Overruled: Stare Decisis in the U.S. Supreme Court

Keywords

abrogated, abrogating, *Burnet*, cases, constitutional, *Coronado*, decisions, disapproved, error, follow precedent, law, list, overrule, overruled, overruling, overturned, precedent, respect precedent, right, rule, settled, stare decisis, U.S. Supreme Court

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Introduction

During August 2005 to January 2006, the U.S. Senate considered the nominations of John Roberts, Harriet Miers, and Samuel Alito to the U.S. Supreme Court. Because all three were nominated by President Bush, who is staunchly pro-life, it was commonly assumed that all three nominees were personally opposed to a legal right to an abortion. Because the issue of abortion is likely to come before the U.S. Supreme Court, the concept of an impartial judiciary prevented these candidates from giving their personal views on abortion during the confirmation process, and especially forbade them from discussing whether they would vote to overrule *Roe v. Wade* after being confirmed as a Justice of the U.S. Supreme Court. Because the nominees could not answer questions about abortion directly, pro-choice senators asked these nominees about their views on upholding precedent (i.e., upholding *Roe v. Wade* only because this 32 year-old decision has been reaffirmed many times). These considerations of an impartial judiciary put pro-choice senators in the silly position of demanding respect for precedent, even if the earlier case was wrongfully decided.[1] Although this essay was initially motivated by my curiosity whether respect for precedent could legitimately be the *only* reason for the continuing validity of *Roe,* this essay is *not* about abortion law.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook.*

List of Some Overruled Cases

It is difficult to search for U.S. Supreme Court decisions that have later been overruled by the Court, because words like "overrule, overruled, overruling" often occur in contexts of either:

- overruling decisions of the U.S. Courts of Appeals,
- "Appellants ask us to overrule [case name], this we decline to do",
- overruling exceptions on appeal, overruling exceptions to a Master's report, or
- mentioning that a trial judge overruled an objection or motion at trial.

Moreover, sometimes the U.S. Supreme Court overrules one of its prior decisions sub silentio (i.e., without explicitly noting the overruling), as *Berger* and *Katz* overruled *Olmstead,* or as *Miller*

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[1] To avoid being misunderstood, I personally believe that *Roe v. Wade* reached the correct result, although I believe the reasons for *Roe* could be put on firmer ground. But, as a general statement, it is obvious that cases that were wrongfully or erroneously decided should be overruled.

overruled *Roth.* Other times, the U.S. Supreme Court indicates that a former decision is no longer good law, by the Court's use of words like "abrogated" or "disapproved". Nonetheless, I believe I have cited below most of the important examples of the U.S. Supreme Court recently overruling its own decisions. Because of limits on my unpaid time, I have only searched[2] U.S. Supreme Court cases since the year 1960. Instead of reading more than two hundred cases, I have generally relied on the Westlaw characterization of a case as overruling a previous case. A list of U.S. Supreme Court cases overruled before the year 1932 was given by Justice Brandeis in his dissenting opinion in *Burnet,* which is quoted below, beginning at page 13. A list of U.S. Supreme Court cases overruled during 1971-91 was given in *Payne,* which is quoted below, beginning at page 20.

The following list of U.S. Supreme Court cases is arranged chronologically by date of the original case, which was later overruled.

some famous cases overruled before 1960

Swift v. Tyson, 41 U.S. 1 (1842), overruled by *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938).

Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138 (1896) held that "equal but separate" segregated facilities were constitutionally permissible. Overruled by *Brown v. Board of Education of Topeka, Shawnee County, Kan.,* 347 U.S. 483, 495, 74 S.Ct. 686, 692 (1954) ("Separate educational facilities are inherently unequal.").

Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539 (1905) held that a state statute could not invalidate employer-employee contracts that required more than 60 hours/week of work. Overruled in part by *Day-Brite Lighting Inc. v. State of Mo.,* 342 U.S. 421, 72 S.Ct. 405 (1952); and *Ferguson v. Skrupa,* 372 U.S. 726, 83 S.Ct. 1028 (1963).

Coppage v. State of Kansas, 236 U.S. 1, 35 S.Ct. 240 (1915) held invalid a state statute that forbade employers to condition employment on a promise not to join a labor union. Overruled in part by *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 61 S.Ct. 845 (1941).

Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525, 43 S.Ct. 394 (1923) invalidated minimum wage statutes. Overruled in part by *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578 (1937).

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[2] I searched the Supreme Court database in Westlaw for `SY(OVERRUL!)` which returns "overrule, overrules, overruled, overruling" that occurs in the syllabus of the opinion.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 52 S.Ct. 443 (1932), overruled in part by *Helvering v. Bankline Oil Co.,* 303 U.S. 362, 58 S.Ct. 616 (1938) and *Helvering v. Mountain Producers Corporation,* 303 U.S. 376, 58 S.Ct. 623 (1938).

Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010 (1940) held that a public school could expel pupils who refused to salute the flag because they were Jehovah's Witnesses. Overruled by *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178 (1943).

cases overruled after 1 Jan 1960

Minturn v. Maynard, 58 U.S. 477 (1854) held that an agent was barred from suing a principal under admiralty law. Overruled by *Exxon Corp. v. Central Gulf Lines, Inc.,* 500 U.S. 603, 111 S.Ct. 2071 (1991).

Low v. Austin, 80 U.S. 29 (1871), overruled by *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 96 S.Ct. 535 (1976).

Pennoyer v. Neff, 95 U.S. 714 (1878), overruled in part by *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569 (1977).

Kring v. State of Missouri, 107 U.S. 221 (1883), overruled by *Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715 (1990).

Coffey v. U.S., 116 U.S. 436, 6 S.Ct. 437 (1886), disapproved of by *U.S. v. One Assortment of 89 Firearms,* 465 U.S. 354, 361, 104 S.Ct. 1099, 1104 (1984) ("Whatever the validity of *Coffey* on its facts, its ambiguous reasoning seems to have been a source of confusion for some time. .... Indeed, for nearly a century, the analytical underpinnings of *Coffey* have been recognized as less than adequate. [footnote omitted] The time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges. To the extent that *Coffey v. United States* suggests otherwise, it is hereby disapproved.").

The Harrisburg, 119 U.S. 199, 7 S.Ct. 140 (1886) held that federal maritime law did not recognize a cause of action for wrongful death. Overruled by *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 90 S.Ct. 1772 (1970). See also *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199 (1996).

Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781 (1887), overruled by *U.S. v. Miller,* 471 U.S. 130, 144, 105 S.Ct. 1811, 1819 (1985) ("To the extent *Bain* stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it, that case has simply not survived. To avoid further confusion, we now explicitly reject that proposition.") and *U.S. v. Cotton,* 535 U.S. 625, 122 S.Ct. 1781 (2002).

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673 (1895), overruled by *South Carolina v. Baker,* 485 U.S. 505, 108 S.Ct. 1355 (1988).

Geer v. State of Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896), overruled by *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727 (1979).

Thompson v. State of Utah, 170 U.S. 343, 18 S.Ct. 620 (1898), overruled by *Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715 (1990).

Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573 (1904), overruled by *Dunn v. Blumstein,* 405 U.S. 330, 337, n. 7, 92 S.Ct. 995, 1000 (1972) ("To the extent that dicta in that opinion are inconsistent with the test we apply or the result we reach today, those dicta are rejected.").

Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550 (1920). Overruled by *U.S. v. Hatter,* 532 U.S. 557, 121 S.Ct. 1782 (2001).

Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83 (1922), disapproved of by *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 101 S.Ct. 2946 (1981) (at page 614: "We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce." At page 617: "Any contrary statements in *Heisler* and its progeny are disapproved." But see footnote 7: "This is not to suggest, however, that *Heisler* and its progeny were wrongly decided.").

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389, 48 S.Ct. 553 (1928), abrogated by *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 365, 93 S.Ct. 1001, 1006 (1973) ("*Quaker City Cab Co. v. Pennsylvania* is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition.").

Olmstead v. U.S., 277 U.S. 438, 48 S.Ct. 564 (1928) held that telephone wiretaps are not forbidden by the Fourth Amendment. Overruled by *Berger v. State of N.Y.,* 388 U.S. 41, 64, 87 S.Ct. 1873, 1886 (1967) (Douglas, J., concurring) ("I join the opinion of the Court because at long last it overrules sub silentio *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment.") and by *Katz v. U.S.,* 389 U.S. 347, 362, n. *, 88 S.Ct. 507, 517 (1967) (Harlan, J., concurring) ("... today's decision must be recognized as overruling *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.").

Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57 (1928), overruled by *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 94 S.Ct. 407 (1973).

Sinclair v. U.S., 279 U.S. 263, 49 S.Ct. 268 (1929), overruled by *U.S. v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310 (1995).

Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310 (1935), overruled by *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 108 S.Ct. 1133 (1988).

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285, 55 S.Ct. 709, (1935), overruled by *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266, 107 S.Ct. 2829 (1987). See also *American Trucking Associations, Inc. v. Smith,* 496 U.S. 167, 110 S.Ct. 2323 (1990).

