed. The trial court recognized that under *Hurley* the fact that the Boy Scouts had not explicitly been opposed to homosexual conduct from the time of their founding in 1910 was not a reason to deny the organization protection under the First Amendment. It was enough that they now wished not to support the message James Dale sought to convey.

So *Boy Scouts v. Dale* should have been an easy case. And it should have been unanimous, just as *Hurley* had been. *Hurley* was not a close, 5-4 case; the opinion in the case was not written by Chief Justice Rehnquist or Justice Scalia, barely holding on to Justices O'Connor and Kennedy in the middle. It was written by Justice Souter, the most liberal member of the current Supreme Court. And it was unanimous.

*Boy Scouts v. Dale* was not unanimous, of course. *Hurley* was followed, but only by the barest 5-4 majority of the Court. In his dissenting opinion, Justice Stevens argued that the Boy Scouts did not really have a position on homosexuality—that the language in the Boy Scout oath about being "morally straight" meant something else. And that, in any event, the inclusion of Dale in the organization would not really alter the Boy Scouts' message as he deemed it to be, even though the Boy Scouts say it would effect a radical change.

But these feeble attempts to distinguish *Hurley* were not the real thrust of Justice Stevens' dissent. Rather, Justice Stevens provided us with an uncharacteristic window into the progressive view of these things. *Hurley* should not be followed, he said, nor the long-established First Amendment rights recognized and reaffirmed in that case, because public perception of homosexuality had changed in the five years since *Hurley*, and that was enough for the Court to alter the constitutional right underlying the Boy Scouts' claim, according to Justice Stevens. It was an extraordinary admission of what the progressive movement means with respect to its understanding of the rule of law.

And Justice Souter, also in dissent, implicitly invited additional challenges to the *Boy Scouts* decision. Justice Souter asserted that the Boy Scouts did not really have a position about homosexuality. Because the case was
decided on summary judgment at the trial court level, there was never a trial to determine what the Boy Scouts' position actually was. In future cases, therefore, we can anticipate factual challenges to the sincerity of the Boy Scouts' stated beliefs, and Justice Souter has invited everyone to ignore the existing precedent once those new trials are held.

Adherence to precedent by conservatives, therefore, operates as a one-way ratchet. Every time a majority of the Court consists of self-styled progressives or liberals, that majority overrules prior cases and develops a new body of precedent ratcheted toward their progressive view of the world. Oftentimes the overruling is not even explicit. In *Romer v. Evans*, for example, Justice Kennedy, writing for the majority, struck down Colorado's Amendment 2 because he could not ascertain any identifiable legitimate governmental purpose underlying the statute that prohibited governments from enacting laws giving preferential treatment to homosexuals. No conceivable governmental purpose, in Justice Kennedy's view, despite the fact that on the books for only a decade was *Bowers v. Hardwick*, which had upheld a Georgia law criminalizing the conduct that defines homosexuality. If the conduct itself can be criminalized because to do so sufficiently furthers a legitimate governmental purpose, surely a law taking the much smaller step of prohibiting preferential treatment to people that engage in that conduct meets the minimal rational basis test by which the Supreme Court assesses the constitutionality of legislation not involving suspect classifications or fundamental rights. Here is how Justice Kennedy distinguished *Bowers*: Silence. That's right; not one word about it. And it is not as though Justice Kennedy just overlooked the decision. Justice Scalia made sure of that in his dissent, criticizing the majority for not even mentioning *Bowers*, a case that, according to Justice Scalia, provided a resounding affirmative response to the question of whether there was any legitimate purpose underlying Colorado's amendment.

When a more conservative majority occupies the bench, it is therefore faced with a dilemma: Overrule the more recent precedent and undermine the traditional doctrine of stare decisis, or adhere to stare decisis and live with the new precedent (at least until the next time the progressive ratchet swings into action). All too often the latter course has been followed, but more about that later.

