UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 86
Number 5 *Precedent & the Roberts Court*

Article 3

6-1-2008

Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Star Decisis

Michael Stokes Paulsen

DOES THE SUPREME COURT'S CURRENT DOCTRINE OF STARE DECISIS REQUIRE ADHERENCE TO THE SUPREME COURT'S CURRENT DOCTRINE OF STARE DECISIS?

MICHAEL STOKES PAULSEN*

This Article asks whether a fair application of the Supreme Court's current doctrine of stare decisis to the Supreme Court's current doctrine of stare decisis would counsel in favor of adhering to current doctrine or departing from it. Professor Paulsen argues that the paradoxical answer is that current doctrine of precedent suggests that current doctrine of precedent disserves all of the doctrine's supposed policy justifications. Accordingly, the Court's current doctrine of stare decisis may and should be overruled—according to the Court's current doctrine of stare decisis.

* Distinguished University Chair and Professor of Law, The University of St. Thomas School of Law. I would like to thank my colleague at St. Thomas, Robert Delahunty, for comments on an earlier draft. I would also like to thank my former colleagues at the University of Minnesota Law School, where I was privileged to have taught for sixteen years, the last four as Associate Dean for Faculty Research and Scholarship. Many of the ideas presented here were formulated during those years, over the course of discussions and debates with colleagues too numerous to list individually. My thanks also to Michael Gerhardt of the UNC School of Law faculty for his many comments and debates. Thanks also to my editor, Kelly Russotti, and the other board members of the North Carolina Law Review for their superb editing and superhuman patience with me.

INTRODUCTION

What if one were to examine—as if without irony—the stare decisis effect that the Supreme Court should accord to its own current doctrine of stare decisis, under a fair application of the Court's current doctrine of stare decisis, in a case where the result turned on whether the doctrine of stare decisis should be adhered to as a matter of stare decisis or not? Would the Court find itself "tested by following" its own "promise of constancy, once given"?[1] Would the Court (or its doctrine) pass its own test? Or would the Court be forced to conclude that the doctrine of stare decisis does not meet the Court's own set of qualifications for when past decisions ought to be followed? And, if so, what follows from *that* conclusion?

In this short Article, I propose to examine, as if it could be taken seriously, the Supreme Court's current stated doctrine of stare decisis, as most comprehensively formulated and defended in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] and as exercised (or deviated from) in several prominent constitutional decisions of the Court in the fifteen years since *Casey* was decided. I propose to do so not from the standpoint of first premises,[3] but from the more

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992).

2. *See id.* at 854–69.

3. I have examined the doctrine of stare decisis in constitutional law from the perspective of first premises of constitutional text, structure, and history, as well as from the perspective of early precedent (specifically, the argument for judicial review under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), in other writing. *See, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1548–49 n.38 (2000) [hereinafter Paulsen, *Abrogating*] (suggesting that stare decisis is unconstitutional and collecting authorities supporting this proposition); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 679–81 (1995) [hereinafter Paulsen, *Captain James T. Kirk*] (arguing that, to the extent that the doctrine is not a hoax, it is flatly unconstitutional); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of*

limited perspective of the Court's own doctrine of stare decisis. My analysis and critique here is thus an "internal" one—does the doctrine satisfy its own standards and purported justification?—rather than the "external" one of consistency with first principles of the Constitution. My conclusion, as one might guess from the framing of the question, is that the Court's doctrine about precedent fails its own test(s) of when precedents should be adhered to. Indeed, the doctrine fails *all* of the doctrine's own tests: It is embarrassingly unworkable. It certainly has not spawned reasonable reliance on the doctrine and practice of stare decisis continuing to remain stable; to the contrary, the Court's subsequent decisions have cast doubt on the content of the doctrine and seemingly left its stare decisis analysis a remnant of abandoned doctrine. Changed factual circumstances cast some mild doubt on the validity of the doctrine, but the doctrine of stare decisis was never really much about facts in the first place. Finally, the Court's announced doctrine of stare decisis probably does not much contribute to, and in fact may well detract from, public perceptions of "judicial integrity," at least if one assumes a reasonably informed, intelligent, and not-hopelessly-naive public. In short, the doctrine serves poorly, if at all, the supposed rule-of-law values of promoting efficiency and stability, protecting reasonable reliance, and enhancing judicial credibility—the values asserted to justify the doctrine. The end result of this inquiry is that the current doctrine of stare decisis does not require adherence to the current doctrine of stare decisis. The doctrine may be repudiated, consistently with the doctrine.

I do not here address at any length for it appears to be no part of the Court's current doctrine of stare decisis—whether the current doctrine of stare decisis is *right* or *wrong*, on interpretive criteria apart from considerations of stare decisis.[4] The whole point of the doctrine, after all, is to address when the Court should adhere to its prior decisions "whether or not mistaken" according to other possible criteria for constitutional adjudication.[5] It is therefore immaterial,

---

Precedent, 22 CONST. COMMENT 289, 289 (2005) [hereinafter Paulsen, *Intrinsically Corrupting*] (arguing that the doctrine of stare decisis always corrupts whatever one otherwise would regard as the correct method of constitutional interpretation); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2731–34 (2003) [hereinafter Paulsen, *Irrepressible Myth*] (arguing that the doctrine of stare decisis is unconstitutional to the extent it has true substantive effect, under the reasoning of *Marbury*).

4. As noted, I address this proposition in other writing. *See supra* note 3.

5. *Casey*, 505 U.S. at 857; *see* Paulsen, *Abrogating*, *supra* note 3, at 1538 n.8 (defining the essence of the doctrine of stare decisis as one of adherence to decisions presumed to be wrong according to other interpretive criteria) (collecting authorities). *See generally*

under the doctrine of stare decisis, for purposes of considering the stare decisis weight to be accorded the doctrine of stare decisis, whether the doctrine is sound.

All of this of course creates something of a quandary: If the doctrine of stare decisis suggests that the doctrine of stare decisis may (and perhaps should) be overruled or modified, precisely what should replace it? If the current doctrine of stare decisis is incoherent, what criteria should one apply to create a doctrine replacing or modifying it?

A short Article admits of a simple roadmap: Part I attempts to describe the Court's current doctrine of stare decisis. The truly impatient reader may feel tempted to skip the set-up, if already familiar with the current doctrine. But I offer this caveat: to describe the doctrine accurately which is my goal in this Part—is already, to a significant degree, to present the argument for its internal incoherence. Grant my description of current doctrine, and everything else follows. Accordingly, I spend more time on this Part than the others. Part II is, in form, the core of the argument, but it proceeds briskly; the wind-up takes more time than the actual pitch. I apply the current doctrine of stare decisis to the current doctrine of stare decisis and conclude that stare decisis does not require adhering to stare decisis in its current form. Squaring this odd interpretive circle, I suggest that the doctrine of stare decisis is almost entirely judicial bootstrap, a conclusion that in turn has important implications for the legitimacy of decisions that rest on its invocation by the Court and, ironically, for the legitimacy of the Court that invokes it as a doctrine designed to enhance its own legitimacy. Part III poses pointed concluding questions about what to do with a doctrine that fails all its own criteria and what doctrine should replace it. Would not the creation of a new, revised doctrine of stare decisis, conflict with whichever new, revised doctrine of stare decisis is sought to be created? Is there any sensible way out of the Court's current doctrine?

I. THE CURRENT DOCTRINE OF STARE DECISIS

Planned Parenthood of Southeastern Pennsylvania v. Casey, decided in 1992, is, somewhat surprisingly, the Supreme Court's first systematic attempt to set forth a general theory of the role of

---

Paulsen, *Intrinsically Corrupting*, *supra* note 3 (arguing that stare decisis is always a departure from, or qualification of, some other interpretive theory about how the Constitution properly should be understood and applied).

precedent and "stare decisis" in constitutional adjudication. The Court had, of course, discussed the idea of stare decisis, and had invoked precedent, many, many times before. But one searches the first 500 volumes of the *U.S. Reports* in vain for a full-blown *theory* or *doctrine* of precedent. Think about it: after over 200 years in operation, *Casey*, in 1992, is the Court's first grand theology of precedent!

But *Casey*, barely fifteen years old as of this writing, is already not quite the Court's last word on the subject. Recent cases subsequent to *Casey* have treated the doctrine too, embracing *Casey*'s treatment or distinguishing it in some manner, persuasive or not. If one is attempting to describe the "current doctrine of stare decisis," *Casey* is a good starting point and a proper prime focus of the inquiry, but it has to be taken in light of the glosses, modifications, and applications of subsequent decisions.

A. Three Preliminaries

Before digging into *Casey*'s explication of the factors comprising the doctrine, it may be useful to clear the doctrine of potentially confusing underbrush. I therefore begin with three straightforward, preliminary observations about the doctrine.

First, the doctrine of stare decisis is not constitutionally required, in any sense, and has never been so understood. Nothing in Article III of the Constitution (or in any other provision of the Constitution) mandates a practice of adherence to precedent; nothing in Article III specifies any rule or set of criteria for when a court should, must, or may follow a prior decision.[6]

Nor does anything in Article III (or in any other provision of the Constitution) grant a *power* to the judiciary to prescribe binding rules that require future members of the judiciary to follow precedents.[7] Indeed, to infer such a power would almost certainly be inconsistent with the probable claimed source of such power: If "[t]he judicial Power"[8] entails a power of courts to vest their decisions with prospective, quasi-legislative binding force—that is, if the judicial power of case-decision entails a power to prescribe binding rules of law—it is hard to see how the exercise of such power legitimately

6. Paulsen, *Abrogating*, *supra* note 3, at 1537 & n.1 (collecting cases and authorities); *id.* at 1543–51 (collecting and discussing the Court's statements that stare decisis is a rule of policy, not a requirement of the Constitution).

7. *Id.* at 1570–82.

8. U.S. Const. art. III, § 1.

could be binding on future possessors of that same judicial power, who presumably have the same power to vest their decisions with authority. If courts legitimately can make constitutional law with their decisions, subsequent courts may repeal such enactments. If courts' interpretations of law purport merely to describe what has always been, is now, and ever shall be the objectively correct interpretation of the Constitution (or other law), it still would not imply that precisely the same interpretive power is thereby taken away from subsequent courts that might disagree with the supposedly objectively correct prior interpretation.[9]

And, to repeat, the Court has never so asserted. Rather, as the Court has said countless times, the doctrine of stare decisis is one of policy and practice only, not a strict rule of law or an inherent prescriptive power of the judiciary to bind present or future courts with its past decisions.[10] To be sure, the Court could (one supposes) change its mind about this, too. But it would be quite hard to reconcile such an action with the enhanced notion of stare decisis thereby created; the act of creation would contradict the creation—an irony to which I return at the close of this Article. For now, it is sufficient to note that the judicial doctrine of stare decisis does not regard the judicial doctrine of stare decisis as being of constitutional dimension. To newly invent such a status would be, well, unprecedented.[11]

A second preliminary point can be stated more briefly: Stare decisis has never been thought absolute in American jurisprudence. It is a policy consideration, not an "inexorable command."[12] The

9. *Cf.* Paulsen, *Intrinsically Corrupting*, *supra* note 3, at 292–93 (arguing that an approach to constitutional interpretation "under which judges' decisions are themselves constitutive of constitutional meaning" cannot logically justify a doctrine of stare decisis under which a prior year's judicial decisions are more constitutive of constitutional meaning than a present year's judicial decisions). Similarly, one Congress cannot constitutionally purport to bar a subsequent Congress from repealing its legislative enactments, or otherwise limit a future Congress's ability to do so (except in the limited sense that there may be certain actions that, once taken, cannot be undone by a simple legislative repeal). The short point: Neither Congress nor the courts can make a rock so big that subsequent possessors of the same legislative or judicial power cannot move it.

10. *See* Paulsen, *Abrogating*, *supra* note 3, at 1537 n.1 & 1543–51 (collecting such statements).

11. For similar reasons, of course, my argument cannot depend on what the judiciary has said about the doctrine of stare decisis. I merely note that the judiciary's own articulation of the doctrine agrees with the position I have set forth.

12. Agostini v. Felton, 521 U.S. 203, 235–36 (1997) (collecting cases and stating that adherence to precedent is "not an inexorable command" but "a policy judgment"). *Agostini* is one of a great many cases, before and after *Casey*, that have made such a statement. *See* Paulsen, *Abrogating*, *supra* note 3, at 1537 n.1.

force of precedent is not strict. Thus, the doctrine of stare decisis is not constitutionally required and, even as a doctrine of mere policy, has never been regarded as absolute.