Triplett v. Lowell, 297 U.S. 638, 56 S.Ct. 645 (1936), overruled in part by *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 91 S.Ct. 1434 (1971).

Puget Sound Stevedoring Co. v. Tax Com'n of State of Washington, 302 U.S. 90, 58 S.Ct. 72 (1937), overruled by *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 98 S.Ct. 1388 (1978).

Moore v. Illinois Central Railroad Co., 312 U.S. 630, 61 S.Ct. 754 (1941), overruled in part by *Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320, 92 S.Ct. 1562 (1972).

Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920 (1942) held commercial speech had no First Amendment protection. Overruled by *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817 (1976).

Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S.Ct. 163 (1942), overruled by *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 108 S.Ct. 1133 (1988).

Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 65 S.Ct. 347 (1945), overruled by *Lapides v. Board of Regents of University System of Georgia,* 535 U.S. 613, 122 S.Ct. 1640 (2002).

House v. Mayo, 324 U.S. 42, 65 S.Ct. 517 (1945) held that the U.S. Supreme Court lacks jurisdiction to review denials of certificates of probable cause. Overruled by *Hohn v. U.S.,* 524 U.S. 236, 118 S.Ct. 1969 (1998).

Commissioner of Internal Revenue v. Wilcox, 327 U.S. 404, 66 S.Ct. 546 (1946) held that embezzled money was not taxable as income. Overruled in part by *James v. U.S.,* 366 U.S. 213, 81 S.Ct. 1052 (1961).

Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815 (1947), overruled by *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 98 S.Ct. 1388 (1978).

Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198 (1948), disapproved of by *Craig v. Boren,* 429 U.S. 190, 210, n. 23 (1976) ("Insofar as *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948), may be inconsistent, that decision is disapproved.").

International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S.Ct. 516 (1949), overruled by *Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548 (1976).

Bryan v. U.S., 338 U.S. 552, 70 S.Ct. 317 (1950), overruled by *Burks v. U.S.,* 437 U.S. 1, 98 S.Ct. 2141 (1978).

Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S.Ct. 508 (1951), overruled by *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076 (1977).

Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182 (1953) held that the Securities Act prohibited arbitration of disputes. Overruled by *Rodriguez de Quijas v. Shearson/American Exp., Inc.,* 490 U.S. 477, 109 S.Ct. 1917 (1989).

U.S. v. Bramblett, 348 U.S. 503, 75 S.Ct. 504 (1955), overruled by *Hubbard v. U.S.,* 514 U.S. 695, 715, 115 S.Ct. 1754, 1765 (1995).

Yates v. U. S., 354 U.S. 298, 77 S.Ct. 1064 (1957), overruled by *Burks v. U.S.,* 437 U.S. 1, 98 S.Ct. 2141 (1978).

Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344 (1957), overruled by *City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513 (1976).

Roth v. U.S., 354 U.S. 476, 484, 77 S.Ct. 1304, 1309 (1957) and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,* 383 U.S. 413, 418, 86 S.Ct. 975, 977 (1966) (plurality opinion) held speech was *un*protected obscenity if "the material is utterly without redeeming social value." Abrogated by *Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 2615 (1973) (third criteria in *Roth* changed to: "do not have serious literary, artistic, political, or scientific value.").

Forman v. U.S., 361 U.S. 416, 80 S.Ct. 481 (1960), overruled by *Burks v. U.S.,* 437 U.S. 1, 98 S.Ct. 2141 (1978).

Jones v. U.S., 362 U.S. 257, 80 S.Ct. 725 (1960), overruled by *U. S. v. Salvucci,* 448 U.S. 83, 100 S.Ct. 2547 (1980).

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) held local governments were immune from litigation under 42 U.S.C. § 1983. Overruled by *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 98 S.Ct. 2018 (1978).

Hoyt v. State of Florida, 368 U.S. 57, 82 S.Ct. 159 (1961) allowed the exclusion of women from juries. Overruled by *Taylor v. Louisiana,* 419 U.S. 522, 533-537 (1975) (at page 537: "... we think it is no longer tenable to hold that women as a class may be excluded to given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male. To this extent we cannot follow the contrary implications of the prior cases, including *Hoyt v. Florida.* If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today.").

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963), overruled by *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 112 S.Ct. 1715 (1992).

Parden v. Terminal Railway of Alabama State Docks Dept., 377 U.S. 184, 84 S.Ct. 1207 (1964) held that state-operated railroad could not plead sovereign immunity. Overruled by *Welch v. Texas Dept. of Highways and Public Transportation,* 483 U.S. 468, 107 S.Ct. 2941 (1987) and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 119 S.Ct. 2219 (1999).

General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1564 (1964), overruled by *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue,* 483 U.S. 232, 107 S.Ct. 2810 (1987).

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), overruled by *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983).

Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965), overruled by *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712 (1986). See also *Allen v. Hardy,* 478 U.S. 255, 106 S.Ct. 2878 (1986) (per curiam).

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 86 S.Ct. 1254 (1966), abrogated by *Healy v. Beer Institute, Inc.,* 491 U.S. 324, 109 S.Ct. 2491 (1989).

Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869 (1968) held that vertical price fixing was a per se violation of antitrust statutes. Overruled by *State Oil Co. v. Khan,* 522 U.S. 3, 118 S.Ct. 275 (1997).

Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017 (1968), overruled by *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465 (1976). (*Usery* was later overruled.)

U. S. v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856 (1967), overruled by *Continental Television, Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549 (1977).

Desist v. U.S., 394 U.S. 244, 89 S.Ct. 1030 (1969), disapproved of by *Griffith v. Kentucky,* 479 U.S. 314, 321-322, 107 S.Ct. 708, 712-713 (1987) (agreeing with Justice Harland's dissent in *Desist*).

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969), overruled in part by *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347 (1974).

O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683 (1969) held that military personnel could not be tried in military courts for crimes unrelated to their military service. Overruled by *Solorio v. U.S.,* 483 U.S. 435, 107 S.Ct. 2924 (1987).

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969) held that there was a presumption of vindictiveness (and denial of due process) when the sentence at trial was greater than in a pervious trial or plea bargain. Overruled by *Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201 (1989).

Durham v. U.S., 401 U.S. 481, 91 S.Ct. 858 (1971), overruled by *Dove v. U. S.,* 423 U.S. 325, 96 S.Ct. 579 (1976).

California v. LaRue, 409 U.S. 109, 93 S.Ct. 390 (1972), disagreed with by *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516 (1996) ("Without questioning the holding in *LaRue,* we now disavow its reasoning insofar as it relied on the Twenty-first Amendment.").

Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S.Ct. 517 (1973), overruled by *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 97 S.Ct. 582 (1977).

Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974), overruled in *Thornburgh v. Abbott,* 490 U.S. 401, 109 S.Ct. 1874 (1989).

U. S. v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006 (1975), overruled by *U.S. v. Scott,* 437 U.S. 82, 98 S.Ct. 2187 (1978).

Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753 (1975) absolutely prohibited tax money being disbursed to religious elementary and secondary schools for education of pupils. Overruled by *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530 (2000).

National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005 (1985).

Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593 (1977), overruled by *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530 (2000).

Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586 (1979), abrogated by *California v. Acevedo,* 500 U.S. 565, 111 S.Ct. 1982 (1991).

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981), overruled by *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662 (1986).

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481 (1983), overruled by *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S.Ct. 2791 (1992).

School District of City of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3216 (1985) and *Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232 (1985) held that teachers paid by taxpayers could not teach in schools operated by religions. Overruled by *Agostini v. Felton,* 521 U.S. 203, 117 S.Ct. 1997 (1997).

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S.Ct. 2169 (1986), overruled by *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S.Ct. 2791 (1992).

Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 (1986) held valid a Georgia statute that criminalized sodomy between two consenting adults. Overruled by *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472 (2003).

Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529 (1987), overruled by *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597 (1991).

South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207 (1989), overruled by *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597 (1991).

Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273 (1989), overruled by *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114 (1996).

Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084 (1990), overruled by *U.S. v. Dixon,* 509 U.S. 688, 113 S.Ct. 2849 (1993).

Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 110 S.Ct. 2997 (1990) held that governmental favoritism for some racial groups could be justified if they were "substantially related to achievement of legitimate government interest". Overruled by *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S.Ct. 2097 (1995), which applied strict scrutiny standard to all racial classifications.

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990) held that a judge alone could impose the death penalty. Overruled by *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 (2002), which held that a jury must recommend the death penalty.

Stare Decisis

The Latin legal phrase *stare decisis* — translated as "to stand by things decided" or "to stand by that which is decided" — has two distinct meanings in American law:

1. courts are reluctant to change rules of law that were established in their prior decisions (i.e., a court is reluctant to overrule its own prior case), or, in other words, courts nearly always follow their own precedents.
2. lower courts *must* follow precedents established by higher courts.
   For example, a U.S. District Court *must* follow precedents of both (1) the U.S. Court of Appeals in the District's Circuit and (2) the U.S. Supreme Court.