Of course, conservative jurists are encouraged to adopt this course by their more liberal brethren, particularly when an era of especially active progressive rulings is coming to a close. In what is perhaps one of the great ironies on this point, Justice Thurgood Marshall, one of the top six all-time overruling justices in our nation's history (and whose career prior to his appointment to the Supreme Court was devoted to overruling the ignominious decisions of the Jim Crow era), issued on the day of his retirement from the
Court in June 1991 a strong defense of stare decisis and a scathing criticism of the Court for its repudiation of the doctrine of stare decisis.

The majority in the case, *Payne v. Tennessee*, overruled two prior cases and held that the admission of victim impact statements at the sentencing phase of a capital trial was not unconstitutional. According to Justice Marshall, this modest decision completely undermined the doctrine of stare decisis, a doctrine to which he now wanted to adhere in order to lock in two decades of Warren Court activism that had expanded the law in the progressive direction that he wanted. The Court's decision in *Payne* was, according to Justice Marshall, "a clear signal that scores of established constitutional liberties were now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case." Yet Justice Marshall failed to note that most of the so-called established constitutional liberties about which he spoke had not been established in the Bill of Rights in 1791 or even in the Fourteenth Amendment after the Civil War, but were instead "discovered"—created ex nihilo might be a more accurate description—by the Warren Court in the 1960s.

Now you might think that Justice Marshall's position is the more just one. After all, we are talking about rights here. Should it not be the case that once the Court has given us rights that we ought to be able to keep them? Quite apart from the faulty assumption regarding the nature of rights underlying Justice Marshall's position, the question of rights enhancement is often in the eye of the beholder. As Justice Scalia has previously noted, the progressive move to allow alleged victims of child molestation to testify behind screens out of view of both the public and their alleged molester is less-protective of the defendant's constitutional right to confront witnesses, not more. The case of *Payne v. Tennessee* itself, involving victim impact statements, can just as easily be characterized as an expansion of victims' rights as the retraction of defendants' rights that Justice Marshall decried. And Murray Dry's description of the *Boy Scouts* case provides an equally good example. He asserts that the case involved a conflict between the rights of homosexuals not to be discriminated against and the right of the Boy Scouts to make decisions about the composition of their private association, so no matter which way the Court ruled, a case could be made that someone's rights were expanded.

In short, in order to accept Justice Marshall's view that the one-way ratchet I have described is a good thing because it is protective of rights, we have to know what we mean by rights—and on that score, perhaps more than any other, the progressive vision is at odds with the natural rights vision held by our founders and embodied in the Constitution.

Let me turn now to the granddaddy in the stare decisis fight, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided in 1992 after the Reagan revolution's impact on the federal judiciary reached its zenith. A few
years before, the Court in *Webster v. Reproductive Health Services* had strongly signaled not just a retreat from *Roe v. Wade*, but that it was prepared to overrule that controversial case. Justice Clarence Thomas had joined the Court the previous October, replacing Justice Marshall, giving the Court the five votes necessary for the purpose. Justice Blackmun candidly acknowledged as much in his partial concurrence in *Casey*: “Three years ago, in *Webster* . . . four members of this Court appeared poised to ‘cast[i] into darkness the hopes and visions of every woman in this country’ who had come to believe that the Constitution guaranteed her the right to reproductive choice.” We all know what happened. Justices O’Connor and Kennedy—both Reagan appointees—joined with Justice Souter—President Bush’s “stealth” nominee—to retain the core of *Roe* because of the importance of stare decisis in retaining settled expectations and in protecting the institutional integrity of the Court. The stare decisis analysis applied by the three justices in their joint opinion was flawed even by stare decisis standards. More fundamentally, it was not consistently applied from one part of the trio’s joint opinion to another. It is often forgotten, but in that opinion, Justices O’Connor, Kennedy, and Souter overruled several post-*Roe* decisions that had afforded even greater protection to the right to an abortion expounded in *Roe*. Justices O’Connor, Kennedy, and Souter viewed these post-*Roe* decisions as inconsistent not with the language of *Roe* itself but with what they now divined to be the core central meaning of *Roe*, as modified by their opinion in *Casey*. And they did this all in the name of stare decisis.