Planned Parenthood of Southeastern Pennsylvania v. Casey embraces both of these first two observations. In *Casey*, the Court's discussion of the doctrine begins with the concession that stare decisis is a rule of judicial policy thought to be dictated by considerations of practicality.[13] While the doctrine is championed as serving rule-of-law values, adherence to precedent has never been regarded as itself a strict rule of law. In America, the binding prospective force of precedent has never been thought absolute. Courts overrule cases.[14] Indeed, *Casey* itself overruled two of them.[15]

The third preliminary point is slightly more difficult—defining exactly what is *meant* by the term stare decisis. We know it is a rule of practice and policy, not commanded by the Constitution or the product of a constitutionally delegated power. And we know it is not, and never has been, an absolute policy or practice. What, then, defines the essence of the doctrine? What *is* the non-absolute policy or practice to which the doctrine refers?

The short answer is that the doctrine of stare decisis is the judicial policy of (sometimes) adhering to a prior decision *irrespective of the prior decision's legal correctness* according to other interpretive criteria. As *Casey* put it fairly bluntly, it is the practice of adhering to a prior decision "whether or not mistaken."[16] What defines the doctrine of stare decisis as a judicial practice—what gives the doctrine any punch at all—is adherence to what a court, by hypothesis, otherwise would regard as an erroneous exposition of the law. This distinguishes the doctrine of stare decisis from a milder doctrine of precedent as serving the more modest role of providing relevant interpretive information (the informed, considered views of prior, presumably competent interpreters) or serving as a starting point or baseline against which a departure ought to be justified or explained.[17] The Supreme Court's current doctrine of stare decisis

13. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.").

14. *Id.* at 854–69.

15. *Id.* at 882, *overruling, in part*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *and* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

16. *Id.* at 857. For more detailed discussion, see Paulsen, *Abrogating*, *supra* note 3, at 1538 & n.8; and Paulsen, *Intrinsically Corrupting*, *supra* note 3, at 289–90 & nn.1–2.

17. *See* Paulsen, *Abrogating*, *supra* note 3, at 1544–46 (distinguishing between the "information" function of precedent and the "disposition" function of precedent and

contemplates something more than mere *consideration* of prior cases' reasoning and conclusions; it is a doctrine about the judicial policy or practice of adhering, sometimes, to a decision a court would otherwise feel fully justified in concluding was legally wrong.

The trick, then, for the Court in *Casey*, was to explain when and why precedent should be followed, and when and why it need not, apart from consideration of the precedent's correctness:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.[18]

Both sides of the equation were involved in the *Casey* decision, which ended up reaffirming *Roe v. Wade*[19] largely on the theory that stare decisis required such action yet overruled two of its decisions applying *Roe* on the theory that stare decisis permitted overruling those cases.[20]

To the "prudential and pragmatic" end of informing the Court's judgment about which way to go in a particular instance, *Casey* identified a cluster of factors, interrelated and overlapping in some respects, relevant to the decision whether or not to overrule a prior decision. There are four primary, identified factors, plus an additional set of prudential, policy, and (seemingly) political judgments to lay on top of the more-legal factors. None is treated as dispositive; none is identified as essential; the relative weight of each is unclear. In short, current doctrine consists of a classic multifactor balancing test of incommensurable considerations. Let us consider each element in turn.

B. The Current Doctrine: When Should Wrong Precedent Be Followed (and When May It Be Overruled)?

1. Workability

First, *Casey* says, courts must consider the "workability" of a precedent decision or line of decisions.[21] A rule announced in a prior

identifying the core of the doctrine of stare decisis as involving the disposition function quite apart from, and even in contradiction of, the information function).

18. *Casey*, 505 U.S. 833, 854–55.

19. 410 U.S. 113 (1973).

20. *See supra* note 15.

21. *Casey*, 505 U.S. at 854–55.

case may have "proved to be intolerable simply in defying practical workability."[22] The Court did not elaborate at length, but cited, perhaps instructively, *Garcia v. San Antonio Metropolitan Transit Authority*'s[23] overruling of *National League of Cities v. Usery*[24] on the ground (among others) that the Tenth Amendment test created by the Court in *National League of Cities* for invalidating congressional legislation otherwise within the scope of an enumerated power was not susceptible of principled application, but rather seemed to partake too much of ad hoc policy judgments.[25] *Casey* then summarized "workability," perhaps a bit cryptically, as a question of whether "the required determinations fall within judicial competence."[26]

In some respects, "workability" resembles some of the Court's inquiries in applying the so-called "political question" doctrine: a precedent or line of precedents, just like a new, contemplated judicial intervention, tends to be thought "unworkable" where there exist no readily discoverable, judicially manageable standards to guide judicial discretion or where the purported "rule" supplied by precedent seems to require judicial policy determinations of a kind not appropriate for courts to be making.[27] Precedents that call for inquiries and line-drawing not "within judicial competence" tend to be unworkable. This accords with common sense, and with experience: nebulous, vague, judicially crafted standards not well-rooted in legal texts or traditions tend to generate inconsistent applications, which then generate their own problems of faithful application and render the stated standard unworkable in practice.

On the other hand, not all constitutional provisions state clear, bright-line determinate rules. Some obviously create standards that generate uncertainties of application that might be thought to land in

---

22. *Id.* at 854.

23. 469 U.S. 528 (1985).

24. 426 U.S. 833 (1976).

25. *Casey*, 505 U.S. at 855 (citing *Garcia*, 469 U.S. at 546, *overruling Nat'l League of Cities*, 426 U.S. 833). The page of *Garcia* cited in *Casey* noted the problem with judicial tests that "invite[] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia*, 469 U.S. at 546. The *Garcia* Court overruled *National League of Cities*'s announced rule as "unsound in principle and unworkable in practice." *Id.*

26. *Casey*, 505 U.S. at 855.

27. The standard modern formulation of the political question doctrine is set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See also* Nixon v. United States, 506 U.S. 224, 228–29 (1993). *See generally* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 713 (1993) (noting, discussing, and criticizing the political question doctrine).

the neighborhood of "workability" problems. Presumably, a court could not properly discard a correct interpretation of a nebulous constitutional provision—an interpretation that accurately captured the provision's imprecise content—in favor of a more-workable but less-faithful interpretation. A difficult, unruly standard might well be the correct interpretation of an imprecise constitutional text (or at least no worse a standard than the text itself). It would seem, then, that as to judicial precedent, too, workability concerns, standing alone, are probably not a *sufficient* reason to overrule precedent.[28]

Another value, closely aligned with "workability," may lurk behind the workability label: judicial efficiency. The Court's discussion of stare decisis in *Casey*, before plowing through specific factors one at a time, began with the idea of efficiency, noting that the idea of following precedent "begins with necessity, and a contrary necessity marks its outer limit."[29] The judicial system simply could not do society's work, the Court said, if it had to re-invent the wheel each time an issue came before it.[30] Precedent is a shortcut. It permits the judge to cut to the chase; the interpreter need not act as if no one had thought about this issue before. In this respect, precedent, and a doctrine of stare decisis, is a judicial helpmate, a super-duper law clerk helping judges dispose of easy cases more easily.

But this only works if a precedent ably and reliably serves the interpretive shortcut function. Where a precedent's rule is unclear, or its application hopelessly uncertain, it does not save work but multiplies it. Not only must the judge read the governing legal text, but now he or she must study a fuzzy precedent and try to discern its rule or principle, figure out how it applies to the case at hand, and (given that stare decisis is not absolute) figure out whether it is at least a satisfactory explication of the legal text it purports to interpret. And one more thing yet: The judge must look at subsequent cases applying, extending, refining, distinguishing, limiting, or themselves trying to figure out the precedent case. This often generates a body of precedents to be reconciled, clarified, explained, distinguished, or selectively ignored. All of a sudden, the supposed efficiency gain of a system of precedent and stare decisis vanishes in the haze. Workable, clear rules derived from precedent create useful efficiency gains for the judicial process. Unworkable, unclear, inconsistent rules derived

28. *See* Paulsen, *Abrogating*, *supra* note 3, at 1552.

29. *Casey*, 505 U.S. at 854.

30. *Id.* ("[W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.").

from precedent create efficiency drags. This may have been, in part, what the Court was getting at in *Casey* when it began its stare decisis discussion by noting that resort to precedent was "indispensable" as a general proposition, but could not be absolute, because sometimes a precedent's errors or unclarity become so well recognized by courts that they become obstacles to be evaded, and their enforcement is "doomed."[31]

The Court in *Casey* did not say quite all of this. Rather, what it said was that unworkability was a factor that could permit overruling a prior decision or line of decisions—or, at least, a factor that might explain some of the Court's prior precedents that themselves had overruled prior precedents. The Court did not state whether unworkability was sufficient to justify overruling a precedent. Nor did the Court say whether unworkability was necessary to overrule a precedent, except perhaps by negative implication from the fact that it is not the only factor the Court discussed. Finally, the Court did not specify how much weight should be accorded this factor. "Workability" as articulated in *Casey* seems to consist primarily of a very general, gestalt sense of whether the Court believes it can work effectively within a framework established by a prior decision, plus an unresolved question of how much weight to accord a positive or negative evaluation on this point.[32]

To distill and refine: the inquiry into workability appears to ask whether the rule of a precedent decision, besides being wrong, has tended to generate inconsistent applications, fostered unclarity and uncertainty, or proven difficult to manage in any kind of principled way—and on such account should be regarded as intolerable. "Workability" is not a hard-and-fast standard.

Moreover, that standard does not always even come into play in the first place. As noted above—and as illustrated by abundant examples in judicial practice before and since *Casey*—a finding of unworkability is not necessary for the Court to overrule a prior case. It is possible for a prior holding to be perfectly workable, but yet, in the Court's judgment, simply wrong. The holding of *Bowers v. Hardwick*[33] ('There is no substantive due process constitutional right to homosexual conduct!') is a perfectly workable bright-line rule,

31. *Id.*

32. Paulsen, *Abrogating*, *supra* note 3, at 1552 ("The inquiry into 'workability,' as framed by the Court, is essentially a question of whether the Court believes itself able to continue working within a framework established by a prior decision. The unworkability of precedent provides additional incentive for the judiciary to overrule it.").

33. 478 U.S. 186 (1986).

readily susceptible of straightforward application, yielding no uncertainty or manageability problems. The holding of *Lawrence v. Texas*[34] ('Oh yes, there is!') scraps *Bowers* because the Court thought it wrong, not unworkable.[35] *Atkins v. Virginia*[36] held that the Eighth Amendment forbids capital punishment of mentally retarded murderers, overruling *Penry v. Lynaugh*[37] which held that it did not. In like manner, *Roper v. Simmons*[38] held that the Eighth Amendment prohibited execution of minors, overruling *Stanford v. Kentucky*,[39] which held that it did not. *Atkins* did not find *Penry* unworkable; *Penry*'s rule was bright-line, clear, unequivocal, and involved no invention of standardless factors. Rather, *Atkins* merely disagreed with *Penry*'s holding.[40] Likewise, *Roper* did not find *Stanford*'s rule unworkable or unclear. It merely thought it should no longer be considered controlling.[41] In earlier death penalty cases, the Court likewise had overruled precedents excluding victim-impact statements from sentencing proceedings, not because the exclusion rule was

34. 539 U.S. 558 (2003).

35. *Id.* at 578. The Court in *Lawrence* bowed—perfunctorily, unclearly, and unpersuasively—in the general direction of workability, *see id.* at 577 ("*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding."), but the point of that sentence seems more directed to the claim that *Bowers* was an aberration and that one should regard the body of precedents as being in conflict—a different stare decisis factor I discuss below. *See infra* text accompanying notes 58–78. It is not really a point about the *rule* of the case itself being hard to understand or apply. In the end, the Court in *Lawrence* overruled *Bowers* straightforwardly on the ground that it disagreed with the majority in *Bowers* and agreed with the dissenters. *See Lawrence*, 539 U.S. at 577–78 ("The rationale of *Bowers* does not withstand careful analysis . . . Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

36. 536 U.S. 304 (2002).

37. 492 U.S. 302 (1989).

38. 543 U.S. 551 (2005).

39. 492 U.S. 361 (1989).

40. *Atkins*, 536 U.S at 314 ("Much has changed since then.").