The justification for stare decisis is that this doctrine gives us stable law, so attorneys can reliably determine legal rights from reading precedents. It is a well established rule of American law, explained in this section of this essay, that it is more important to have settled, stable law than

correct law.[3] However — and this is important — as explained in this section of this essay, the U.S. Supreme Court is more willing to consider overruling its previous decisions of constitutional law than to consider overruling either statutory interpretations or common law.

Brandeis in 1932

Back in the year 1932, Justice Brandeis wrote a famous dissent that explained stare decisis:

> **Stare decisis is not, like the rule of res judicata, a universal inexorable command.**[4] "The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Hertz v. Woodman,* 218 U. S. 205, 212, 30 S. Ct. 621, 54 L. Ed. 1001. Stare decisis is usually the wise policy, because **in most matters it is more important that the applicable rule of law be settled than that it be settled right.**[5] Compare *National Bank v. Whitney,* 103 U. S. 99, 102, 26 L. Ed. 443. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. [FN1] But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. [FN2] The court bows to the lessons of experience and the force of better reasoning, [FN3] recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. Compare *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 681, 50 S. Ct. 451, 74 L. Ed. 1107. Recently, it overruled several leading cases, when it concluded that the states should not have been permitted to exercise powers of taxation which it had theretofore repeatedly sanctioned. [FN4] In cases involving the Federal Constitution [footnote omitted] the position of this court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. [footnote omitted] Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

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[3] Before I became an attorney in 1998, I was a physicist (Ph.D. 1977) who did scientific research for more than 16 years. As a scientist, I find the declaration that stability is more important than correctness to be chilling, because I prefer to get the correct result, even if I need to publicly repudiate earlier errors. Respect for precedent forces lower courts to follow wrongfully decided cases like lemmings jumping off a cliff. In short, the doctrine of stare decisis makes it more difficult to correct mistakes by judges, and helps perpetuate *in*justices and *un*fairness. Most lawyers in the USA are familiar only with the American legal system, so they accept *stare decisis,* because they know of no other way. However, the legal system in some other countries (e.g., Germany) has trial judges work from first principles — the Constitution and statutes — on every case, and precedent is of little concern.

[4] Boldface added by Standler. This sentence is discussed below, beginning at page 25.

[5] Boldface added by Standler. This sentence is discussed below, beginning at page 16.

FN1 This Court has, in matters deemed important, occasionally overruled its earlier decisions although correction might have been secured by legislation.
See

- •[6] Chicago & Eastern Illinois R. Co. v. Industrial Commission of Illinois, 284 U. S. 296, 52 S. Ct. 151, 76 L. Ed. 304, overruling Erie R. Co. v. Collins, 253 U. S. 77, 40 S. Ct. 450, 64 L. Ed. 790, and Erie R. Co. v. Szary, 253 U. S. 86, 40 S. Ct. 454, 64 L. Ed. 794;
- Gleason v. Seaboard Air Line Ry. Co., 278 U. S. 349, 357, 49 S. Ct. 161, 73 L. Ed. 415, in part overruling Friedlander v. Texas & Pacific Ry. Co., 130 U. S. 416, 9 S. Ct. 570, 32 L. Ed. 991;
- Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653, 659, 43 S. Ct. 230, 67 L. Ed. 443, overruling Ex parte Wisner, 203 U. S. 449, 27 S. Ct. 150, 51 L. Ed. 264, and qualifying In re Moore, 209 U. S. 490, 28 S. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164;
- Boston Store v. American Graphophone Co., 246 U. S. 8, 25, 38 S. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447, and Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 518, 37 S. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959, overruling Henry v. A. B. Dick Co., 224 U. S. 1, 32 S. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880;
- Rosen v. United States, 245 U. S. 467, 470, 38 S. Ct. 148, 62 L. Ed. 406, overruling United States v. Reid, 12 How. 361, 13 L. Ed. 1023 (compare Greer v. United States, 245 U. S. 559, 561, 38 S. Ct. 209, 62 L. Ed. 469; Jin Fuey Moy v. United States, 254 U. S. 189, 195, 41 S. Ct. 98, 65 L. Ed. 214; Olmstead v. United States, 277 U. S. 438, 466, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376);
- Roberts v. Lewis, 153 U. S. 367, 377, 14 S. Ct. 945, 38 L. Ed. 747, overruling Giles v. Little, 104 U. S. 291, 26 L. Ed. 745;
- Kountze v. Omaha Hotel Co., 107 U. S. 378, 387, 2 S. Ct. 911, 27 L. Ed. 609, overruling Stafford v. Union Bank of Louisiana, 16 How. 135, 14 L. Ed. 876;
- United States v. Phelps, 107 U. S. 320, 323, 2 S. Ct. 389, 27 L. Ed. 505, overruling Shelton v. The Collector, 5 Wall. 113, 118, 18 L. Ed. 544;
- Hornbuckle v. Toombs, 18 Wall. 648, 652, 653, 21 L. Ed. 966, overruling Orchard v. Hughes, 1 Wall. 77, 17 L. Ed. 560;
- Noonan v. Lee, 2 Black, 499, 17 L. Ed. 278, and Dunphy v. Kleinschmidt, 11 Wall. 610, 20 L. Ed. 223; Mason v. Eldred, 6 Wall. 231, 238, 18 L. Ed. 783, in effect overruling Sheeby v. Mandeville, 6 Cranch. 253, 3 L. Ed. 215;
- Gazzam v. Phillips, 20 How. 372, 377, 378, 15 L. Ed. 958, overruling Brown's Lessee v. Clements, 3 How. 650, 11 L. Ed. 767;
- Vidal v. Girard's Executors, 2 How. 127, 11 L. Ed. 205, qualifying Philadelphia Baptist Ass'n v. Hart's Executors, 4 Wheat. 1, 4 L. Ed. 499;
- Gordon v. Ogden, 3 Pet. 33, 34, 7 L. Ed. 592, overruling Wilson v. Daniel, 3 Dall. 401, 1 L. Ed. 655;
- compare Brenham v. German-American Bank, 144 U. S. 173, 187, 12 S. Ct. 559, 36 L. Ed. 390, overruling Rogers v. Burlington, 3 Wall. 654, 18 L. Ed. 79, and Mitchell v. Burlingham, 4 Wall. 270, 18 L. Ed. 350;

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6 Formatting added by Standler to make this long footnote easier to read.

- Hudson v. Guestier, 6 Cranch, 281, 285, 3 L. Ed. 224, overruling Rose v. Himely, 4 Cranch, 241, 284, 2 L. Ed. 608. See, also, Fairfield v. County of Gallatin, 100 U.S. 47, 54, 55, 25 L. Ed. 544, and cases cited.

FN2 Besides cases in note 4, see

- [7] East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 472, 51 S. Ct. 499, 75 L. Ed. 1171, overruling Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434;
- Terral v. Burke Construction Co., 257 U. S. 529, 533, 42 S. Ct. 188, 66 L. Ed. 352, 21 A. L. R. 186, overruling Doyle v. Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148, and Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, 26 S. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317;
- Pennsylvania R. Co. v. Towers, 245 U. S. 6, 17, 38 S. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475, in part overruling Lake Shore & Michigan Southern Ry Co. v. Smith, 173 U. S. 684, 19 S. Ct. 565, 43 L. Ed. 858;
- United States v. Nice, 241 U. S. 591, 601, 36 S. Ct. 696, 60 L. Ed. 1192, overruling In re Heff, 197 U. S. 488, 25 S. Ct. 506, 49 L. Ed. 848;
- Garland v. Washington, 232 U. S. 642, 646, 647, 34 S. Ct. 456, 58 L. Ed. 772, overruling Crain v. United States 162 U. S. 625, 16 S. Ct. 40 L. Ed. 1097;
- Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108, in effect overruling Hylton v. United States, 3 Dall. 171, 1 L. Ed. 556;
- Leisy v. Hardin, 135 U. S. 100, 118, 10 S. Ct. 681, 34 L. Ed. 128, overruling Thurlow v. Massachusetts, 5 How, 504, 12 L. Ed. 256;
- Leloup v. Port of Mobile, 127 U. S. 640, 647, 8 S. Ct. 1380, 32 L. Ed. 311, overruling Osborne v. Mobile, 16 Wall. 479, 21 L. Ed. 470;
- Morgan v. United States, 113 U. S. 476, 496, 5 S. Ct. 588, 28 L. Ed. 1044, overruling Texas v. White, 7 Wall. 700, 19 L. Ed. 227;
- Legal Tender Cases, 12 Wall. 457, 553, 20 L. Ed. 287, overruling Hepburn v. Griswold, 8 Wall. 603, 19 L. Ed. 513;
- The Belfast, 7 Wall. 624, 641, 19 L. Ed. 266, overruling in part Allen v. Newberry, 21 How. 244, 16 L. Ed. 110;
- The Genesee Chief v. Fitzhugh, 12 How. 443, 456, 13 L. Ed. 1058, overruling The Thomas Jefferson, 10 Wheat. 428, 6 L. Ed. 358, and The Steamboat Orleans v. Phoebus, 11 Pet. 175, 9 L. Ed. 677;
- Louisville, Cincinnati & Charleston R. Co. v. Letson, 2 How. 497, 554-556, 11 L. Ed. 353, overruling Commercial & Rail Road Bank v. Slocomb, 14 Pet. 60, 10 L. Ed. 354, and other cases, and qualifying Bank of the United States v. Deveaux, 5 Cranch, 61, 3 L. Ed. 38;

compare Marshall v. Baltimore & Ohio R. Co., 16 How. 314, 325, 326, 14 L. Ed. 953, in turn qualifying the Letson Case, supra.