While the particular post-*Roe* decisions overruled in *Casey* were more protective of the abortion “right” than *Roe* itself, the principle underlying the plurality opinion’s new view of stare decisis will enshrine the “central holding” of *Roe* in our law, at least until a more solidly progressive Court regains the votes to further expand the right articulated in *Roe*. Under the plurality’s rationale, any incremental attempt to restrict *Roe*’s holding will be as impermissible as were the incremental attempts to expand its holding were. The trio thus exacerbated the one-way ratchet problem of stare decisis for conservatives, making it clear that adherence to stare decisis by them prevents not just the reversal of incorrect past decisions, but adherence to decisions rendered subsequent to the incorrect precedent that might narrow the ruling that was flawed in the first place.

Let me be clear. Both sides in the debate acknowledge that *Roe v. Wade* is a terribly reasoned and wrongly decided decision, even those who like the outcome. So we are not talking about something that is designed to get the benefit of stare decisis as that doctrine was originally understood. The doctrine of stare decisis as originally understood was grounded in humility—the idea that judges would not lightly reconsider or overturn the considered judgment of their predecessors without strong and good reason. Part of what is furthered by the doctrine is efficiency. If a court continues to revisit its
prior decisions, the same issues will come up over and over, without ever being settled. But what we are faced with now is a claim of stare decisis that operates in an entirely different realm that it has before. Rather than deferring to the considered judgment made by a predecessor court about the constitutionality of a particular action or statute, the new stare decisis operates even where the predecessor court’s holding is acknowledged to be wrong, and even when the predecessor court itself acknowledged that its ruling was rendered in spite of the Constitution, not in accord with it. To continue to adhere to stare decisis in the face of such a transformation in how the doctrine is used to undermine the core rationale of the doctrine itself—namely, that stare decisis is grounded in a view of humility about one’s own abilities.

I often make the analogy to a football game. In football, there is a rulebook and also a set of referees for each game. Suppose that in one game a ball thrown into the end zone is caught by a receiver with one foot out of bounds. The referee mistakenly signals a touchdown, despite a clear provision in the rulebook requiring that both feet be in bounds. What does a referee in the next game do when faced with another one-footed end-zone reception? Is the rule now that you only need one foot in the end zone? Of course not. We go back to the rulebook, especially when the referee acknowledges that he made a mistake or when he made the claim that he was not required to follow the rulebook in the first place.

The joint opinion in Casey rejects the rulebook in favor of the admittedly erroneous decision of a prior referee. The new understanding of stare decisis adopted in that opinion signals that subsequent courts must adhere to prior decisions, even when they are acknowledged to be wrong. And Justices O’Connor, Kennedy, and Souter come very close to making just that admission in Planned Parenthood v. Casey—I would argue that they actually make that admission, but at the very least they come very close to making the admission that Roe was wrongly decided, as a matter of constitutional law, history, and principle. For them, it did not matter whether Roe was wrongly decided. They reach that conclusion by drawing on a strand of stare decisis thought that originated in cases dealing with commercial and contractual relations. The Court has established a rule in such cases that it will not change prior precedent lightly because to do so would unsettle the expectations of the people entering into the contract. Application of the “settled expectations” rationale is particularly inapposite in the abortion context, however, where the relevant effects of the settled expectations have a very short half-life. Unlike a long-term contract or a lease, the settled expectations that were involved in Casey would last all of nine months. If the Court was truly concerned about settled expectations, it could simply have required that no new restriction on abortion take effect for a year. That way, no one would engage in activity without knowing the consequences of the new rule, and their
settled expectations with regard to the consequences of their conduct prior to the enactment of the new rule would be given full effect.