41. *Roper*, 543 U.S. at 574 ("*Stanford v. Kentucky* should be deemed no longer controlling on this issue."). The Court did not, in either *Atkins* or *Roper*, hold that the overruled precedents were wrong when decided, but that social facts had changed and that this changed the meaning of the Constitution as applied. *See Atkins*, 536 U.S. at 307, 315, 318, 321; *Roper*, 543 U.S. at 574. Justice Scalia made this point, angrily, in his dissent in *Roper*. *See Roper*, 543 U.S. at 608 (Scalia, J., dissenting) ("Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*."). Scalia's point, shorn of his vitriol, is essentially right. The *Roper* majority held not that *Stanford* was wrong, but that "[t]o the extent *Stanford* was based on review of the objective indicia of consensus that obtain in 1989 . . . , it suffices to note that those indicia have changed." *Id.* at 574 (majority opinion).

unclear, standardless, vague, or unpredictable in some way—the exclusion was perfectly bright-line—but because a majority concluded that the earlier decisions simply were wrong.[42] *Adarand Constructors, Inc. v. Peña*,[43] overruling *Metro Broadcasting, Inc. v. FCC*,[44] similarly rested on the view that *Metro Broadcasting* departed from proper analysis on the merits, not that that departure had proved unworkable in any sense.[45] The list could continue, but the point is sufficiently made: unworkability is not a prerequisite to the Court's overruling of a case, even under the Court's own analysis.

"Workability" thus remains *a factor*. But it is hard to say much more beyond that. It is a factor of unclear weight and unclear application. It is perhaps fair to say, generally, that the more standardless, variable, and difficult-to-apply the holding of a particular case; the less it tends to yield predictable, principled results; the more unworkable that rule is; the greater the justification for discarding it. But a decision need not be unworkable to be overruled, and an unworkable decision need not be overruled.

2. Reliance

Casey's second factor in weighing the relative costs of reaffirming or overruling is whether a prior decision's rule "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."[46] As to "special hardship," the Court invoked the "cost of a rule's

---

42. *See* Payne v. Tennessee, 501 U.S. 808, 808 (1991), *overruling* Booth v. Maryland, 482 U.S. 496 (1987), *and* South Carolina v. Gathers, 490 U.S. 805 (1989). *Payne*, decided the year before *Casey*, briefly collected and set forth a list of stare decisis considerations and propositions from earlier cases. (In that sense, it might be thought a "proto-*Casey*" in terms of development of a "doctrine" of stare decisis, but with the singular difference that these factors were gathered in support of the Court's authority to overrule problematic precedents, rather than an obligation to reaffirm them.) Among these factors, the Court in *Payne* noted that "when governing decisions are *unworkable or* are *badly reasoned*," the Court has not thought it obligatory to follow them. *See id.* at 827 (emphasis added). A few sentences later, the Court hinted that *Booth* and *Gathers* might be thought to have "defied consistent application by the lower courts," but the overwhelming thrust of the Court's decision to overrule was obviously its view that the earlier cases were "badly reasoned"—that is, simply wrongly decided. *See id.* at 830 ("Reconsidering these decisions now, we conclude, for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled.").

43. 515 U.S. 200 (1995).

44. 497 U.S. 547 (1990).

45. *See Adarand Constructors*, 515 U.S. at 227, *overruling* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

46. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

repudiation as it would fall on those who have relied reasonably on the rule's continued application."[47]

The core of the reliance inquiry posed by *Casey* (and subsequent cases) asks whether a precedent, notwithstanding being wrong, nonetheless has generated reasonable, justified, *vested* reliance in its continuation, such that it would be unfair in some sense, or work a special hardship, to overrule even such a wrong decision. The classic case, frequently noted by the Court, is where a legal rule has created substantial investment-backed expectations, such that shifting it would feel like Lucy pulling the football away from Charlie Brown, once the full force of his leg and body had become invested in the legitimate expectation of kicking it.[48]

The notion has a powerful intuitive appeal. It also has considerable legitimacy. But again, protecting legitimate, reasonable reliance interests is not an absolute rule. More fundamentally, it is not all that clear how reasonable it really is to rely on "reliance." It is just *a factor* and one of unclear weight and uncertain application. The simple fact is that legal rules change all the time. Legislatures are constantly creating new legal rules. These often frustrate well-informed prior expectations, causing folks to lose money they had invested or forcing them to invest some they had not planned on investing. This is what governments do: they upset prior expectations. Yet, no one thinks that this somehow gives those aggrieved by the new rule some vested legal right in the continuation of the prior legal regime.[49] Can one imagine the laughter (and sanctions) that would greet the lawyers for a polluting firm arguing that a new statute imposing stricter pollution controls was invalid and could not be applied to their client because the client had banked on the prior law remaining in force and not being changed? And well-deserved that greeting would be. The Court has held (rightly) that

47. *Id.* at 855–56.

48. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) (asserting that reliance interests are at their height in cases involving contract and property rights—true instances of investment-backed expectations); CHARLES M. SCHULZ, PEANUTS TREASURY (1968) (unnumbered successive pages in middle of anthology) (Lucy stating "I guarantee that the only thing that will make me pull the ball away this year will be an involuntary muscle spasm"—which then somehow occurred); *id.* (Lucy promising that she would not pull the ball away and agreeing to "shake on it," but subsequently asserting that "[a] woman's handshake is not legally blinding"). As I observe below, the Supreme Court is as reliable as Lucy, and litigants' reliance on the Court's decisions is fully as reasonable as Charlie Brown's reliance on Lucy.

49. *See* Paulsen, *Abrogating*, *supra* note 3, at 1554 ("The fact of reliance does not create a vested right in the prior legal regime; nor does it supply a basis for a court to refuse to apply a new rule of law, if that is what is otherwise required.").

there is no constitutional legal right to have one's reasonable reliance interests prevail over a prospective change in the applicable legal rule.[50]

What is true for legislative lawmaking is also true for judicial decisionmaking. Given that the courts have said, too many times to count, that the idea of stare decisis is not, and never has been, one of absolute adherence to a prior decision, and given the innumerable times that the Supreme Court has reconsidered and overruled its prior constitutional interpretations, there is not much more reason to expect that any given judicial interpretation will not change than there is to expect that a legislature will not enact a new statute.

Only a fool or a sucker—like Charlie Brown relying on Lucy—would count on the legal rule remaining firmly in place. The better bet, frequently, is that it will not. In each case, whether the legal rule will remain the same is largely a matter of informed prediction. Someone knowledgeable about legislative politics will be able to approximate the likelihood of a particular legislative change. Likewise, a good lawyer will be able to approximate the likelihood of a change in judicial interpretation of the law in a given area. Constitutional law is no different from any other area in this respect; if anything, the likelihood of change is even easier to predict and more accessible to the general understanding of non-specialists.

One might distinguish between such "predictive reliance"—the discount that informed observers reasonably would apply to a particular legal rule remaining the same—and what I would call "stare decisis reliance"—the amount of *additional* reliance that might be generated by virtue of the fact of *having* a judicial doctrine of stare decisis. The former reliance is largely reasonable, if perhaps small and hard to measure with certainty. The latter form of reliance is probably almost entirely *un*reasonable in practice and utterly defies rational measurement. Given how factor-contingent, variable, uncertain, and discretionary (some might even say arbitrary) the

50. *See* United States v. Carlton, 512 U.S. 26, 33–34 (1994) ("Although Carlton's reliance is uncontested—and the reading of the original statute on which he relied appears to have been correct—his reliance alone is insufficient to establish a constitutional violation.... An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process."); *see also* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (holding that substantive law cannot be permitted to change depending upon the equities of particular parties' claims of actual reliance on a prior legal rule that the party expected to remain unchanged).

doctrine of stare decisis is, how much reasonable reliance can it really generate? Certainly not very much, if any.[51]

To some extent, this observation anticipates my critique, in the next Part, of the doctrine of stare decisis as applied to the doctrine of stare decisis. But one might as well begin unraveling a circular argument at any point on the circle: *reliance*, as that factor is employed in stare decisis, is little different from the argument one might employ with respect to an undesired legislative change in the law, and no more worthy of protection. Anything else—"stare decisis reliance"—is pure bootstrap, created by the existence of a doctrine of stare decisis in the first place.

What's more, it is hopelessly unclear how big a bootstrap it is. Under the current doctrine of stare decisis, it is uncertain precisely *what* should count as reasonable reliance and *how much* it should count, as weighed against correction of an erroneous rule of law embodied in a precedent. The Court has sometimes moved beyond the paradigm of "sunk cost," investment-backed-expectations type of reliance and embraced what might be termed "social reliance"—that is, the way people have come to assume things will be. That is not really "reliance" in the traditional sense. But *Casey* appears to broaden the inquiry, framing the question of reliance as whether changing a legal interpretation to correct a perceived error would cause "significant damage to the stability of the society governed by" the rule in question.[52] Pause on that formulation for a moment:

---

51. I must acknowledge a very strange "but see" to this proposition. Justice Scalia, concurring in part and dissenting in part in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), declared, almost inexplicably: "It is my view, in short, that reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance (though reliance alone may not always carry the day)." *Id.* at 321 (Scalia, J., concurring in part and dissenting in part). Further, Scalia stated that the Court "ought not visit economic hardship upon those who took us at our word" and could not fairly demand of private parties that they "anticipate our overrulings" when, after all, the Supreme Court directs lower courts *not* to do so. *Id.* All of this from Scalia in the same Term as *Casey*! Ironically, such promise-of-constancy-once-given-ish, tested-by-following-esque language could have been cited by the *Casey* majority in support of its stare decisis analysis. *Compare id., with Casey*, 505 U.S. at 868.

The only thing that saves Scalia's *Quill* scribblings from absurdity is the parenthetical concession that "reliance alone may not always carry the day"—a recognition that reliance interests are not, and cannot be, an absolute trump card. But it is hard to fathom how Scalia would think, in light of the Court's practice of selective stare decisis and its demonstrated willingness to overrule cases, that it would be reasonable for a private party to rely, in any strong sense, on the Court's not overruling one of its precedents in any given situation, especially where there is a reasonable, informed basis for predicting it might well do so.

52. *Casey*, 505 U.S. at 855.

damage to the *stability of society governed by the rule in question.* This embraces more, it would seem, than special individual reliance interests; it recognizes as part of protected "reliance" interests the more diffuse *expectation that things will remain as they are.*

The Court in *Casey* appeared to mean just that. For there is the same notion, popping up rather prominently a few pages later, as applied to *Roe v. Wade*:

> [F]or two decades of economic and social developments people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.[53]

This is not investment-based reliance; it is sheer expectation that a legal rule will remain the same because a prospective change is contrary to people's "views of themselves" and their desire to maintain the availability of abortion as a method of backup birth control.[54]

The same notion appears in *Dickerson v. United States*,[55] which declined, in part because of stare decisis, to overrule *Miranda v. Arizona*,[56] noting that *Miranda* warnings had "become embedded in routine police practice to the point where the warnings have become part of our national culture."[57] By "part of our national culture" the Court meant *familiarity*—gained from watching too many TV cop shows, perhaps—not reliance in any vested, sunk-cost sense. It is not that criminal suspects have engaged in certain conduct they otherwise might not have engaged in, in reliance on *Miranda*'s protections shielding them from making unwitting incriminating comments during custodial interrogation. It is that the warnings have become so familiar that everyone expects them to be read. (Of course, one might then think the warnings presumably are so familiar that a suspect would not need to have the warnings read to him in order to know his rights; he would just miss them terribly.)

---

53. *Id.* at 856.

54. I have suggested in earlier writing, half-facetiously, that, to the extent that *Casey* was genuinely concerned with individual reliance interests in the abortion context, a rule could be fashioned that would "grandfather" in a change only after a nine-month gestation period. *See* Paulsen, *Abrogating*, *supra* note 3, at 1555 n.53.

55. 530 U.S. 428 (2000).

56. 384 U.S. 436 (1966).

57. *See Dickerson*, 530 U.S. at 443.

Other times, however, the Court clearly has *not* credited such social reliance interests as part of its stare decisis calculus. *Lawrence v. Texas* is a prominent example. "The holding in *Bowers*," wrote Justice Kennedy for the Court, "has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual *or societal* reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."[58] It is easy to take shots at this vapid, vacuous analysis of reliance—and Justice Scalia's dissent did so with his characteristic barbed effectiveness—for it is embarrassingly inconsistent with *Casey*'s approach.[59] *Casey* posits that if a meaningful segment of society has come to count on the Court's maintenance of a particular legal interpretation, or simply become comfortably accustomed to it, that itself counts as a reason for reaffirming it, lest the Court be seen as breaching faith with those who have developed such expectations.[60] The fact of pervasive disagreement with, criticism of, and resistance to, the Court's initial decision is not a legitimate reason to fail to protect such social-expectations reliance, said the Court in *Casey*. Indeed, quite the opposite, it is a reason for the Court most emphatically to *maintain* its course, whether or not mistaken.[61] In *Lawrence*, it is almost exactly the reverse: the fact of disagreement with and criticism of *Bowers* is a reason to discard it, not reaffirm it; and societal reliance is disparaged, downplayed, and discounted.[62] The conflict between *Lawrence* and *Casey* on this score does not say which one's approach is right; it simply points out that the Court sometimes accords social reliance significant weight and sometimes it does not. (The cynic might be inclined to say that the choice depends on the Court's social policy preferences.)[63]

58. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (emphasis added).