Compare Helson v. Kentucky, 279 U. S. 245, 251, 49 S. Ct. 279, 73 L. Ed. 683, qualifying Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745;

- Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095, qualifying Texas Co. v. Brown, 258 U. S. 466, 42 S. Ct. 375, 66 L. Ed. 721;
- Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139, and Standard Oil Co. v. Graves, 249 U. S. 389, 39 S. Ct. 320, 63 L. Ed. 662; Union Tank Line v. Wright, 249 U. S. 275, 283, 284, 39 S. Ct. 276, 63 L. Ed. 602,

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[7] Formatting added by Standler to make this long footnote easier to read.

qualifying Pullman's Palace-Car Co. v. Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613;

- Wheeler v. Sohmer, 233 U. S. 434, 440, 34 S. Ct. 607, 58 L. Ed. 1030, qualifying Buck v. Beach, 206 U. S. 392, 27 S. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732 (compare Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A. L. R. 1303);
- Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U. S. 278, 294, 33 S. Ct. 312, 57 L. Ed. 510, qualifying Barney v. City of New York, 193 U. S. 430, 24 S. Ct. 502, 48 L. Ed. 737;
- Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 226, 28 S. Ct. 638, 52 L. Ed. 1031, qualifying Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 S. Ct. 121, 35 L. Ed. 994;
- In re Chapman, 166 U. S. 661, 670, 17 S. Ct. 677, 41 L. Ed. 1154, qualifying Runkle v. United States, 122 U. S. 543, 555, 7 S. Ct. 1141, 30 L. Ed. 1167;
- New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 195, 12 S. Ct. 406, 36 L. Ed. 121, qualifying Gordon v. Appeal Tax Court, 3 How. 133, 11 L. Ed. 529;
- Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 342, 7 S. Ct. 1118, 30 L. Ed. 1200, qualifying State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164;
- Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U. S. 557, 568, 569, 7 S. Ct. 4, 30 L. Ed. 244, qualifying Peik v. Chicago & Northwestern Ry. Co., 94 U. S. 164, 24 L. Ed. 97;
- Kilbourn v. Thompson, 103 U. S. 168, 196-200, 26 L. Ed. 377, qualifying Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242.

See, also, discussion of City of New York v. Miln, 11 Pet. 102, 9 L. Ed. 648, in Passenger Cases, 7 How. 283, 12 L. Ed. 702; that of Ficklen v. Shelby County Taxing District, 145 U. S. 1, 12 S. Ct. 810, 36 L. Ed. 601, in Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 296, 38 S. Ct. 126, 62 L. Ed. 295, and in Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150, 153, 154, 44 S. Ct. 242, 68 L. Ed. 611, 34 A. L. R. 907; that of Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U. S. 403, 27 S. Ct. 360, 51 L. Ed. 540, in Baltimore & Ohio Southwestern R. Co. v. Settle, 260 U. S. 166, 173, 43 S. Ct. 28, 67 L. Ed. 189.

FN3 Compare Taney, C. J., in *The Passenger Cases,* 7 How. 283, 470, 12 L. Ed. 702: "After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

See, also, Miller, J., dissenting in *Washington University v. Rouse,* 8 Wall. 439, 444, 19 L. Ed. 498: 'With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court. * * *'

Compare Field, J., in *Barden v. Northern Pacific R. Co.* 154 U. S. 288, 322, 14 S. Ct. 1030, 1036, 38 L. Ed. 992: 'It is more important that the court should be right

upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination, and the test of experience.'

FN4 See

- •[8] *Alpha Portland Cement Co. v. Com. of Massachusetts,* 268 U. S. 203, 218, 45 S. Ct. 277, 69 L. Ed. 916, 44 A. L. R. 1219, overruling *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127;
- *Farmers Loan & Trust Co. v. Minnesota,* 280 U. S. 204, 209, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000, overruling *Blackstone v. Miller,* 188 U. S. 189, 23 S. Ct. 277, 47 L. Ed. 439.

See, also, *Baldwin v. Missouri,* 281 U. S. 586, 591, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A. L. R. 1303; *Beidler v. South Carolina Tax Commission,* 282 U. S. 1, 8, 51 S. Ct. 54, 75 L. Ed. 131; *First National Bank of Boston v. State of Maine,* 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313.

During the twenty-seven years preceding the decision of Farmers' Loan & Trust Co. v. Minnesota, *Blackstone v. Miller* had been cited with approval in this Court fifteen times. Compare *Educational Films Corp. v. Ward,* 282 U. S. 379, 392-394, 51 S. Ct. 170, 75 L. Ed. 400, and *The Pacific Co. v. Johnson,* 285 U. S. 480, 52 S. Ct. 424, 76 L. Ed. --, decided today, qualifying *Macallen Co. v. Massachusetts,* 279 U. S. 620, 49 S. Ct. 432, 73 L. Ed. 874.

Movement in constitutional interpretation and application, often involving no less striking departures from doctrines previously established, takes place also without specific overruling or qualification of the earlier cases. Compare, for example,

- *Allgeyer v. Louisiana,* 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832, with *The Slaughter House Cases,* 16 Wall. 36, 21 L. Ed. 394;
- *Tyson & Bro.-United Theatre Ticket Offices v. Banton,* 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236, with *Munn v. Illinois,* 94 U. S. 113, 24 L. Ed. 77;
- *Muller v. Oregon,* 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, and *Bunting v. Oregon,* 243 U. S. 426, 37 S. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918A, 1043, with *Lochner v. New York,* 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-410, 52 S.Ct. 443, 447-449 (1932) (Brandeis, J., dissenting).

more important that law be settled than right

A dissenting opinion itself is *not* law, but Justice Brandeis' statement, "... it is more important that the applicable rule of law be settled than that it be settled right." has been quoted in fourteen subsequent opinions of the U.S. Supreme Court. Remarkably, this statement of Justice Brandeis was ignored, even by dissenting opinions, for 14 years. This statement was first quoted with approval in a majority opinion in the year 1974, 42 years after *Burnet* was written. When I wrote this in November 2005, half of the quotations are since the year 1985, from 53 to 73 years after *Burnet,* which shows that the Court only recently adopted the view of Justice Brandeis. What

[8] Formatting added by Standler to make this long footnote easier to read.

is more, both liberal justices (e.g., Douglas, Marshall, Stevens) and conservative justices (e.g., Rehnquist, Scalia, Thomas) have embraced this statement by Justice Brandeis.

In 1946, a dissenting opinion by Justice Douglas was the first to quote Justice Brandeis.

> Mr. Justice Brandeis stated that "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815. But throughout the history of the Court stare decisis has had only a limited application in the field of constitutional law. And it is a wise policy which largely restricts it to those areas of the law where correction can be had by legislation. Otherwise the Constitution loses the flexibility necessary if it is to serve the needs of successive generations.

State of New York v. U.S., 326 U.S. 572, 590-591 (1946) (Douglas, J., dissenting).

In 1970, Justice Black quoted Justice Brandeis:

> When the Court implies that the doctrine called Stare decisis rests solely on 'important policy considerations * * * in favor of continuity and predictability in the law,' it does not tell the whole story. Such considerations are present and, in a field as delicate as labor relations, extremely important. Justice Brandeis said, dissenting in *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932):
>
> > Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257 (1970) (Black, J., dissenting).

In 1974 and 1976, majority opinions of the U.S. Supreme Court adopted Justice Brandeis dissent in *Burnet:*

> In the words of Mr. Justice Brandeis: "State decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406-408, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (dissenting opinion) (footnotes omitted).

Edelman v. Jordan, 415 U.S. 651, 671, n. 14 (1974) (majority opinion).
Quoted with approval in *Runyon v. McCrary,* 427 U.S. 160, 175, n. 12 (1976) (majority opinion).

In 1978, Justice Rehnquist, joined by Chief Justice Burger, dissented:

> As this Court has repeatedly recognized, [*Runyon v. McCrary,* 427 U.S.] at 175, n. 12, 96 S.Ct., at 2596; *Edelman v. Jordan,* 415 U.S. 651, 671, n. 14, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions."
>
> *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406-407, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (dissenting opinion) (footnotes omitted).

Monell v. Department of Social Services of City of New York, 436 U.S. 658, 714-715 (1978) (Rehnquist, J., dissenting). See also *Sheet Metal Workers' Intl. Ass'n., AFL-CIO v. Carter,* 450 U.S. 949, 952 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("In these days of proliferating litigation, there is a tendency to lose sight of the very sensible observation of Justice Brandeis, dissenting in *Burnet* ... that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' ").