The other argument the plurality in *Casey* made was that the institutional credibility of the Court would be undermined if the Court were to overturn *Roe* such a short time after it was decided. Here it is important to recall the last part of the definition of stare decisis discussed above—to ability to keep things tranquil. Now I understand that some may believe that the abortion debate has been relatively tranquil since 1973, but just the opposite is true. However much the Court thought in 1973 that by deciding a hotly contested political issue it would resolve the controversy once and for all so that we could all go back and lead our nice tranquil lives and not have to deal with it any more, subsequent events have proven the Court wrong. So the notion that the Court was preserving its institutional integrity by keeping this tranquil issue tranquil was just absurd. Indeed, by essentially admitting that the earlier decision was wrong, the plurality opinion has itself undermined the continuing institutional integrity of the Court, choosing by mere will to abide by a decision—not because of the Justices’s humility about the correctness of the prior decision but despite its acknowledged wrongness. That turns the principles of stare decisis on their head.

Thus the conservative principle of stare decisis, in the hands of conservative justices—two of the three authors of the joint opinion in *Casey* are often called conservative—locks in place precedents enacted by more progressive Courts, precedents, which themselves ignored the principles of stare decisis, but refuses to move back toward a view of the law more consistent with the principles of the American founding when a more conservative majority is in control. Such a principle is guaranteed over time to further undermine the moral foundations of this country.

**NOTES**

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4. I borrow the useful descriptive phrases, “vertical stare decisis” and “horizontal stare decisis,” from Brenner and Speath, supra note 4, at 1.

5. U.S. Constitution, Article III, 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”).


9. This does not take account of the many cases in which prior precedent was only implicitly or subtly overruled.


18. Justice Stevens offered as proof of this proposition the 1910-era founding documents of the Boy Scouts, which say nothing about homosexuality, from which he concluded that the Boy Scouts organization could not have had a view on the subject. 530 U.S. at 668–69 (Stevens, J., dissenting). The absurdity of Justice Stevens' logic is manifest. The reason the Boy Scouts did not mention homosexuality prior to 1978 is because homosexuality was before then considered “unmentionable.” The Boy Scouts took an explicit position on homosexuality as soon as homosexuality became an open topic of conversation in the 1970s, when pro-homosexual advocates started to make claims of moral equivalence of the kind Ed Erler discusses elsewhere in this volume. See Edward J. Erler, “The California Supreme Court in the Culture Wars: A Case Study in Judicial Failure,” reprinted supra at 139–150. For twenty years the Boy Scouts organization has hired very expensive lawyers to defend the organization's position, so the view that it really does not have a belief about homosexuality is just absurd. But even if the Boy Scouts had not held a view opposing homosexual conduct all that time, the First Amendment does not protect only long-established views; it also protects the right to hold views that one adopts only today. Indeed, one of the principles underlying the First Amendment is that, by virtue of our ability to reason and have free speech, we might actually persuade one another and bring about a change of views. So the whole premise of the argument proffered by Justice Stevens is flawed.
25. 517 U.S. at 636 (Scalia, J., dissenting).
29. The authors of the Bill of Rights went to great pains to use language that "recognized" rights rather than "created" rights. See e.g., U.S. Constitutional Amendment IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"); see also U.S. Constitutional Amendment IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). In their
view, rights exist apart from and prior to government; they are not gifts from government. See Declaration of Independence Paragraph 2 (recognizing that all human beings “are endowed by their Creator with certain unalienable Rights” and that the purpose of government is “to secure these rights”).


38. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 873 (“We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*”).


40. See, e.g., David A. Strauss, “Common Law Constitutional Interpretation,” *University of Chicago Law Review* 63 (Summer 1996):877, 913 (describing the Burkean view of stare decisis as one grounding in “humility and a sense of one’s own limitations”).

41. See, e.g., Michael Stokes Paulsen, “Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century,” *Albany Law Review* 59 (1995):671, 679 (“Taken seriously, stare decisis means a deliberate practice of adhering to precedents that one knows to be incorrect interpretations of the Constitution, simply because that is what has been done before,” or, in other words, “deliberately interpreting the Constitution in a way you know to be wrong”).