59. *See id.* at 591–92 (Scalia, J, dissenting) (pointing out, among other things, "[w]hat a massive disruption of the current social order . . . the overruling of *Bowers* entails" and concluding that *Lawrence* "expose[s] Casey's extraordinary deference to precedent for the result-oriented expedient that it is").

60. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992).

61. *Id.* at 866–67.

62. *Lawrence*, 539 U.S. at 577.

63. For the record, I think *Casey*'s approach to stare decisis is wrong. I have no quarrel with the fact that *Lawrence* did not adhere to *Bowers* simply on grounds of stare decisis. *Lawrence*'s treatment of *Casey*'s discussion of stare decisis is obviously disingenuous and result-driven, however. I think that both *Casey* and *Lawrence* are wrongly decided on the merits, for the simple, straightforward, independent-of-stare-decisis reason that nothing in the text, structure, or historical understanding of the written

On certain issues, it would be virtually unthinkable to allow social reliance to override a conclusion that a prior decision was wrong. Can one seriously imagine, let alone defend, a decision in *Brown v. Board of Education*[64] reaffirming *Plessy v. Ferguson*[65] "whether or not mistaken" and "with whatever degree of personal reluctance any of us may have,"[66] on the ground that such considerable societal reliance, social expectations, and patterns of conduct (in addition to investment of resources) had been built up around the rule of separate-but-equal that it ought not, in fairness, be disturbed?[67]

It thus seems that the "reliance" thread of current doctrine can be summarized, not unfairly, as follows: Current doctrine treats reliance interests, of different kinds, as counseling, sometimes, to some extent, in favor of adhering to a decision otherwise thought to be wrong on independent interpretive criteria. Like workability, reliance is a *factor*, but one of uncertain content and uncertain weight.

Constitution supports the claim of a constitutional right to either abortion or homosexual conduct that is immune from government regulation.

64. 347 U.S. 483 (1954).

65. 163 U.S. 537 (1896).

66. *Casey*, 505 U.S. at 857, 861.

67. My former student, Dan Rosen, and I mockingly proposed such a position as a satire of *Casey*, shortly after the decision came out, in the form of the pretended discovery of a preliminary draft of *Brown* that did the unthinkable: reaffirm *Plessy* on grounds of stare decisis. *See* Michael Stokes Paulsen & Daniel N. Rosen, Brown, Casey-*Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994). Here's the social reliance issue, taking *Casey*'s words and applying them to segregation:

> The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Plessy*, which merely affirms the constitutionality of state laws governing social arrangements. This argument appears premised on the hypothesis that social arrangements can be changed virtually immediately.
>
> But this simply refuses to face the fact that for at least six decades of economic and social developments, people in vast regions of the Nation have organized intimate relationships and made choices that define their views of themselves and their places in society in reliance on the segregation of the races and *Plessy*'s affirmation of the constitutionality of segregation by local law or custom. The ability of the races to assume their proper roles in society has been facilitated by the stability of the social regimes in which they live and on which they have come to depend. The Constitution serves human values, and while the effect of reliance on *Plessy* cannot be exactly measured, neither can the certain cost of overruling *Plessy* for people who have ordered their thinking and living around the holding of that case be dismissed.

Id. at 1293–94.

It perhaps can be said of the reliance factor, charitably, that the more that a legal rule has remained clear, stable, reasonably determinate, and certain in its application, and essentially uncontested over a sustained period of time, the more it will tend to have produced reasonable reliance; the more that such reasonable reliance has (then) tended to induce past, sunk action on the part of individuals, or institutions, that would require an enormous expenditure of resources, impose costs, or cause serious social or other dislocation in order to reverse or undo, the stronger the argument for protection of reliance interests.

But through all this, the *Plessy* problem remains and looms large. *Plessy* was as wrong as wrong precedent can be. Yet, the summary of reliance in the preceding paragraph *does* offer a pretty good argument for protecting the vested social, cultural, and even commercial reliance interests in maintaining segregation. Separate-but-equal was, for more than half a century, a clear, stable, and reasonably determinate rule. Cases were presented as to application of that rule—when separate was not equal in fact. But the rule itself was not unclear and much social conduct revolved around its stability, including actual sunk costs along with societal expectations. And as the long battle over desegregation for the half century after *Brown* abundantly demonstrates, undoing *Plessy*'s rule was not an easy day's work, but involved enormous expenditure of resources, social dislocation, and human cost. If "reliance" and stability interests ever should counsel against overruling a precedent, under the reasoning of *Casey*, *Plessy* would have been such a case. But that cannot possibly be right, can it?

The doctrinal escape hatch from this doctrinal problem—simply treating reliance considerations as a factor, not as dispositive—creates another problem. Under current doctrine, the need to correct error sometimes trumps reliance interests. But sometimes it does not. And there appears no clear rule or standard to identify when a case is of one type rather than another. That is the state of current reliance doctrine.

3. Remnant of Abandoned Doctrine

Casey's third identified factor is whether a precedent decision's premises, analysis, or holding have been significantly (or significantly *enough*) undermined by a subsequent case or by subsequent cases that the precedent has become a "doctrinal anachronism discounted

by society," a "remnant of abandoned doctrine" that has been "left . . . behind as a mere survivor of obsolete constitutional thinking."[68]

Stripped of its wordiness, the "left behind" factor looks to *changed law* (as opposed to *changed facts*, the next factor I will discuss). If a case is a remnant, it may more readily be discarded. This factor is obvious enough, and it obviously overlaps with both "workability" and "reliance": If a case is an abandoned remnant (or might be thought one), its continued existence becomes an efficiency drag, impairing overall workability. It is a derelict in the stream of the law. It also provokes a reliance problem. If litigants generally can rely on precedent, a dilemma arises when a precedent is "out of whack" with other precedents.

This, of course, raises an interesting (and inconvenient) question: How did precedents get out of whack with each other in the first place? How does something *get to be* a remnant of abandoned doctrine? How did there come to be subsequent decisions that undermined the first precedent? Did those cases fail to adhere to stare decisis?[69]

The reality of the phenomenon is familiar to all lawyers and students of the law, who are trained from Day Two of law school to recognize how the second case in the book has departed, subtly or abruptly, from the first case in the book. Day Three is all about reconciling (or not) the first case and the second case, or choosing which one to apply, now that a third, unanticipated case comes along. This is the glorified, pseudo-mysterious "common law" method, so painfully memorable to all.

How does the doctrine of stare decisis permit this? The only logical answer is that, to whatever extent Case Two is in tension with Case One, it was to precisely that extent a departure from the idea of stare decisis. Occasionally, the departure or tension is acknowledged; sometimes it is disguised, which creates efficiency/workability problems.

Now we're on Day Three of the course. The third case has come along. When should Case One be thought a remnant? How great a degree of undermining needs to have been accomplished by Case Two in order to conclude that Case One has been left behind? Current stare decisis doctrine supplies no answer. There is no clear standard other than the Case Three court's evaluation of the state of

68. *Casey*, 505 U.S. at 855, 857.

69. I have made a different version of this argument in prior writing. *See* Paulsen, *Abrogating*, *supra* note 3, at 1560–61 & n.74.

law created by the precedents in tension with one another. It seems more accurate to say that the remnant-of-abandoned-doctrine argument merely posits that it is better to overrule a case in two (or more) steps than in one. But the remnant factor does not *require* that there always be this intermediate step, and there appears no logical reason why there should have to be one.

Consider the problem from the reverse perspective. Can the same thing legitimately be done to Case Two as was done to Case One? Could Case Three undermine Case *Two* and lean back toward restoring the undermined rule of Case One? Current stare decisis doctrine supplies no answer to this question, either. Indeed, it seems fair to say that current doctrine generates two contradictory answers. Sometimes the Supreme Court has said that the earlier case had been undermined by subsequent cases, and that this makes it reasonable to take the next step of overruling it outright. And sometimes the Court has said that the *undermining* case (Case Two) improperly departed from prior doctrine, and that *its* departure from the earlier precedent weakens the case for adhering to it.

Again, *Lawrence v. Texas* (2003) is a prominent, recent, and familiar example of the first approach.[70] The *Lawrence* majority argued that *Bowers v. Hardwick* had been undermined by *Romer v. Evans*,[71] which had struck down Colorado's state constitutional provision prohibiting state or local statutory designations of sexual orientation as a special protected class for purposes of nondiscrimination laws. (Indeed, Justice Scalia, dissenting in *Romer*, argued that the Court's result in that case was in serious tension with its precedent decision upholding criminal statutes banning homosexual conduct in *Bowers*.[72]) The notoriously cryptic majority opinion in *Romer* essentially ignored *Bowers*. *Lawrence* subsequently treated that fact as itself undermining *Bowers*'s authority—as pointing in the direction of "remnant" status. But why may not the opposite judgment, that of Scalia's dissent, be reached—that *Romer* was itself unsound, as a matter of stare decisis, because of its disregard of *Bowers*?

The second case that *Lawrence* cited as undermining *Bowers* was, ironically and somewhat amusingly, *Casey* itself.[73] The irony is that *Casey* rested, so strongly, on asserted grounds of stare decisis, but

70. Ironically, as we shall see, it is also an example of the contradictory second approach. *See infra* text accompanying note 87.

71. 517 U.S. 620 (1996).

72. *Id.* at 636 (Scalia, J., dissenting).

73. Lawrence v. Texas, 539 U.S. 558, 573–74 (2003).

then became the basis for an argument that evolving legal principle, articulated in *Casey* (1992), had undermined *Bowers* (1986) by embracing the legitimacy of judicial creation or embrace of substantive due process. Further complicating the roller coaster ride is the fact that *Washington v. Glucksberg*[74] (1997) had undermined *Casey*'s substantive due process analysis (and effectively embraced *Bowers*'s) but without explicitly disapproving of *Casey*.[75] The *Bowers*-to-*Casey*-to-*Romer*-to-*Glucksberg*-to-*Lawrence* quintuple play thus presents the nearly comical illustration of Case One undermined by Case Two and Case Three, where Case Two was all about not undermining prior cases, yet its merits analysis was undermined by Case Four, which implicitly restored Case One, but then was ignored in Case Five.

A further irony involving *Casey* highlights the unpredictability of the remnant-of-abandoned-doctrine factor. Under *Casey*'s own articulation of this factor, the Court might have *overruled Roe* as readily as reaffirmed it. Surely, *Roe* had been significantly undermined by *Webster v. Reproductive Health Services*,[76] decided three years earlier in 1989. Of course, the majority in *Casey* found that *Webster* had not undermined *Roe* all that much—or at least not in all respects. It read *Webster*'s undermining effect narrowly, as limited to *Roe*'s trimester framework and to cases between *Roe* and *Webster* that had expanded *Roe*'s holding and logic[77] (two of which the Court in *Casey* in fact went ahead and overruled[78]). But the Court just as easily might have read the undermining effect of *Webster* more expansively; indeed, such a reading probably would have been more plausible than the one upon which the joint opinion ultimately settled. After all, *Webster* upheld state legislative restrictions on abortion that were inconsistent with *Roe*'s framework, with a plurality holding that such restrictions should be evaluated on nothing more stringent than a rational basis standard.[79] The joint opinion in *Casey* had to create an entirely new standard, not adopted in any prior holding of the Court, and to overrule two cases, in order to reach its new result—on the ground that the doctrine of stare decisis required it.

---

74. 521 U.S. 702 (1997).

75. *See* Paulsen, *Abrogating*, *supra* note 3, at 1557–61.

76. 492 U.S. 490 (1989).

77. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857–58 (1992).

78. *Id.* at 882, *overruling, in part*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *and* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

79. *Webster*, 492 U.S. at 518–20.