In 1986, a majority of justices on the U.S. Supreme Court granted a criminal defendant a new trial, 23 y after he was convicted of murder, although there was no allegation of unfairness in the first trial. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented:

> Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). Accordingly, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 559, 105 S.Ct. 1005, 1022, 83 L.Ed.2d 1016 (1985) (POWELL, J., dissenting). Nevertheless, when governing decisions are badly reasoned, or conflict with other, more recent authority, the Court "has never felt constrained to follow precedent." *Smith v. Allwright,* 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944). Instead, particularly where constitutional issues are involved, "[t]his Court has shown a readiness to correct its errors even though of long standing." *United States v. Barnett,* 376 U.S. 681, 699, 84 S.Ct. 984, 994, 12 L.Ed.2d 23 (1964). In this case, the Court misapplies *stare decisis* because it relies only on decisions concerning grand jury discrimination. There is other precedent, including important cases of more recent vintage than those cited by the Court, that should control this case. Those cases hold, or clearly imply, that a conviction should not be reversed for constitutional error where the error did not affect the outcome of the prosecution.

Vasquez v. Hillery, 474 U.S. 254, 268-269 (1986) (Powell, J., dissenting).

In 1986, a majority opinion of the U.S. Supreme Court concluded:

> The Court of Appeals, in Judge Friendly's characteristically thoughtful and incisive opinion, suggested that, in view of subsequent developments, this Court might be prepared to overrule *Keogh.* We conclude, however, that the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. [FN34] As Justice Brandeis himself observed, a decade after his *Keogh* decision, in commenting on the presumption of stability in statutory interpretation: "*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right.... This is commonly true, even where the error is a matter of serious concern, provided correction can

be had by legislation." [FN35] We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.

FN34. See, *e.g., NLRB v. Longshoremen,* 473 U.S. 61, 84, 105 S.Ct. 3045, 3058, 87 L.Ed.2d 47 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation"); *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736, 97 S.Ct 2061, 2069, 52 L.Ed.2d 707 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). See also Levi, An Introduction to Legal Reasoning, 15 U.Chi.L.Rev. 501, 540 (1948) ("The doctrine of finality for prior decisions setting the course for the interpretation of a statute is not always followed.... Nevertheless, the doctrine remains as more than descriptive. More than any other doctrine in the field of precedent, it has served to limit the freedom of the court. It marks an essential difference between statutory interpretation on the one hand and case law and constitutional interpretation on the other").

FN35. *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (dissenting).

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423-424 (1986).

In 1990, a unanimous U.S. Supreme Court said:

Petitioner asks this Court fundamentally to restructure a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process. That departure would be inconsistent with the measured and considered change that marks appropriate adjudication of such statutory issues. See *Square D Co., supra,* at 424, 106 S.Ct., at 1930 (for statutory determinations, " 'it is more important that the applicable rule of law be settled than that it be settled right.... This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation,' " quoting *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)).

California v. Federal Energy Regulatory Commission, 495 U.S. 490, 500 (1990).

In 1991, a majority opinion of the U.S. Supreme Court concluded:

Payne and his *amicus* argue that despite these numerous infirmities in the rule created by *Booth* and *Gathers,* we should adhere to the doctrine of *stare decisis* and stop short of overruling those cases. *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery,* 474 U.S. 254, 265-266, 106 S.Ct. 617, 624-625, 88 L.Ed.2d 598 (1986). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith v. Allwright,* 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944). *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). This is particularly true in constitutional cases, because in such cases

"correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co., supra,* 285 U.S., at 407, 52 S.Ct., at 447 (Brandeis, J., dissenting). Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, see *Swift & Co. v. Wickham,* 382 U.S. 111, 116, 86 S.Ct. 258, 261- 262, 15 L.Ed.2d 194 (1965); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977); *Burnet v. Coronado Oil & Gas Co., supra,* 285 U.S., at 405-411, 52 S.Ct., at 446-449 (Brandeis, J., dissenting); *United States v. Title Ins. & Trust Co.,* 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924); *The Genesee Chief v. Fitzhugh,* 12 How. 443, 458, 13 L.Ed. 1058 (1852); the opposite is true in cases such as the present one involving procedural and evidentiary rules.

Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions. [FN1] *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts. See *Gathers,* 490 U.S., at 813, 109 S.Ct., at 2212 (O'CONNOR, J., dissenting); *Mills v. Maryland,* 486 U.S. 367, 395-396, 108 S.Ct. 1860, 1875-1876, 100 L.Ed.2d 384 (1988) (REHNQUIST, C.J., dissenting). See also *State v. Huertas,* 51 Ohio St. 3d 22, 33, 553 N.E.2d 1058, 1070 (1990) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area") (Moyer, C.J., concurring). Reconsidering these decisions now, we conclude, for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled. [footnote omitted] We accordingly affirm the judgment of the Supreme Court of Tennessee.

FN1. *Perez v. Campbell,* 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (overruling *Kesler v. Department of Public Safety of Utah,* 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962));

- [9] *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (overruling *Pope v. Williams,* 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904));
- *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928));
- *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (overruling *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966));
- *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (overruling *Louis K. Liggett Co. v. Baldridge,* 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928));
- *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (overruling in part *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969);
- *State Dept. of Health & Rehabilitative Services of Florida v. Zarate,* 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972); and *Sterrett v. Mothers' & Children's Rights Organization,* 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972));

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[9] Formatting added by Standler to make this long footnote easier to read.

- *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (overruling in effect *Hoyt v. Florida,* 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961));
- *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) (overruling *Low v. Austin,* 13 Wall. 29, 20 L.Ed. 517 (1872));
- *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (overruling *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942));
- *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (overruling *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968));
- *New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957));
- *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948));
- *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951));
- *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878));
- *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.,* 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Comm'n,* 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937));
- *United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins,* 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975));
- *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (overruling *Geer v. Connecticut,* 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896));
- *United States v. Salvucci,* 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (overruling *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960));
- *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (overruling *Heisler v. Thomas Colliery Co.,* 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922));
- *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (overruling *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964));
- *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (overruling in part *Rolston v. Missouri Fund Comm'rs,* 120 U.S. 390, 7 S.Ct. 599, 30 L.Ed. 721 (1887));
- *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (overruling *Coffey v. United States,* 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886));
- *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (overruling *National League of Cities v. Usery, supra*);
- *United States v. Miller,* 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (overruling in part *Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887));

- *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (overruling in part *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981));
- *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (overruling in part *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965));
- *Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987) (overruling *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969));
- *Welch v. Texas Dept. of Highways and Public Transportation,* 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling in part *Parden v. Terminal Railway of Alabama Docks Dept.,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964));
- *South Carolina v. Baker,* 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895));
- *Thornburgh v. Abbott,* 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling in part *Procunier v. Martinez,* 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974));
- *Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) (overruling *Simpson v. Rice* (decided with *North Carolina v. Pearce*), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969));
- *Healy v. Beer Institute,* 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (overruling *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966));
- *Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (overruling *Kring v. Missouri,* 107 U.S. 221, 27 L.Ed. 506 (1883); *Thompson v. Utah,* 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898));
- *California v. Acevedo,* 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (overruling *Arkansas v. Sanders,* 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979)).

It is so ordered.
Payne v. Tennessee, 501 U.S. 808, 827-830 (1991).

In 1994, Justice Thomas, joined by Justice Scalia, wrote a long opinion that concurred in the judgment of the Court:

> *Stare decisis* is a powerful concern, especially in the field of statutory construction. See *Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989). See also *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 538-539, 114 S.Ct. 1023, 1035, 114 S.Ct. 1023 (1994) (THOMAS, J., concurring in judgment). But "we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes." *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 695, 98 S.Ct. 2018, 2038, 56 L.Ed.2d 611 (1978). *Stare decisis* should not bind the Court to an interpretation of the Voting Rights Act that was based on a flawed method of statutory construction from its inception and that in every day of its continued existence involves the Federal Judiciary in attempts to obscure the conflict between our cases and the explicit commands of the Act. The Court has noted in the past that *stare decisis* " 'is a principle of policy,' " *Payne,* 501 U.S., at 828, 111 S.Ct., at 2609 (quoting *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940)), and it " 'is usually the

> wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.' " 501 U.S., at 827, 111 S.Ct., at 2609 (quoting *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)). I cannot subscribe to the view that in our decisions under the Voting Rights Act it is more important that we have a settled rule than that we have the right rule. When, under our direction, federal courts are engaged in methodically carving the country into racially designated electoral districts, it is imperative that we stop to reconsider whether the course we have charted for the Nation is the one set by the people through their representatives in Congress. I believe it is not.

Holder v. Hall, 512 U.S. 874, 944-945 (1994) (Thomas, J., concurring).