The point here is not to re-argue *Casey*'s outcome but to show the uncertainty and ready manipulability of the remnant-of-abandoned-doctrine / changed law / "left behind" element of stare decisis doctrine. Simply and starkly put, if the fact of *intervening inconsistent decisions* may provide a sufficient rationale, or even a push-factor, in the direction of overruling a prior case; and if, as is implied, the intervening inconsistent decisions are not themselves in any way illegitimate or inconsistent with the notion of stare decisis, then there appears no principled reason why the Court could not do in one step what it says is entirely proper to do in two. The two-step dance might seem more gradual, but it is still just a dance.

As noted, however, sometimes the Court says just the opposite—sometimes even in the same case. No, the Court says, we will not take the second step of the two-step and overrule, because Case Two—the undermining case—was itself an improper departure from precedent; *that* case is the one that needs to go.

Two familiar examples well illustrate this second approach. *Adarand*, overruling *Metro Broadcasting*, remarked that what made such overruling proper was that *Metro Broadcasting* was at odds "with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."[80] "*Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over [fifty] years."[81] This part of the *Adarand* opinion was joined only by Justice O'Connor (writing) and Justice Kennedy, almost certainly because of its labored, and mildly embarrassing, attempt to reconcile its stare decisis reasoning with *Casey*'s. (This lost the votes of those members of the majority who had dissented in *Casey*—Chief Justice Rehnquist and Justices Scalia and Thomas.) But the O'Connor-Kennedy discussion drew, fairly, on a long series of earlier Supreme Court cases embracing the propriety of overruling cases that depart from earlier, purportedly sounder precedent.[82]

A second major example (leaving aside the several cases collated in *Adarand*) is *Garcia v. San Antonio Metropolitan Transit Authority*. *Garcia* abandoned *National League of Cities v. Usery*, in part (as noted above) because the Court gave up, after nine years, trying to apply *National League of Cities*'s reading of the Tenth Amendment as

80. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231–34 (1995) (Part III.C of the opinion by O'Connor, J., joined by Kennedy, J.) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

81. *Id.* at 231.

82. *Id.* at 232–33.

a freestanding, substantive limitation on the scope of enumerated federal legislative power, finding the Court's standard unmanageable.[83] In doing so, the Court noted that *National League of Cities* was in tension with earlier cases of the Court, and that it was returning to the earlier approach, from which *National League of Cities* had departed.[84]

Thus, any fair discussion of the remnant-of-abandoned-doctrine factor of the Court's current stare decisis analysis must reckon with the seemingly equal but opposite restoration-of-departed-from-doctrine counter-factor. There are many other cases that might be added to the "restoration" side of the ledger. *Casey* itself (ironically, yet again) can be seen as a "restoration" of *Roe* following its undermining in *Webster* and other cases. *Dickerson v. United States* can be seen as a restoration of *Miranda* as a constitutional (or quasi-constitutional) rule, following its undermining in a long line of intervening cases that had held the *Miranda* rule to be one of remedial, sub-constitutional judicial policy and evidence.[85] *Lawrence* casts itself, in part, as a "restoration" decision, too: not only had *Bowers* been undermined by subsequent decisions; it had departed from the course of the Court's earlier privacy decisions, including *Griswold v. Connecticut*,[86] which the Court in *Lawrence* took as its starting point for analysis.[87]

How does current doctrine treat the question of when to go the "remnant" route and when to go the "restoration" route? If Case One and Case Two are in conflict (at some level), what forms the basis for the choice? As I have written before, it is certainly not the doctrine of stare decisis that dictates the decision: "The Court's doctrine of stare decisis says that either course may be chosen."[88] The current doctrine of stare decisis provides that the existence of inconsistent precedent decisions means that the Court may choose which ones it wishes to follow. It supplies no standard for making that choice.

---

83. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985); *see supra* notes 21–28 and accompanying text.

84. *Garcia*, 469 U.S. at 556–57.

85. *See* Dickerson v. United States, 530 U.S. 428, 451–54 (2000) (Scalia, J., dissenting) (setting forth the long line of cases that had regarded *Miranda* differently than the *Dickerson* majority's recasting of its status as a constitutional rule).

86. 381 U.S. 479 (1965).

87. *See* Lawrence v. Texas, 539 U.S. 558, 564–65 (2003) (citing *Griswold*, 381 U.S. at 485).

88. Paulsen, *Abrogating*, *supra* note 3, at 1561.

Consider two decisions by the Roberts Court in 2007 on significant constitutional issues. *Gonzales v. Carhart*[89] upheld the federal partial-birth abortion statute, notwithstanding the Court's decision in *Stenberg v. Carhart*[90] in 2000, invalidating a similar but non-identical state partial-birth abortion prohibition.[91] No sane, informed observer thinks that the two decisions are consistent with each other. No sane, informed observer would be persuaded that the distinctions the Court in *Gonzales* (or "*Carhart II*") drew between the federal statute and the state statute struck down in *Stenberg* (or "*Carhart I*") should make a difference in constitutional outcome. No sane, informed observer thinks that any of the Justices comprising the majority in 2007 would have joined the majority in 2000. (Three of them were members at both times and dissented in the 2000 case.).[92] Yet *Stenberg* was not overruled in *Gonzales*, even though it is plain as can be that every Justice in the 2007 majority believed that *Stenberg* was wrongly decided. Instead, the case is explained and distinguished—carefully, never with direct approval; and never with direct disapproval—rather than scrapped.[93] The doctrine of stare decisis is nowhere discussed. The Court simply took step one of the possible two-step: It undermined *Stenberg* greatly. Under the current doctrine of stare decisis, a subsequent case might well conclude that *Stenberg* has been left behind as a remnant of abandoned, discredited doctrine. But it is also possible that a subsequent case might conclude that *Gonzales* departed from the doctrine announced in *Stenberg*, and that the *Stenberg* approach should be restored. Current stare decisis doctrine does not say which course is more appropriate.

Federal Election Commission v. Wisconsin Right to Life, Inc.[94] has certain similarities to *Gonzales* both in the Court's voting alignment and in its treatment of earlier, seemingly-in-conflict precedent. Five Justices (the same bloc of Roberts, Scalia, Kennedy, Thomas and Alito that formed the majority in *Gonzales*) voted to strike down section 203 of the Bipartisan Campaign Reform Act (popularly known as "McCain-Feingold"), as applied to Wisconsin Right to Life's issue advocacy ads shortly before an election. The statute appeared to prohibit such ads and *McConnell v. Federal*

89. 550 U.S. __, 127 S. Ct. 1610 (2007).

90. 530 U.S. 914 (2000).

91. *Stenberg*, 530 U.S. at 914.

92. *See id.* at 953 (Scalia, J., dissenting); *id.* at 956 (Kennedy, J., dissenting); *id.* at 980 (Thomas, J., dissenting).

93. *See Gonzales*, 550 U.S. at __, 127 S. Ct. at 1629–31.

94. 551 U.S. __, 127 S. Ct. 2652 (2007).

Election Commission[95] had upheld that provision of the statute in 2003. Chief Justice Roberts wrote the lead opinion in *Wisconsin Right to Life*, but garnered only one additional vote (Justice Alito's) for the core substantive section finding that Wisconsin Right to Life's as-applied constitutional challenge could prevail without the need to re-examine *McConnell*'s upholding of the provision on its face. "We have no occasion to revisit that determination today," Roberts wrote.[96] Justice Scalia's concurring opinion (for himself and Justices Kennedy and Thomas) declined to join in Chief Justice Roberts's reasoning and instead set forth arguments why *McConnell* was wrong and should be forthrightly overruled, and, further, why the doctrine of stare decisis posed no proper barrier to such a holding.[97]

As with *Gonzales*-re-*Stenberg*, probably no reasonable person would think that the as-applied invalidity of section 203, as explained by the principles of Chief Justice Roberts's opinion in *Wisconsin Right to Life*, could be squared comfortably with the rationale upholding that section on its face in *McConnell*, or that either Roberts or Justice Alito would so hold in a case unavoidably presenting the issue.[98] But the failure of Roberts and Alito to embrace the Scalia-Kennedy-Thomas approach leaves *Wisconsin Right to Life* as the first step of a possible two-step, with the likelihood that *McConnell*'s holding on this point will be "left behind" as a remnant—but with the option open that *Wisconsin Right to Life* could one day be treated as a narrow exception to, or a departure from, the earlier, sounder precedent of *McConnell*.

The lesson one might take from this pair of cases, as a description of the status of current doctrine of stare decisis, is that at least some Justices on the Roberts Court as currently constituted—and, most clearly so, the new Chief Justice—favor the two-step, incremental approach. Those Justices are reluctant to overrule precedent all at once, preferring first to *render* a precedent a remnant of abandoned doctrine before going ahead and abandoning it. This, however, is more a description of certain Justices' patterns of conduct and disposition than a description of any clear doctrinal requirement. The "rule" remains: a precedent that has been seriously undermined by subsequent precedents may more readily be overruled, but

95. 540 U.S. 93 (2003).

96. *Wis. Right to Life*, 551 U.S. at __, 127 S. Ct. at 2674 (Roberts, C.J., plurality).

97. *Id.* at __, 127 S. Ct. at 2684–86 (Scalia, J., concurring). Scalia, Kennedy, and Thomas had been the three dissenters in *McConnell*. *McConnell*, 540 U.S. at 247–48.

98. Justice Alito hinted clearly at this in his one-paragraph concurrence. *Wisc. Right to Life*, 551 U.S. at __, 127 S. Ct. at 2674 (Alito, J., concurring).

sometimes the reverse will hold true, and the Court may choose to reaffirm the earlier precedent and undermine the underminers. What becomes a remnant—what is left behind—is a function of the Court's subsequent decisions, not governed by any clear rules of stare decisis.

4. Changed Facts

Casey's stare decisis formula next asks "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[99] The way this is expressed is slightly strange: facts have either changed "or come to be seen . . . differently." Thus, even if facts have not *actually* changed, they might now be *viewed* differently. These real or perceived changes in social facts are then relevant where they have robbed the old rule of "application" *or* "justification." But if changes in factual circumstances mean precedent no longer *applies* to very many real-world situations—its relevance has been overtaken by historical changes—that scarcely seems a reason to change the governing legal interpretation and abandon the precedent. Presumably, the precedent might still be right; it simply does not matter much any more.[100]

The second part of *Casey*'s changed facts formulation is that factual changes (or changed perceptions) may deprive a rule of its *justification*. Again, as formulated, it is hard to see, in the abstract, what the Court might mean. The Court's subsequent discussion makes reasonably clear that this formulation is all about *Brown v. Board of Education*. It is an effort to supply a justification for *Brown*'s overruling of *Plessy* that might distinguish *that* overruling from others that might be urged upon the Court. The *Casey* joint opinion spends considerable time discussing *Brown* as a unique and exceptional situation.[101] The burden of this explanation is to support *Brown*'s overruling of *Plessy* on the ground that social facts had changed between 1896 and 1954, or that they had "come to be seen so differently" that the rule of separate-but-equal segregation could no

99. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

100. In just the same way, the *meaning* of the Titles of Nobility Clauses, U.S. CONST. art. I, § 9, cl. 8; § 10, cl. 1, is not altered by the fact that the clauses have become essentially dead letters in practice because the social phenomenon to which they are addressed has disappeared. Changed facts may have robbed the clauses of much application, but that would not be reason to change the interpretation of them, merely in order to give them more work to do.

101. *Casey*, 505 U.S. at 861–65. The joint opinion does much the same with respect to the overruling of *Lochner v. New York*, 198 U.S. 45 (1905), which I will address more briefly in the notes.

longer be sustained. *Casey*'s discussion of *Brown* warrants quotation at length:

> The *Plessy* Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." [Plessy v. Ferguson, 163 U.S. 537, 551 (1896)]. Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, *this understanding of the implication of segregation was the stated justification for the Court's opinion.* But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown I). As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid." Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421 (1960).
>
> The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 374 U.S., at 494–495. *Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896.* While we think *Plessy* was wrong the day it was decided, see *Plessy*, *supra*, at 552–564 (Harlan, J., dissenting), *we must also recognize that the* Plessy *Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine* Plessy *was on this ground alone not only justified but required.*[102]

---

102. *Casey*, 505 U.S. at 862–63 (emphasis added). In the preceding paragraphs, the Court in *Casey* had explained the repudiation of the *Lochner* line of cases (named for *Lochner v. New York*) in similar terms. The earlier decisions had "rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare." These facts "had prove[d] to be untrue, and history's demonstration of their untruth not only justified but required the

The Court in *Casey* seems to have been saying that *Plessy* was wrong when decided but that the *Brown* Court's overruling of it was not based on *Plessy*'s wrongness but on changed facts only.

Brown is the reason, clearly, for the inclusion of the "changed facts" factor in *Casey*. But the factor, as used in *Casey* to explain the propriety of the Court's repudiation of *Plessy* (and of the *Lochner v. New York*[103] line) entails a subtle and disturbing implication—almost impossible to reconcile with the other factors comprising the Court's stare decisis doctrine—*that the meaning of the Constitution properly depends on how society views social facts at different times.*

Brown is a marvelous decision, a wonderful restoration of a lost original understanding of the meaning of Section 1 of the Fourteenth Amendment and a repudiation of a socially invented limitation on that meaning by the Jim Crow era.[104] But to the extent the *Brown* opinion is vulnerable to criticism, it is because of its seeming reliance on "changed facts" in the form of recent, trendy, contingent social science—psychological or social studies—instead of announcing a categorical, principled rejected of *Plessy* as wrong when decided and continuously wrong for fifty-eight years.

There is, I think, a great danger in this. If what makes it proper to *change* a legal interpretation is current social understandings of facts, then it is hard to argue that it was improper to *have made* a legal interpretation based on *then-current* social understandings of facts. The changed facts argument as explicated in *Casey* permits one to conclude that an awful case was not in fact awful when decided; it simply would be awful to adhere to it now. The Court did not actually make a grievous mistake back then; but it is right to change the rule for modern times. So used, "changed facts" means never having to say you're sorry. It is redemption without repentance.

The Court in *Casey* did not explicitly embrace this position. To the contrary, it added the politically correct, but in this context

---

new choice of constitutional principle that *West Coast Hotel* [*v. Parrish*, 300 U.S. 379 (1937)] announced." *Id.* at 861–62.

The Court in *Casey* concluded from these examples that "*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions." *Id.* at 863.

103. 198 U.S. 45 (1905).

104. Earlier Supreme Court decisions had rejected racial exclusion from juries and segregation in transportation. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (rejecting racial exclusion from jury service); R.R. Co. v. Brown, 84 U.S. 445, 452–53 (17 Wall.) (1873) (rejecting segregation in transportation). For a brilliant, insightful argument that *Brown* was right on historical grounds, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 955 (1995).

throwaway, line that "we think *Plessy* was wrong the day it was decided."[105] But the logic of its discussion of what made overruling *Plessy* proper would seem to lead to the conclusion that *Plessy*'s wrongness at the time was no essential part of what justified its repudiation.

Surely, that is a proposition worth examining long and questioning hard. One cannot read *Plessy*, or *Giles v. Harris*,[106] or *Berea College v. Kentucky*,[107] or any of the other American apartheid cases, without sensing how deeply self-imprisoned the era was by its own racist assumptions. The passage of *Plessy* quoted in *Casey*, set forth above, shows this as well as any other. But combine that social context of racism with the notion that the Constitution must be read reasonably, in tune with the tenor of the times, and reflect current social mores and values, and *Plessy* and its fellow travelers indeed become rightly decided.

I pose this very issue as a discussion question for that day of the basic Constitutional Law course: "Should the Constitution be interpreted in accordance with prevailing social understandings of the time?" My hope is that *Plessy* produces more than a few emphatic "no" answers. (It does.) But it is amazing, and disturbing, how many "yes" answers I receive. Some students evidently are not made uncomfortable by the proposition that *Plessy* was right in its day. I have had students argue seriously that *Brown* was right for its time and *Plessy* was right for *its* time; the meaning of the Constitution changes with the times and with folks' understanding of the proper result dictated by social facts.

There is, of course, no need for this in order to vindicate *Brown*. Segregation can be understood as violating equal protection in part because of the social reality of segregation as discrimination—this was Charles Black's insight in his justly renowned *The Lawfulness of the Segregation Decisions*[108]—without thereby conceding that legal segregation ever was anything other than a fundamental denial of equality. The social reality of segregation as oppression was as clear in 1896 as in 1954.

All of this is, of course, more a critique of the implications of the "changed facts" factor than a dry description of current doctrine: If

105. *Casey*, 505 U.S. at 863.

106. 189 U.S. 475 (1903).

107. 211 U.S. 45 (1908).

108. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). As noted above, the Court in *Casey* cited and quoted from Professor Black's article. *See Casey*, 505 U.S. at 862–63; *supra* text accompanying note 102.

the changed facts notion is understood as an inquiry that permits overruling cases whenever social understandings, mores, and values have changed substantially, it has truly sweeping jurisprudential implications. "Changed facts," so understood, would be the stare decisis factor that swallowed stare decisis: courts should decide cases as current values dictate, and legitimately may overrule anything in their way. There is substantial support for this view in *Casey*'s discussion of what permitted overruling *Lochner* and *Plessy*. To the extent *Casey*'s discussion can be read to support this view, what it permits is nearly complete judicial discretion to decide whether or not things have changed sufficiently to permit overruling an earlier case. So much for "stare decisis."

At the same time, this seems to overstate the *Casey* Court's intention. The discussion of *Lochner* to *West Coast Hotel v. Parrish*,[109] and *Plessy* to *Brown*, might be understood to stand for something somewhat narrower: Where the Court had *justified its decision* at the time, at least in substantial part, by making factual statements or proceeding from factual premises that we would now conclude were simply wrong as a matter of fact, the inclusion of such factual misstatements within the stated rationale of decision gives a subsequent court special justification for overruling the precedent—that is, a justification for overruling beyond the fact of legal error. The Court has frequently spoken of the need for a "special justification" for overruling—something in addition to a conclusion that the prior interpretation was wrong as a matter of law.[110] On this narrower view, a precedent's reliance on wrong facts supplies this justification. The subsequent Court may overrule if the precedent was wrong on the law *and* said something wrong about social facts, too.[111] Under this reading, the decisions in *Lochner* and *Plessy*, by revealing some of the Court's views on matters of social fact, gave subsequent Courts something to seize upon to justify overruling—something they otherwise would not have had.

This is plausible, but not entirely satisfying. Would it really have mattered if *Plessy* had been a drier, one-paragraph opinion saying, in

109. 300 U.S. 379 (1937).

110. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (collecting cases); Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

111. Abraham Lincoln, criticizing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), indicated as part of his views of the force of judicial precedent that a Supreme Court decision should not be regarded as authoritative and binding where "based on assumed historical facts which are not really true." Abraham Lincoln, President of the U.S., Address at Springfield, Illinois (June 26, 1857), *in* 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 390–92 (Library of Am. ed. 1989).

essence, "The amendment uses the word 'equal'; it does not prohibit separate facilities or separation of the races in terms. As long as separate facilities are equal, there is no constitutional violation," without any further discussion of social facts?

A final possibility, narrower yet, seems the best way to understand this factor, though it is harder to square with the Court's discussion: changes in facts, in the times, or in social conditions, may *reveal*, or help to make clear, that a prior decision *always was* wrong as a matter of law; the Court was simply *blinded by* social context, social facts, or the latest trendy science or social science at the time of the error.[112] With changed context and social understandings, the scales have dropped from our eyes. So understood, this factor is more of a *warning against* basing constitutional interpretation on shifting social understandings of facts than an embrace of it.

Under this view, it would be something of a misnomer to label this factor "changed facts," as if to suggest that changed facts or changed views of social facts justify changed interpretations of the law. Changed facts, or new perspectives, simply help reveal that the old interpretation was wrong. Interestingly, under this understanding of "changed facts," this element of current doctrine is not really an argument about stare decisis, in the sense of addressing a reason to adhere or not adhere to a decision "whether or not mistaken."[113] It is a point about how and when one might come to realize that a decision *was* mistaken. It is an argument for the propriety of overruling a wrong decision *demonstrated to be* a wrong decision.

Once again, it must be pointed out that the Court in *Casey* did not say all of this; its discussion was much more cursory, superficial, and vague. But this is all part of the descriptive problem. In the end, the factor of changed facts is unclear on a number of scores. It can be understood to mean three entirely different things: one of which the Court seems to have said, but the logic of which is more extreme than the Court possibly could have intended; a second of which makes changed facts merely a pretense to be seized upon; and third of which seems to imply that focusing on different understandings of social facts is precisely the wrong thing upon which to base a decision and is evidence of a prior case's defects. It is also unclear exactly what *types* of changed facts are sufficient and *how much* social facts need to have

112. I add "science" to "social science." *Buck v. Bell*'s outrageous embrace of eugenic understandings probably reflected the elite "scientific" consensus of the day. 274 U.S. 200, 207 (1927).

113. *Casey*, 505 U.S. at 857.

changed in order to counsel more in favor of overruling. Social understandings of homosexuality were different in 2003 than in 1986; but social understandings of abortion were different in 1992 than in 1973, too. And finally, the relationship of this factor to others, and its relative weight, is not at all clear. It is unclear whether a change in facts is necessary in order to overrule a precedent, or whether it is ever sufficient on its own to justify overruling.

5. Judicial Integrity

The final factor in *Casey*'s stare decisis analysis is a wide-ranging one that occupies several pages and consumes a great deal of the *Casey* Court's rhetorical attention. It goes by various names, but might usefully, if imprecisely, be termed "judicial integrity."[114] It is reflected in that part of *Casey*'s discussion that emphasizes how "frequent overruling would overtax the country's belief in the Court's good faith," how overruling "under fire" a "watershed" decision "would subvert the Court's legitimacy"; how the country would suffer a "loss of confidence in the judiciary" if those who were "tested by following" the Court's decision found that they had paid a price for nothing; and how the "promise of constancy, once given," binds the Court and breaching it "would be nothing less than a breach of faith."[115]

I have criticized this grandiose, vain, self-absorbed cluster of notions in other writing[116] and continue to think that criticism warranted. But here I would like merely to describe this factor as accurately as possible, for purposes of promoting assessment (which I make in the next Part of this Article) of whether the doctrine of stare decisis the Court has fashioned satisfies the standards the Court has set for itself. Shorn of the Court's overwrought formulations, the "judicial integrity" factor asks an understandable question: whether, even if a precedent is thought erroneous, it would seem arbitrary, capricious, or fickle for the Court to be changing its mind too often or too readily (especially if its decisions change along with personnel changes) or to be changing its interpretation in response to public, or political, or even scholarly criticism or pressure. Would this not, sometimes, *look bad*? Might it even *be bad*—unfair, in some sense,

114. For further discussion, see Paulsen, *Abrogating*, *supra* note 3, at 1564–67.

115. *Casey*, 505 U.S. at 866–68.

116. *See* Paulsen, *Abrogating*, *supra* note 3, at 1564–67; Michael Stokes Paulsen, Book Review, 10 CONST. COMMENT. 221, 225–33 (1993) (reviewing ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992)).

for the Court to change its mind, especially as a result of political or personnel changes?

The difficulty lies in transforming this intuition into a principled rule, susceptible of consistent application. Sometimes the Court says that maintaining public perceptions of "judicial integrity" requires the Court to adhere to a prior case, even if wrong. And sometimes the Court says maintaining such perceptions requires the Court *not* to adhere to a prior case precisely *because* it is wrong. The Court is concerned with the politics of its own power, and this plays into its evaluation of whether, when, and which precedents may be overruled. But the problem is that the politics of judicial power can cut in different directions, depending on the issue at hand. It is hard to find coherent principle in such a standard.

It is even harder to find principled application. In the perceptions-of-judicial-integrity-requires-adhering-to-precedent category, for example, one finds *Casey* reaffirming *Roe*. In the judicial-integrity-requires-*not*-adhering category, one finds *Lawrence* overruling *Bowers* and *Brown* overruling *Plessy*. In *Casey*, with respect to criticism of the Court's abortion precedents, one finds the Court saying that "to overrule under fire ... would subvert the Court's legitimacy beyond any serious question"[117] because " 'the vitality of ... constitutional principles ... cannot be allowed to yield simply because of disagreement with them.' "[118] In *Lawrence*, with respect to homosexual sodomy laws, one finds the Court saying that a factor in favor of overruling *Bowers* is the fact that "criticism of *Bowers* has been substantial and continuing."[119]

It is almost too easy to point out that these are direct contradictions. But that is an accurate description of the content of the current doctrine of stare decisis with respect to this particular factor—and not an entirely surprising one since this factor is addressed to issues of politics, power, and perception. And so it stands as a fair description of "judicial integrity" that the impact of overruling-versus-adhering-to a case on public perceptions of judicial integrity will sometimes cut one way and sometimes cut the other way, with no clear, principled standard to control the decision.