In 1995, a majority opinion of the U.S. Supreme Court said:

> With the foregoing considerations in mind, we now turn to the difficult *stare decisis* question that this case presents. It is, of course, wise judicial policy to adhere to rules announced in earlier cases. As Justice Cardozo reminded us: "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 149 (1921). Adherence to precedent also serves an indispensable institutional role within the Federal Judiciary. *Stare decisis* is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' " *Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (quoting The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). See also *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 854-855, 112 S.Ct. 2791, 2808-2809, 120 L.Ed.2d 674 (1992) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). Respect for precedent is strongest "in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736, 97 S.Ct. 2061, 2070, 52 L.Ed.2d 707 (1977). [FN11]
>
> > FN11. See also, *e.g., Patterson v. McLean Credit Union,* 491 U.S., at 172-173, 109 S.Ct., at 2370 (*stare decisis* has "special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done"); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409, 424, 106 S.Ct. 1922, 1930, 90 L.Ed.2d 413 (1986) (noting "the strong presumption of continued validity that adheres in the judicial interpretation of a statute"); *Runyon v. McCrary,* 427 U.S. 160, 189, 96 S.Ct. 2586, 2603, 49 L.Ed.2d 415 (1976) (STEVENS, J., concurring) (declining to overturn "a line of [statutory] authority which I firmly believe to have been incorrectly decided"); *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation") (citation omitted).

Hubbard v. U.S., 514 U.S. 695, 711-712 (1995) (majority opinion).

In June 1997, another majority opinion of the U.S. Supreme Court, *Agnostini,* quoted Justice Brandeis with approval. This quotation appears in this essay, below, at page 27.

In Nov 1997, a majority opinion of the U.S. Supreme Court said:

> We approach the reconsideration of decisions of this Court with the utmost caution. *Stare decisis* reflects "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " *Agostini v. Felton,* 521 U.S. 203, 235, 117 S.Ct. 1997, 2016, 138 L.Ed.2d 391 (1997) (quoting *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)). It "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991). This Court has expressed its reluctance to overrule decisions involving statutory interpretation, see, *e.g., Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736, 97 S.Ct. 2061, 2069-2070, 52 L.Ed.2d 707 (1977), and has acknowledged that *stare decisis* concerns are at their acme in cases involving property and contract rights, see, *e.g., Payne,* 501 U.S., at 828, 111 S.Ct., at 2609-2611. Both of those concerns are arguably relevant in this case.
>
> But "*[s]tare decisis* is not an inexorable command." *Ibid.* In the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *National Soc. of Professional Engineers v. United States,* 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978). As we have explained, the term "restraint of trade," as used in § 1, also "invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890." *Business Electronics,* 485 U.S., at 732, 108 S.Ct., at 1523-1524; see also *GTE Sylvania,* 433 U.S., at 53, n. 21, 97 S.Ct., at 2559, n. 21; *McNally v. United States,* 483 U.S. 350, 372-373, 107 S.Ct. 2875, 2888-2889, 97 L.Ed.2d 292 (1987) (STEVENS, J., dissenting). Accordingly, this Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question. See, *e.g., Copperweld Corp., supra,* at 777, 104 S.Ct., at 2744-2745; *GTE Sylvania, supra,* at 47-49, 97 S.Ct., at 2556-2557; cf. *Tigner v. Texas,* 310 U.S. 141, 147, 60 S.Ct. 879, 881-882, 84 L.Ed. 1124 (1940).
>
> Although we do not "lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error," we have noted that "different sorts of agreements" may amount to restraints of trade "in varying times and circumstances," and "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics, supra,* at 731-732, 108 S.Ct., at 1524. Just as *Schwinn* was "the subject of continuing controversy and confusion" under the "great weight" of scholarly criticism, *GTE Sylvania, supra,* at 47-48, 97 S.Ct., at 2556-2557, *Albrecht* has been widely criticized since its inception. With the views underlying *Albrecht* eroded by this Court's precedent, there is not much of that decision to salvage. See, *e.g., Neal v. United States,* 516 U.S. 284, 295, 116 S.Ct. 763, 769, 133 L.Ed.2d 709 (1996); *Patterson v. McLean Credit Union,* 491 U.S. 164, 173, 109 S.Ct. 2363, 2370-2371, 105 L.Ed.2d 132 (1989); *Rodriguez de Quijas v. Shearson/ American Express, Inc.,* 490 U.S. 477, 480- 481, 109 S.Ct. 1917, 1919-1920, 104 L.Ed.2d 526 (1989).

State Oil Co. v. Khan, 522 U.S. 3, 20-21 (1997) (majority opinion).

There is no doubt that criminal procedure law would be easier to learn if the U.S. Supreme Court stopped changing the rules. However, why should law be *un*changing? Knowledge and understanding in science, engineering, and other professions change with time. It is essential that law change with time, especially when it is alleged that rules of criminal procedure are either *un*just or *un*fair.

stare decisis *not* an inexorable command

Justice Brandeis, in his dissent in *Burnet* that was quoted above, also remarked that: "Stare decisis is not, like the rule of res judicata, a universal inexorable command." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).[10] This terse remark in *Burnet* has been quoted with approval by the following majority opinions of the U.S. Supreme Court.

- *Vasquez v. Hillery,* 474 U.S. 254, 266 (1986);
- *Payne v. Tennessee,* 501 U.S. 808, 828 (1991);
- *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 854 (1992);
- *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 63 (1996);
- *U.S. v. International Business Machines Corp.,* 517 U.S. 843, 856 (1996);
- *Agostini v. Felton,* 521 U.S. 203, 235 (1997);
- *State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997);
- *Hohn v. U.S.,* 524 U.S. 236, 251 (1998);
- *Dickerson v. U.S.,* 530 U.S. 428, 443 (2000);
- *Harris v. U.S.,* 536 U.S. 545, 556 (2002); and
- *Lawrence v. Texas,* 539 U.S. 558, 577 (2003).

[10] Eight years earlier, Justice Brandeis made a similar remark in a case that has apparently been subsequently overlooked. *State of Washington v. W.C. Dawson & Co.,* 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting) ("Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command.").

Only Supreme Court Can Overrule Its Cases

The U.S. Court of Appeals, 845 F.2d 1296, 1299 (5th Cir. 1988), said the U.S. Supreme Court's decision in *Wilko* was obsolete and refused to follow it. In 1989, the U.S. Supreme Court overruled *Wilko,* but admonished the Courts of Appeals to follow precedents of the U.S. Supreme Court:

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko.* If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions. Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language, *Commissioner v. Estate of Church,* 335 U.S. 632, 649-650, 69 S.Ct. 322, 330-331, 93 L.Ed. 288 (1949), and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation, see, *e.g., Boys Markets, Inc. v. Retail Clerks,* 398 U.S. 235, 240-241, 90 S.Ct. 1583, 1586-1587, 26 L.Ed.2d 199 (1970) (overruling *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962)). Both purposes would be served here by overruling the *Wilko* decision.
>
> It also would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side. Their inconsistency is at odds with the principle that the 1933 and 1934 Acts should be construed harmoniously because they "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 206, 96 S.Ct. 1375, 1387, 47 L.Ed.2d 668 (1976). In this case, for example, petitioners' claims under the 1934 Act were subjected to arbitration, while their claim under the 1933 Act was not permitted to go to arbitration, but was required to proceed in court. That result makes little sense for similar claims, based on similar facts, which are supposed to arise within a single federal regulatory scheme. In addition, the inconsistency between *Wilko* and *McMahon* undermines the essential rationale for a harmonious construction of the two statutes, which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another. For all of these reasons, therefore, we overrule the decision in *Wilko.*
>
> Petitioners argue finally that if the Court overrules *Wilko,* it should not apply its ruling retroactively to the facts of this case. We disagree. The general rule of long standing is that the law announced in the Court's decision controls the case at bar. See, *e.g., Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 608, 107 S.Ct. 2022, 2025, 95 L.Ed.2d 582 (1987); *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 109, 2 L.Ed. 49 (1801). In some civil cases, the Court has restricted its rulings to have prospective application only, where specific circumstances are present. *Chevron Oil v. Huson,* 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-356, 30 L.Ed.2d 296 (1971). Under the *Chevron* approach, the customary rule of retroactive application is appropriate here. Although our decision to overrule *Wilko* establishes a new principle of law for arbitration agreements under the Securities Act, this ruling furthers the purposes and effect of the Arbitration Act without undermining those of the Securities Act. Today's ruling, moreover, does not produce "substantial inequitable results," 404 U.S., at 107, 92 S.Ct., at 355, for petitioners do not make any serious allegation that they

> agreed to arbitrate future disputes relating to their investment contracts in reliance on *Wilko*'s holding that such agreements would be held unenforceable by the courts. Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.
>
> The judgment of the Court of Appeals is *Affirmed.*

Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484-486 (1989).

In 1997, the U.S. Supreme Court overruled its earlier decision in the same case, *Agostini,* because First Amendment Establishment Clause law had changed during the intervening 12 years. The second Supreme Court decision in *Agostini* gives an explanation of relevant legal concepts in overruling of precedent.