* * * * *

So that is the state of current stare decisis doctrine: The factors are (1) workability, (2) reliance, (3) remnant of abandoned doctrine,

117. *Casey*, 505 U.S. at 867.
118. *Id.* (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)).
119. Lawrence v. Texas, 539 U.S. 558, 576 (2003).

(4) changed facts, and (5) judicial integrity. Each of the factors contains internal contradictions. Each admits of conflicting applications, and there are examples of such conflicts in each category. Each factor suffers from certain major analytic defects and unclarity. The relationship of each factor to the others, and their relative weight, is not defined. No factor is necessarily necessary. No factor is sufficient.

II. APPLYING THE DOCTRINE OF STARE DECISIS TO THE DOCTRINE OF STARE DECISIS

How does the current doctrine of stare decisis fare under these five criteria? Should the current doctrine of stare decisis be adhered to because it well serves the policies of workability-efficiency, protection of reliance interests, stability and predictability, and protection of judicial integrity? Or, perhaps, have changed facts, or changed law, undermined the doctrine in ways that might counsel in favor of it being overruled?

If one were to apply *Casey*'s criteria fairly, to the question of *whether the current decisional law of precedent should be followed*, it is hard to avoid the conclusion that the current doctrine of stare decisis does not require adherence to the current doctrine of stare decisis. Ironically, the doctrine, to the extent it can be thought to yield any clear direction, counsels in favor of overruling the doctrine. Nothing in any of the criteria set forth in *Casey* and subsequent cases—*none* of the factors of workability, reliance, changed law / remnant, changed facts, or judicial integrity—points in the direction of standing by what the Court has decided about when precedent should be followed. To the contrary, the current doctrine of stare decisis, applied to the current doctrine of stare decisis, tends to suggest that the doctrine undermines nearly all of the policies that the doctrine is supposed to serve. Current stare decisis doctrine therefore properly may, and even should, be abandoned, consistent with the evaluative criteria established by current stare decisis doctrine. To put it bluntly: The doctrine of stare decisis, as presently formulated, constitutes its own circular firing squad.

The preceding Part's detailed description and discussion of current stare decisis law admits of a quick tour through current doctrine in terms of the goals it has set for itself. I will take up each criterion of the doctrine, as applied to current stare decisis doctrine as a whole.

A. Workability

Consider first "workability," and its companion value, the promotion of judicial efficiency: Does the current doctrine and practice of stare decisis supply a workable, coherent, readily administrable set of clear principles that promotes clarity, efficiency and predictability in adjudication, and that economizes on judicial work? Plainly not. As demonstrated above, the current doctrine of stare decisis supplies no clear standards. It is a laundry list mish-mash of factors, each of which has serious problems of unclarity and imprecision of application. The relative weight of each factor is also unclear—it is unspecified—as is the relationship of each to the others.

The workability inquiry, which asks whether a line of decisions supplies reasonably clear criteria susceptible of principled, predictable judicial application, itself fails to do so, but instead has degenerated into an ad hoc gestalt judicial inquiry, capable of being applied in either direction depending on the Court's preferences. That is precisely what the doctrine, as formulated, says is *not* the objective.[120]

The reliance standard is no less unworkable and unprincipled, given that the Court is not clear on what legitimately constitutes reliance, has contradicted itself in application of this standard, and sometimes credits "social reliance" and sometimes does not, depending on the particular situation. The Court's use of reliance has been unpredictable and, thus, unworkable and inefficient.[121]

Changed law / remnant of abandoned doctrine, as shown above, is a push-me-pull-you inquiry that permits the Court to go in either of two opposing directions. Inconsistent precedents mean *either* that a subsequent precedent has undermined a prior one, permitting the earlier case's overruling, *or* that a subsequent precedent has improperly departed from the earlier one, permitting an overruling of the departing case and a restoration of the earlier one. There is no clear standard for choosing one course over the other; and the Court has, in practice, done each, in different circumstances, depending on what appears to be nothing more than its preferences. The inquiry may not be wholly unworkable, in the sense of being unmanageable. But it is plainly not workable in the sense of providing principled standards susceptible of, and producing, predictable and principled applications.[122]

---

120. *See supra* text accompanying notes 21–43.
121. *See supra* text accompanying notes 46–67.
122. *See supra* text accompanying notes 68–98.

As to "changed facts," the problem is identical. This factor has failed to supply a clear, coherent standard because it permits the Court to judge, seemingly ad hoc, whether or not it wishes to change a rule based on changed social situations. Again, sometimes it does, and sometimes it does not.[123]

And finally, "judicial integrity" is a political factor capable of (and often displaying) political manipulation. It is standardless and not susceptible of principled application. Sometimes the goal of promoting public perceptions of the integrity of the judiciary leads the Court to declare that it is imperative that precedents be reaffirmed, for appearances' sake. Sometimes the goal of promoting public perceptions of the integrity of the judiciary leads the Court to declare that it is imperative that wrong precedents be overruled, in order to restore justice.[124]

Plainly, current stare decisis doctrine is unworkable and inefficient. It supplies no standards of any meaningful content. What criteria it announces are susceptible of contradictory applications. It does not promote coherence or stability in the law; it simply adds another layer of confusing analysis, and it is unclear what, if anything, this actually adds. The application of the Court's doctrine of stare decisis shows results that are inconsistent, unpredictable, and unprincipled. The rule on the ground is that Courts follow precedent, except when they don't. And that is no rule at all.

B. Reliance

If reliance is the residue of predictability and stability, and if one of the objects of the doctrine of stare decisis is to protect reasonable, vested reliance interests, current doctrine must be judged a failure on this score as well. Surely, no reasonable person familiar with the Court's doctrine and practice of precedent would rely on current stare decisis doctrine remaining stable. No reasonable person would rely on the doctrine being applied in a consistent and predictable fashion. And no reasonable person would rely on the Court's adhering, in any given instance, to a decision it has concluded is wrong, simply for reasons of stare decisis. The Court's reliance on reliance has been unreliable. The Court finds protection-worthy reliance interests in all kinds of different things, when it suits its purposes (such as social reliance in a rule remaining the same because people desire it or are

123. *See supra* text accompanying notes 99–113.
124. *See supra* text accompanying notes 114–18.

accustomed to it),[125] but sometimes will simply rush on past such considerations or dismiss them as incidental.[126]

The current doctrine of stare decisis does not seem like the kind of legal formulation that causes persons to invest resources or otherwise sink costs. It is not the type of legal rule or standard to which society has become accustomed (as *Miranda* is claimed to be, in *Dickerson*) or around which people have ordered their lives or thinking (as *Roe* is claimed to be, in *Casey*). Unlike "watershed" social policy decisions, which often provoke controversy, no one is "tested by following" the doctrine of stare decisis itself. The doctrine is not a substantive one. It is second-order "lawyer's law" that most sensible members of the public regard as either inscrutable or self-evidently manipulable. Sensible lawyers do not rely on the doctrine either. In terms of whether the doctrine of stare decisis is itself stable and reliable, the best that a highly sophisticated lawyer could advise a client is that the Court will adhere to precedents it wants to adhere to (like *Roe* or *Miranda*); that it will overrule precedents it wants to overrule (like *Bowers* or *Metro Broadcasting*); that such a decision will almost always actually turn on merits or policy factors quite apart from precedent; and that, at most, prior precedent, and the Court's doctrine and precedent *about* precedent, will be something the Court may feel it needs to discuss and explain. But this never serves as much of a barrier to a changed decision to which the Court otherwise is committed.

In short, current doctrine—and practice—of stare decisis has not generated reasonable reliance interests that would counsel in favor of adhering to current doctrine.

C. Remnant of Abandoned Doctrine

Has the doctrine of stare decisis remained stable and consistent over time, or has it been undermined by subsequent cases? At the *North Carolina Law Review* Symposium in which this paper was presented in preliminary form, one of the questioners asked whether it even made sense to *organize* and *discuss* the doctrine of stare decisis in terms of *Casey*'s articulation of its factors. So much has happened in the fifteen years since *Casey*, with respect to the Court's treatment of precedent in constitutional cases; so many times has the doctrine been refined, modified, or departed from, that (the challenge

125. *Casey* and *Dickerson* are cases of this sort. *See supra* text accompanying notes 52–57.

126. *Lawrence* is a case of this sort. *See supra* text accompanying notes 58–59.

goes) it makes little sense to speak of the doctrine as *Casey* did. Rather, the doctrine of stare decisis has remained "fluid" and evolved to respond to new situations.

Just so! To the extent this observation is correct (which is considerable), it renders the doctrine of stare decisis, as formulated in *Casey*, a remnant of abandoned doctrine. If so, that is a reason why it may be abandoned, under *Casey*'s own criteria. Surely, it is correct to observe that the *Casey* formulation was the high-water mark in the Court's invocation of constitutional precedent as a constraining force. Since *Casey* was decided in 1992, the waters have receded considerably. In fact, the process started in *Casey* itself, which despite its high-church rhetoric of the necessity of adhering to precedent, overruled two abortion cases.[127] Two years later, in 1994, *Adarand* overruled *Metro Broadcasting*, with two crucial members of the *Casey* majority joining in a stare decisis discussion, irreconcilable with *Casey*'s, in which they asserted the propriety of overruling a case that had marked a departure from earlier law, in order to restore a prior, sounder antecedent understanding.[128] Three years after that, in 1997, *Agostini v. Felton*[129] overruled *Aguilar v. Felton*'s[130] aggressive misinterpretation of the Establishment Clause, on the ground that it had gone too far and been undermined by subsequent decisions.[131] *Adarand* and *Agostini* surely undermined *Casey*'s stare decisis doctrine, but without direct acknowledgement that they were doing so. Also in 1997, *Glucksberg*'s embrace of a very narrow substantive due process analysis as a limiting principle undermined *Casey*'s substantive due process analysis.[132]

Cutting sharply in the other direction, *Dickerson*, decided in 2000, reaffirmed *Miranda*, recasting intervening decisions inconsistent with the Court's restoration of *Miranda*, in part on social reliance grounds.[133] One effect *Dickerson* might be thought to have had was to revitalize *Casey*-esque stare decisis doctrine, which had been undermined by *Adarand* and *Agostini*.

---

127. *See* Paulsen, *Abrogating*, *supra* note 3, at 1537 & n.2 (discussing *Casey*'s overruling of *Akron* and *Thornburgh*).

128. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231–34 (1995), *overruling* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

129. 521 U.S. 203 (1979).

130. 473 U.S. 402 (1985).

131. *Agostini*, 521 U.S. at 235–36, *overruling Aguilar*, 473 U.S. 402.

132. *See* Paulsen, *Abrogating*, *supra* note 3, at 1557–60 (discussing *Glucksberg* as undermining *Roe* and *Casey*'s substantive due process holding, leaving the Court's abortion decisions to rest on principles of stare decisis).

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

But then, dramatically, the Court in 2003 seemed to leave behind its strong version of stare decisis, set forth in *Casey* and deployed in *Dickerson*, distinguishing it (however unpersuasively) into near-oblivion in *Lawrence v. Texas*. *Lawrence* is a minor landmark in judicial exposition of the doctrine of stare decisis—but in the opposite direction of *Casey*. Not only did *Lawrence* overrule a major constitutional case (*Bowers*), it did so by readopting the sweeping view of substantive due process the Court had rejected in *Glucksberg*, ironically embracing *Casey* for its substantive due process thinking but not for its stare decisis thinking.[134] The twin death penalty overrulings of 2002 and 2005, *Atkins* and *Roper*, are more in the *Adarand-Agostini-Lawrence* pattern and less in the *Casey-Dickerson* pattern.[135] And finally, two of the big cases of 2007, *Gonzales v. Carhart* and *Wisconsin Right to Life*, whose results cannot sensibly be reconciled with the cases they all-but-overrule (*Stenberg v. Carhart* and *McConnell v. FEC*), must be counted in the genre of cases undermining *Casey*'s stare decisis reasoning, leaving it arguably an empty shell—a test abandoned in every way except forthrightly.[136]

In terms of the "remnant" standard then, it is fair to observe that, though the Court's actions have not been perfectly consistent (again, undermining workability and reliance), the doctrinal evolution of the Court's decisions has left *Casey*'s discussion of stare decisis very much left behind. In practice, the doctrine is abandoned whenever the Court wishes to abandon it. The doctrine of stare decisis, as discussed in *Casey*, would thus seem to suggest that the doctrine of stare decisis has itself become, or is rapidly becoming, a remnant of abandoned doctrine. If subsequent decisions are fully as authoritative as to the meaning and content of current stare decisis doctrine (and how could they not be, consistent with such doctrine?), then there obviously has been a lot of undermining of the doctrine of stare decisis going on. To borrow Justice O'Connor's words (penned for a different occasion), the doctrine of stare decisis (in terms of the *Roe* framework) "is on a collision course with itself."[137]

134. Lawrence v. Texas, 539 U.S. 558, 573–74, 577 (2003); *see supra* text accompanying notes 58–63, 70–75.

135. *See supra* text accompanying notes 36–42.

136. *See supra* text accompanying notes 89–98.

137. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

D. Changed Facts

Have social or political facts changed, or come to be seen so differently, as to undermine the justification for continued adherence to the current doctrine of stare decisis? This is genuinely hard to evaluate, in part because of the difficulties presented by the "changed facts" factor itself. If changes in social understandings, without more, permit changes in constitutional doctrine, there is no reason why one could not conclude that social understandings of the premises on which the doctrine of stare decisis rests have changed, though it is unclear how one would measure such a thing. If this factor is better understood as counseling in favor of overruling when changed social contexts have helped reveal the error of the original rule, again there is no reason why this could not be the case with respect to the doctrine of stare decisis. But again this is hard to evaluate.

Finally, if this factor is understood as especially favoring overruling when a precedent opinion *invoked* factual assumptions or premises in support of its rationale, and those "facts" (whether hard facts or social facts) are now demonstrated to be false or are now "seen . . . differently"—the understanding perhaps best supported by *Casey*'s lengthy discussion of *Lochner* and *Plessy*[138]—there is quite an excellent chance that these facts *have* changed. It is hard to tell, of course. As discussed above, whether or not there have been material changes in facts, or in how they are now viewed, seems to be largely in the eyes of the beholding subsequent Court. But this problem is diminished, at least a little bit, if the relevant "facts" are ones that can be identified as factual statements or assertions, now shown to be wrong, contained in the precedent decision itself. Thus, to the extent this factor may be taken seriously, it is useful to examine whether there were indeed factual assumptions or premises contained in the *Casey* opinion, in support of its articulation of a grand doctrine of stare decisis, analogous to the factual assumptions or premises that had been recited in support of *Lochner* and *Plessy*, the paradigm cases noted by the *Casey* Court as decisions predicated on false factual views.

There are some such quasi-factual (or pseudo-factual) assertions, or premises, in *Casey*'s stare decisis section. They are set forth in the extended final section of the Court's stare decisis analysis, discussing what I have termed the "perceptions of judicial integrity" factor. To the extent that adherence to precedent was justified, in *Casey*, in part

138. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833, 861–64 (1992). *See generally supra* text accompanying notes 79–92 (discussing the "changed facts" factor).

on the ground that this is what the people *expect* of the Court, that is, presumably, an empirically testable proposition. Similarly, to the extent the Court's rationale for stare decisis was that the people's "belief in themselves" was not "separable" from their confidence in the Court and that this confidence would be undermined by too frequent overrulings, that too is presumably an empirically testable "fact."[139] The Court's "facts" might prove false, or views of them may have changed.

To be sure, *Casey*'s windy flights of rhetorical excess were probably just that, and can be criticized on this ground. But there they are. Taking the doctrine of stare decisis seriously, on its own terms—and treating the *Casey* opinion's rhetoric on this score seriously, as if it deserves to be taken seriously—makes these statements fair ground for empirical testing (or even subjective judgment, apparently). When the Court asserts, in *Casey*, that the people's "belief in themselves" as a "people who aspire to live according to the rule of law . . . *is not* readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals,"[140] it is making a factual assertion, just as the Court in *Plessy* was making a factual assertion when it said that any perception that enforced racial separation implied discrimination would be "solely because the colored race chooses to put that construction upon it."[141] They are the sorts of claims where someone, coming across them, could just say, "that ain't so!" They are, in theory, testable: a sophisticated social science survey, or even a public opinion poll, could evaluate whether people, today, truly do think that their belief in themselves as governed by the rule of law is connected to their views of whether the Supreme Court should adhere to past decisions, even where the Court has concluded that those decisions were legally wrong. (Similarly, one might have sought to measure statistically whether separate-but-equal was understood by whites, as well as blacks, as signifying anything about believed racial inferiority.)

To be sure, constitutional law ought not turn on such almost-silly inquiries. It should consist of application of the original meaning of the words of the written Constitution, in context, where they supply a

139. *Casey*, 505 U.S. at 868.
140. *Id.* (emphasis added).
141. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

rule or standard that governs the issue at hand.[142] It is almost comical to discuss the proposition that the decision to adhere to or overrule a particular legal doctrine would turn on whether a poll showed that this would improve how people viewed the Supreme Court. But that is exactly what one of the Court's stated stare decisis criteria (the one I return to next) appears to say. And if the Court's factual assumptions about public perceptions indeed formed part of the justification for the current doctrine of stare decisis, then another factor in the doctrine—changed facts—justifies *not* adhering to that doctrine if the facts about public perceptions have changed, if new knowledge has revealed the Court's factual assumptions always to have been wrong, or simply if those facts have now "come to be seen" differently.

In short, the "changed facts" factor likewise could come to be seen as supporting the overruling of current stare decisis doctrine.

E. Judicial Integrity

Finally, there is the grab-bag of considerations concerning public perceptions of judicial integrity. Does the furtherance of notions of (or public perceptions of) judicial integrity require adherence to the current doctrine of stare decisis? *Casey* seems to require us to ask whether the current doctrine and practice of stare decisis is one on which the Court has "staked its authority" or "legitimacy" such that departure from it would undermine the people's belief in themselves and in the Court.[143]

Surely any such assertion should be met with considerable skepticism, if not outright laughter. Even assuming one could tell when a case is a "watershed" or not,[144] and whether it was a good watershed or a bad one,[145] the doctrine of stare decisis as formulated by the Court in *Casey* does not appear to be a prime candidate for such exalted status. Doubtless, few folks have been "tested by following" the unweighted assortment of factors that comprise the Court's stated doctrine of precedent. The Court in *Casey* did not say

142. For a defense of my methodological premises of original-meaning-textualism, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1124–48 (2003). *See also* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. (forthcoming 2009).

143. *Casey*, 505 U.S. at 868.

144. *Id.* at 867.

145. *See supra* text accompanying notes 114–18. *Compare id.* at 867–68, *with* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003)

that the Court had staked its authority on the idea of following precedent. It did not even appear to stake its authority on the idea of *sometimes* following precedent. Rather, it said that it had staked its authority on *Roe* and that it therefore might appear to some to be a breach of faith for the Court to retreat from the ground it had assumed. The doctrine of stare decisis almost certainly does not have the same stature.

Moreover, more sensible notions of "judicial integrity" would seem to require acknowledgment that stare decisis is a doctrine of convenience, endlessly pliable, followed only when desired, and almost always invoked as a makeweight. I have elsewhere called it a "Grand Hoax."[146] At the very least, minimal candor compels recognition of the fact that the doctrine is imprecise, ad hoc, and can be invoked to support just about any result. The emperor has no clothes.

Recognize this, and the game is nearly up. If the doctrine of stare decisis, despite the arguments made for it in *Casey*, is unworkable, unreliable, unstable, unpredictable, and unprincipled, how can one with a straight face champion the doctrine as serving the value of promoting public perceptions of judicial integrity?

* * * * *

To review and recapitulate: the Court's current doctrine of stare decisis is unworkable, unsusceptible to principled application, inconsistent, unpredictable, and so unreliable as not to justify reliance upon it. The stated doctrine, as formulated in *Casey*, has been so greatly undermined by subsequent decisions and applications of the doctrine of stare decisis as to render the doctrine of stare decisis itself a remnant of abandoned doctrine. The doctrine does not further perceptions of judicial integrity, but probably undermines them. The circular firing squad, when ordered to fire, destroys itself.

III. IF THE CURRENT DOCTRINE OF STARE DECISIS PERMITS ABANDONING OR MODIFYING THE CURRENT DOCTRINE OF STARE DECISIS, WHAT SHOULD REPLACE IT?

What should one do with a doctrine that is such a failure on its own terms? Given the irony that the current doctrine of stare decisis emphatically does not require adherence to the current doctrine of stare decisis, but suggests that it may and should be modified or replaced, what should replace it?

146. *See* Paulsen, *Captain James T. Kirk*, *supra* note 3, at 681.

One bright idea might be to move in the direction of much stricter adherence to precedent—something closer to absolute stare decisis. The double paradox with such a view is that, in the first place, such a move would be, well, *unprecedented*—unsupported by anything the Court has ever said about the authority of precedent. In the second place (and relatedly), there is the paradox that such a new, improved, better, stronger, faster stare decisis would be inconsistent with the act of adopting such a new rule. Given current doctrine, and long unsteady practice, for the judiciary to create a far stricter rule of stare decisis would be an act of activism overruling or drastically overhauling much prior law. This would be contrary to the far stricter rule of stare decisis being proposed.

No. The only direction in which the doctrine could be changed and not self-destruct, is in the direction of even looser "stare decisis." To be sure, it is hard to imagine a doctrine of stare decisis much looser than current doctrine is, in practice, but at least this result could be made more honest. This would require disapproval of the tone, and some of the substance, of *Casey*'s discussion. It would require acknowledging that the decision to adhere to precedent or depart from it is really just a product of ad hoc, case-by-case decisionmaking. (The only problem is that the label "stare decisis" does not seem particularly apt for such a refashioned doctrine of precedent.)

All of this points in the direction of what I think is the proper approach. The doctrine of stare decisis may, and should be replaced by a much simpler, cleaner theory of the proper role of precedent in constitutional adjudication. The primary inquiry, in any situation, is whether a prior decision (or line of decisions) is *right* or *wrong*, on independent interpretive criteria one thinks are correct on grounds other than precedent.[147] In conducting such an inquiry, precedent can serve an important "information function" of furnishing what one would hope would be useful, thoughtful arguments of prior interpreters concerning the proper understanding and application of a particular constitutional provision. This can promote efficiency: a subsequent interpreter need not re-invent the interpretive wheel for every issue. He or she may read prior opinions, with care but independent judgment, and use good prior reasoning as an efficient shortcut to correct conclusions today. This can also multiply competence: a subsequent interpreter may stand on the shoulders of

147. We can have a separate, longer discussion about what those criteria are. *See generally* Kesavan & Paulsen, *supra* note 142.

others; moreover, a less competent or less confident interpreter may follow in others' footsteps, unless and until fully persuaded that the path is legally wrong. But where an interpreter is fully persuaded, after full and careful consideration of all relevant information, including the decisions of those who have gone before, that the standing interpretation is simply wrong, the interpreter should (indeed, I have argued elsewhere, *he must*) follow what he is persuaded is the correct interpretation of the Constitution, not what he has concluded is the incorrect interpretation of judges who have gone before him. This strikes me as a much more *modest*, sensible, coherent doctrine of precedent—one that does not make grandiose claims or require a grand theory that cannot be satisfied. It also appears to have been the original understanding of precedent, to boot.[148]

I have addressed this question at greater length in other writing, arguing that stare decisis is essentially inconsistent with first principles of constitutional law and that the doctrine should be abandoned entirely.[149] Precedent may serve legitimate informative functions, and may serve as a baseline against which departing decisions need to justify themselves,[150] but stare decisis, in the strong sense of adhering to a decision one otherwise would conclude is wrong—the sense in which *Casey* uses it to adhere to *Roe* "whether or not mistaken" and the only sense in which the doctrine has meaningful force—is impossible to justify on first principles.

My point in this Article has been more limited: The current doctrine of stare decisis is impossible to justify on *its own* premises. There are those for whom an appeal to first principles simply does not stir the heart. If a doctrine *works*, tolerably well—if it is sensible, reasonable, practical, logical—that, for them, is enough. For such folk, this Article is intended as a virus injected into their often unexamined systems of legal thought and (hopefully) causing disruption to their complacent, ingrained notions about precedent.

But I did not create the virus; I am merely identifying and describing it. The virus is the current doctrine of stare decisis itself. And if a fair application of that doctrine, to itself, produces a system crash, surely it is time to reexamine that system and question whether

148. *See* Paulsen, *Abrogating*, *supra* note 3, at 1571–78.

149. Paulsen, *Intrinsically Corrupting*, *supra* note 3, at 290–91; Paulsen, *Irrepressible Myth*, *supra* note 3, at 2731–34.

150. Paulsen, *Abrogating*, *supra* note 3, at 1544–48.

the current doctrine of stare decisis really should be retained as a part of our system of constitutional law.