> The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions. As we have often noted, "*[s]tare decisis* is not an inexorable command," *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63, 116 S.Ct. 1114, 1127, 134 L.Ed.2d 252 (1996); *Payne, supra,* at 828, 111 S.Ct., at 2609-2610; *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 94, 56 S.Ct. 720, 744, 80 L.Ed. 1033 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of *stare decisis* ... has only a limited application in the field of constitutional law"). Thus, we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law. *United States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 2319, 132 L.Ed.2d 444 (1995) (*stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"); *Alabama v. Smith,* 490 U.S. 794, 803, 109 S.Ct. 2201, 2207, 104 L.Ed.2d 865 (1989) (noting that a "later development of ... constitutional law" is a basis for overruling a decision); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 857, 112 S.Ct. 2791, 2810, 120 L.Ed.2d 674 (1992) (observing that a decision is properly overruled where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking"). As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar,* so our decision to overturn those cases rests on far more than "a present doctrinal disposition to come out differently from the Court of [1985]." *Casey, supra,* at 864, 112 S.Ct., at 2813-2814. We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.
>
> Nor does the "law of the case" doctrine place any additional constraints on our ability to overturn *Aguilar.* Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. *Messenger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." *Arizona v. California,* 460 U.S. 605, 618, n. 8, 103 S.Ct. 1382, 1391, n. 8, 75 L.Ed.2d 318 (1983). In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, *Davis v. United States,* 417 U.S. 333,

342, 94 S.Ct. 2298, 2303, 41 L.Ed.2d 109 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent).

We therefore conclude that our Establishment Clause law has "significant[ly] change[d]" since we decided *Aguilar.* See *Rufo,* 502 U.S., at 384, 112 S.Ct., at 760. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does. Our general practice is to apply the rule of law we announce in a case to the parties before us. *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 485, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526 (1989) ("The general rule of long standing is that the law announced in the Court's decision controls the case at bar"). We adhere to this practice even when we overrule a case. In *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), for example, the District Court and Court of Appeals rejected the argument that racial classifications in federal programs should be evaluated under strict scrutiny, relying upon our decision in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). When we granted certiorari and overruled *Metro Broadcasting,* we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time. 515 U.S., at 237-238, 115 S.Ct., at 2117-2118. See also *Hubbard v. United States,* 514 U.S. 695, 715, 115 S.Ct. 1754, 1765, 131 L.Ed.2d 779 (1995) (overruling decision relied upon by Court of Appeals and reversing the lower court's judgment that relied upon the overruled case).

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas, supra,* at 484, 109 S.Ct., at 1921-1922. Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.

Agostini v. Felton, 521 U.S. 203, 235-238 (1997).

Note the admonition in this last paragraph to judges in U.S. District Courts and U.S. Courts of Appeal to follow U.S. Supreme Court precedents until the U.S. Supreme Court explicitly overrules its earlier opinion.

In 1997, the U.S. Supreme Court overruled its decision in *Albrecht,* a case decided in the year 1968.

Despite what Chief Judge Posner aptly described as *Albrecht*'s "infirmities, [and] its increasingly wobbly, moth-eaten foundations," 93 F.3d, at 1363, there remains the question whether *Albrecht* deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht,* for it is this Court's prerogative alone to overrule one of its precedents.

State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (majority opinion).

Additional Remarks by U.S. Supreme Court

In 1936, a concurring opinion by Justice Brandeis gave different reasons for reaching the same result as the majority opinion. Justices Cardozo and Stone concurred in the result of this case, and endorsed the reasoning of Justice Brandeis. Their entire concurrence said:

> We think the opinion of Mr. Justice BRANDEIS states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it. If the opinion of the Court did no more than accept those precedents and follow them, we might be moved to acquiescence. More, however, has been attempted. The opinion re-examines the foundations of the rule that it declares, and finds them to be firm and true. We will not go so far. The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. See the cases collected by BRANDEIS, J., dissenting, in *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 407, 408, 52 S.Ct. 443, 76 L.Ed. 815. If the challenged doctrine is to be reconsidered, we are unwilling to approve it.
>
> For the reasons stated by Mr. Justice BRANDEIS the decree should be affirmed.

St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 93-94 (1936) (Cardozo and Stone, JJ., concurring in the result). Their sentence, "The doctrine of stare decisis ... has only a limited application in the field of constitutional law." has been quoted with approval in the following cases:

- *Connecticut General Life Ins. Co. v. Johnson,* 303 U.S. 77, 85 (1938) (Black, J., dissenting) ("A constitutional interpretation that is wrong should not stand.").
- *State of New York v. U.S.,* 326 U.S. 572, 590 (1946) (Douglas and Black, JJ., dissenting).
- *Agostini v. Felton,* 521 U.S. 203, 235 (1997) (majority opinion).

Allwright

In 1944, a majority opinion said:

> In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. [footnote omitted] However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, [FN9] and this practice has continued to this day. [long footnote collecting cases overruled during 1937-43 omitted] This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. [FN11]
>
> FN9 See cases collected in the dissenting opinion in *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 410, 52 S.Ct. 443, 448, 76 L.Ed. 815.
>
> FN11 Cf. Dissent in *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, at page 410, 52 S.Ct. 443, at page 448, 76 L.Ed. 815.

Smith v. Allwright, 321 U.S. 649, 665-666 (1944) (majority opinion).

The sentence saying "... when convinced of former error, this Court has never felt constrained to follow precedent." has been quoted with approval in four majority opinions:

- *Payne v. Tennessee,* 501 U.S. 808, 827 (1991).

- *U.S. v. Dixon,* 509 U.S. 688, 712 (1993).
- *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 63 (1996).
- *Vieth v. Jubelirer,* 541 U.S. 267, 306 (2004).

In 1983, Justice O'Connor, joined by Justices White and Rehnquist, wrote a dissent about the trimester time frame in *Roe v. Wade*:

> The Court adheres to the *Roe* framework because the doctrine of *stare decisis* "demands respect in a society governed by the rule of law." *Ante,* at 2487. Although respect for *stare decisis* cannot be challenged, "this Court's considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases." *Glidden Company v. Zdanok,* 370 U.S. 530, 543, 82 S.Ct. 1459, 1469, 8 L.Ed.2d 671 (1962). Although we must be mindful of the "desirability of continuity of decision in constitutional questions. ... when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, when correction depends on amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith v. Allwright,* 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944) (footnote omitted).
>
> Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe* and employed by the Court today on the basis of *stare decisis.*

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458-459 (1983) (O'Connor, J., dissenting); *majority opinion overruled by Casey,* 505 U.S. 833 (1992).

In 1989, Justice Scalaia wrote in dissent:

> Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it. That is particularly true with respect to a decision such as *Booth,* which is in that line of cases purporting to reflect "evolving standards of decency" applicable to capital punishment. *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion). Once a law-abiding society has revised its laws and practices to comply with such an erroneous decision, the existence of a new "consensus" can be appealed to — or at least the existence of the pre-existing consensus to the contrary will no longer be evident — thus enabling the error to triumph by our very failure promptly to correct it. Cf. *Thompson v. Oklahoma,* 487 U.S. 815, 854-855, 108 S.Ct. 2687, 2709, 101 L.Ed.2d 702 (1988) (O'CONNOR, J., concurring in judgment).
>
> In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible (a description that surely does not apply to *Booth*), I agree with Justice Douglas:
>
> > "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."
>
> Douglas, Stare Decisis, 49 Colum.L.Rev. 735, 736 (1949). Or as the Court itself has said:

> "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."

Smith v. Allwright, 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944).
South Carolina v. Gathers, 490 U.S. 805, 824-825 (1989) (Scalia, J., dissenting), *majority opinion overuled by Payne v. Tennessee,* 501 U.S. 808 (1991).

Barnett

In 1964, a majority opinion of the U.S. Supreme Court refused to overrule cases about contempt of court.

> It is true that adherence to prior decisions in constitutional adjudication is not a blind or inflexible rule. This Court has shown a readiness to correct its errors even though of long standing. Still, where so many cases in both federal and state jurisdictions by such a constellation of eminent jurists over a century and a half's span teach us a principle which is without contradiction in our case law, we cannot overrule it.

U.S. v. Barnett, 376 U.S. 681, 699 (1964).

Hilton

In 1991, the U.S. Supreme Court considered a case involving interpretation of a federal statute.

> Our analysis and ultimate determination in this case are controlled and informed by the central importance of *stare decisis* in this Court's jurisprudence. Respondent asks us to overrule a 28-year-old interpretation, first enunciated in *Parden,* that when Congress enacted FELA and used the phrase "[e]very common carrier by railroad," 45 U.S.C. § 51, to describe the class of employers subject to its terms, it intended to include state-owned railroads. 377 U.S., at 187-188, 84 S.Ct., at 1210-1211. [footnote omitted] Just two Terms ago, in *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990), we assumed the applicability of FELA to state-owned railroads in finding that the defendant, a bistate compact corporation, had waived any Eleventh Amendment immunity that it may have had. The issue here is whether we should reexamine this longstanding statutory construction. Because of the strong considerations favoring adherence to *stare decisis* in these circumstances, the answer to that question must be no. Time and time again, this Court has recognized that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch, supra,* 483 U.S., at 494, 107 S.Ct., at 2957; see also *Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989); *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). Adherence to precedent promotes stability, predictability, and respect for judicial authority. *Vasquez v. Hillery,* 474 U.S. 254, 265-266, 106 S.Ct. 617, 624- 625, 88 L.Ed.2d 598 (1986). For all of these reasons, we will not depart from the doctrine of *stare decisis* without some compelling justification. *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2310, 81 L.Ed.2d 164 (1984).
>
> In the case before us the policies in favor of following *stare decisis* far outweigh those suggesting departure. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."

> *Patterson, supra,* 491 U.S., at 172-173, 109 S.Ct., at 2370-2371. Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response. This is so in the case before us.

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197, 201-202 (1991).

Respect for Practices "Embedded" in Society?

On 2 Dec 2005, Senator Arlen Specter, chairman of the U.S. Senate Judiciary Committee, held a press conference and suggested that *Roe v. Wade* should not be overturned because legal access to abortion was now "embedded in the culture". To determine if Senator Specter was correct in his reasoning, I did a search of U.S. Supreme Court Cases in Westlaw for

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("stare decisis" precedent) /P (embed! entrench!)
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which will find embedded, embedding, entrenched, etc. in the same paragraph as either "stare decisis" or precedent.

Back in 1948, Justice Reed dissented in a case and said:

> ... in the light of the meaning given to those words by the precedents, customs, and practices which I have detailed above, I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided. Whatever may be the wisdom of the arrangement as to the use of the school buildings made with The Champaign Council of Religious Education, it is clear to me that past practice shows such cooperation between the schools and a non-ecclesiastical body is not forbidden by the First Amendment.
>
> .... This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population.

People of State of Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Ill., 333 U.S. 203, 255-256 (1948) (Reed, J., dissenting).

This is the first remark that I can find in U.S. Supreme Court opinions that mentions the desirability of *not* upsetting "practices embedded in our society".

A majority opinion in 1984 mentioned three classes of overruled cases:

> In *United States v. Johnson,* 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), we identified three situations in which a "new" constitutional rule, representing " 'a clear break with the past,' " might emerge from this Court. Id., at 549, 102 S.Ct., at 2587 (quoting *Desist v. United States,* 394 U.S. 244, 258-259, 89 S.Ct. 1030, 1038-1039, 22 L.Ed.2d 248 (1969)). First, a decision of this Court may explicitly overrule one of our precedents. *United States v. Johnson,* 457 U.S., at 551, 102 S.Ct., at 2588. Second, a decision may "overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." Ibid. And, finally, a decision may "disapprov[e] a practice this Court arguably has sanctioned in prior cases." Ibid. By definition, when a case falling into one of the first two categories is given retroactive

> application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement. Cases falling into the third category, however, present a more difficult question. Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.

Reed v. Ross, 468 U.S. 1, 17-18 (1984).

In 1989, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, wrote a dissent that advocated overruling *Booth*. Justice O'Connor wrote:

> With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible (a description that surely does not apply to *Booth*), I agree with Justice Douglas:
>
> > "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."
>
> Douglas, Stare Decisis, 49 Colum.L.Rev. 735, 736 (1949). Or as the Court itself has said:
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> > "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."
>
> *Smith v. Allwright,* 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944).

South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (O'Connor, J., dissenting).

Her first sentence tantalizing suggests that there may be some wrongfully decided cases that are "so embedded in our system of government" that overruling is "no longer possible".

In 2000, Chief Justice Rehnquist wrote a majority opinion, joined by six of eight associate justices, that said:

> Whether or not we would agree with *Miranda's* [384 U.S. 436 (1966)] reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. See, *e.g., Rhode Island v. Innis,* 446 U.S. 291, 304, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (Burger, C. J., concurring in judgment) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda,* disparage it, nor extend it at this late date"). While " '*stare decisis* is not an inexorable command,' " *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (quoting *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)), particularly when we are interpreting the Constitution, *Agostini v. Felton,* 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *United States v. International Business Machines Corp.,* 517 U.S. 843, 856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) (quoting *Payne, supra,* at 842, 111 S.Ct. 2597

> (SOUTER, J., concurring), in turn quoting *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)).
>
> We do not think there is such justification for overruling *Miranda.* *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. See *Mitchell v. United States,* 526 U.S. 314, 331-332, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (SCALIA, J., dissenting) (stating that the fact that a rule has found " 'wide acceptance in the legal culture' " is "adequate reason not to overrule" it). While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, see, *e.g., Patterson v. McLean Credit Union,* 491 U.S. 164, 173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), we do not believe that this has happened to the *Miranda* decision. If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.

Dickerson v. U.S., 530 U.S. 428, 443-444 (2000).

Thirty-four years after *Miranda,* Chief Justice Rehnquist recognized that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," so that it was now *un*desirable to overrule *Miranda.*

Elsewhere, I have remarked that:

> In fact, the U.S. Supreme Court has overruled cases that it decided wrongfully more than 50 years earlier, and sometimes more than 100 years earlier.[11] Furthermore, the U.S. Supreme Court ruled segregation *un*constitutional in *Brown v. Board of Education,* although segregation was certainly "embedded in the culture" in the southeastern USA. And there was a long history of Comstock-era statutes that prohibited elective abortions (which means that legal hostility to abortions was "embedded in the culture") when *Roe v. Wade* declared those statutes *un*constitutional.

Standler, *History of the Nomination of Samuel Alito,* http://www.rbs0.com/alito.pdf (4 Dec 2005).

Despite the two majority opinions and two dissents quoted in this section, it seems that being embedded in the culture does *not* guarantee that the U.S. Supreme Court will leave it *un*changed. I believe it is reasonable for the Supreme Court to change the law when it recognizes that either (1) the constitutional rights of a minority are being infringed by the majority in the legislative or executive branches of government or (2) a previous Court's decision of constitutional law was wrongfully decided. Change is *not* a bad thing — change is the process by which societies evolve.

While there is support for Senator Specter's view in one sentence in *Dickerson,* the vast majority of the Supreme Court opinions that discuss respect for precedent show that their precedents in constitutional law can be overruled anytime a majority of justices believe the precedent was wrongfully decided. Therefore, respect for precedent will *not* protect *Roe v. Wade.*

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[11] For examples, see the list that begins at page 4, above.

Conclusion

Judges are human. They make mistakes. I hope it is obvious that the Supreme Could *should* correct its errors in interpreting the U.S. Constitution, as soon as a majority of justices realize their previous decision was wrong. Demanding respect for precedent, even if the original case was wrongly decided, is a stupid position that perpetuates an *in*justice.

Opinions of the U.S. Supreme Court show three different levels of respect for their own precedent:

1. Whenever a majority of justices believe a case involving constitutional law was wrongfully decided, that case can be overruled. As shown in this essay, respect for precedent is *not* a good reason to refuse to overrule wrongfully decided cases involving constitutional law.
2. Respect for precedent is strong in cases involving statutory construction.[12]
3. Respect for precedent is especially strong in cases involving property and contract rights, on which attorneys rely.[13]

As the list above, from pages 4 to 11, shows, there are at least 74 opinions of the U.S. Supreme Court that were overruled during the 46 years from 1960 to 2005. This is an average of approximately one or two cases overruled per year. Therefore, the U.S. Supreme Court not only can, but actually does, overrule its prior decisions.

The key issue is whether or not the case was wrongfully/correctly decided, *not* how many times a decision was cited with approval in subsequent cases at the U.S. Supreme Court. While being cited with approval many times *might* indicate that a decision was correctly decided, and therefore unlikely to be overruled, there are examples of frequently cited cases that have been overruled:

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[12] See a long line of cases, of which the following are recent examples: *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977) ("... we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *Hilton v. South Carolina Public Railways Com'n,* 502 U.S. 197, 205 (1991) ("The issue becomes, then, a pure question of statutory construction, where the doctrine of *stare decisis* is most compelling."); *Neal v. U.S.,* 516 U.S. 284, 295 (1996) (unanimous opinion) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis, ...*"); *IBP, Inc. v. Alvarez,* 126 S.Ct. 514, 523 (8 Nov 2005) ("Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades.").

[13] *Payne v. Tennessee,* 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, ..." [citations omitted]). Quoted with approval in *State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997) (majority opinion) and in *BedRoc Ltd., LLC v. U.S.,* 541 U.S. 176, 189 (2004) (Thomas, joined by Breyer, concurring in judgment).

- Justice Brandeis reminds us[14] that *Blackstone v. Miller,* 188 U.S. 189 (1903) "was cited with approval in this Court fifteen times" before it was overruled in part by *Farmers Loan & Trust Co. v. Minnesota,* 280 U.S. 204 (1930).
- There were many U.S. Supreme Court decisions allowing racial segregation before the practice was finally declared *un*constitutional by *Brown v. Board of Education of Topeka, Shawnee County, Kan.,* 347 U.S. 483 (1954).
- And there were many U.S. Supreme Court decisions invalidating statutes that specified minimum wages and decent working conditions, starting with *Lochner v. New York,* 198 U.S. 45 (1905), and ending in 1937. Books on constitutional law commonly call the years 1905-1937 the "*Lochner* era" of the Court's jurisprudence.

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[14] *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 409, n. 4 (1932) (Brandeis, J., dissenting).