

Chapter 2

The Dialectic of Stare Decisis Doctrine

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Abstract This chapter examines the Supreme Court’s “precedent about precedent”—its doctrine regarding whether and when the Court may overturn its own prior constitutional decisions. Due largely to the influence of Justice Louis Brandeis in the early twentieth century, the role of stare decisis in the Court’s constitutional cases transformed from that of a vague common-law maxim to the status of contested doctrine. Using graphical “opinion maps” to trace the evolution of the Court’s case law on stare decisis, the author illustrates the division of stare decisis doctrine into two competing traditions: a “weak” tradition that allows overruling based on the supposedly faulty reasoning of a prior decision; and a “strong” tradition that demands some independent, non-merits-based justification for overruling. The author demonstrates that individual Justices frequently have aligned themselves with both traditions across different cases, and suggests that the force of the Court’s “precedent about precedent” is more rhetorical than constraining.

2.1 Introduction

In the United States Supreme Court, the concept of stare decisis operates as both metadoctrine and doctrine. On the one hand, stare decisis functions as a generally applicable presumption in favor of adherence to precedent. This presumption is metadoctrinal because it provides a generic argument against overruling that applies independently of the substantive context of any given case. On the other hand, when the Court considers overruling a particularly controversial precedent, it usually weighs the constraining force of stare decisis by invoking factors and tests announced

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in its own prior case law. In other words, the Court has precedent about when to follow its precedent. This “precedent about precedent” seems doctrinal in the conventional sense—it is the Court’s doctrine of *stare decisis*.

The development of a stand-alone *stare decisis* doctrine in the Supreme Court was hardly inevitable. The Constitution does not mention precedent at all and thus provides no textual guidance about when *stare decisis* should be respected. Perhaps predictably, the Court historically decided overruling questions on a case-by-case basis without any reference to “precedent about precedent.” Prior to the early twentieth century, if Court opinions discussed *stare decisis* at all, they typically referred to the concept as a “maxim” or “principle” that abstractly weighed in favor of following past decisions.¹ Though the maxim commanded respect, its authority and meaning were derived from common-law tradition rather than from prior Court pronouncements.

Not so today. Consider the Court’s controversial 2010 *Citizens United* decision.² In *Citizens United*, a sharply divided Court struck down a federal law barring certain corporate electioneering expenditures on the ground that the law violated the First Amendment. While most remember *Citizens United* as opening the door to unlimited political spending by “super PACs,” the case also featured a fierce debate about the majority’s overruling of two existing First Amendment cases.³ Writing for the majority, Justice Kennedy cited the Court’s 2009 decision in *Montejo v. Louisiana* for the proposition that the “relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and ... whether the decision was well reasoned.”⁴ In dissent, Justice Stevens countered that whether a precedent was “well reasoned” was a “merits argument” not entitled to “weight in the *stare decisis* calculus.”⁵ Quoting 1992’s *Planned Parenthood v. Casey*, Stevens insisted that “[a] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”⁶

Critically, this argument between Kennedy and Stevens in *Citizens United* assumed a doctrinal form. The authority of *Montejo* was pitted against that of *Casey* to support conflicting positions on whether *stare decisis* requires adherence to

¹ See, for example, *Pennsylvania v. Cox*, 4 U.S. 170, 192 (1800) (argument of counsel) (“*Stare decisis*, is a maxim to be held forever sacred, on questions of property.”); *Cook v. Moffat*, 46 U.S. 295, 309 (“So far ... as the present case is concerned, the court do not think it necessary or prudent to depart from the safe maxim of *stare decisis*.”); *Bienville Water Supply Co. v. City of Mobile*, 186 U.S. 212, 217 (1902) (“[W]e may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this.”) (all emphases in originals).

² *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 130 S. Ct. 876 (2010).

³ See *Citizens United*, 130 S. Ct. at 913 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003)).

⁴ *Citizens United*, 130 S. Ct. at 912 (quoting *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009)) (emphasis in original).

⁵ *Citizens United*, 130 S. Ct. at 939 (Stevens, J., dissenting) (emphasis in original).

⁶ *Id.* at 938 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992)).

precedent despite disagreement with prior reasoning. As it happens, the cited opinions in *Montejo* and *Casey* themselves cite back to earlier cases to support their competing interpretations about the appropriate test for overruling precedent. The clash in *Citizens United* over stare decisis thus reflects an ongoing dialectic in Court discourse that is distinct from any First Amendment controversy. Instead of a generic maxim associated with common-law tradition, the concept of stare decisis appears to have become a contested doctrine.

How did this happen? How did stare decisis transform from a common-law maxim into a doctrinal dialectic? The goal of this chapter is to answer this essentially historical question and then analyze its implications for our current understanding of precedent on the Supreme Court. After undertaking a historical analysis that charts the evolution of stare decisis on the Court from maxim to contested doctrine, the chapter seeks to shed light on how much stare decisis doctrine actually constrains decisionmaking or affects outcomes in directly substantive territories of the Court's constitutional jurisprudence. Put another way, this chapter maps the dialectic of stare decisis doctrine in order to assess whether the Court's "precedent about precedent" has any genuine precedential value.

The chapter proceeds in three sections. Section 2.2 begins the inquiry by reviewing the early era of the Court's precedent jurisprudence, which extends from the Founding up until Justice Brandeis's landmark dissent in 1932's *Burnet v. Coronado Oil & Gas Co.*⁷ This section demonstrates that, prior to Brandeis's dissent, abstract stare decisis discussions played almost no doctrinal or analytical role in Court debates about overruling precedent. However, Brandeis forever changed this discourse. His *Coronado Oil* dissent catalogued the Court's actual overruling practices in such a powerful manner that his attendant stare decisis analysis immediately assumed canonical authority. After Brandeis, debates about overruling appealed to Court doctrine on stare decisis.

Section 2.3 analyzes the evolution of the Court's stare decisis discourse from *Coronado Oil* until *Citizens United*. Through the use of graphical "opinion maps," this section illustrates how modern stare decisis doctrine became a dialectic. The dialectic pits competing lines of opinions against each other. The competing opinion lines diverge on whether stare decisis requires adherence to precedent in the face of disagreement with prior reasoning. Although both lines ultimately trace back to Brandeis's *Coronado Oil* dissent, this section demonstrates how the contemporary conflict emerged from a key debate between Chief Justice William Rehnquist and Justice Thurgood Marshall in 1991's *Payne v. Tennessee*. The *Payne* debate serves as the blueprint for the Court's modern dialectic of stare decisis doctrine.

With the history thus mapped, Sect. 2.4 takes a critical look at the competing claims in the contemporary stare decisis dialectic. By analyzing in context the arguments pressed by both sides, this final section considers whether the Court's stare decisis doctrine has any genuine precedential value. It concludes that even though the doctrine's actual constraint on Supreme Court decisionmaking is minimal, it retains real political and rhetorical significance.

⁷ 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

2.2 Early-Era Stare Decisis Jurisprudence and the Impact of Brandeis

Article III of the Constitution vests the “judicial Power of the United States” in the Supreme Court and in inferior courts established by Congress. Beyond describing the subjects of the power’s jurisdiction, Article III does not articulate principles governing the proper exercise of this judicial power. Similarly, although Article VI establishes the Constitution as the supreme law of the land, and although various Amendments guarantee important substantive and procedural rights, no constitutional provision explains how to interpret or apply this supreme law and its guaranteed rights. The Constitution, in short, specifies no rules of judicial adjudication.

This absence of constitutionally mandated adjudicatory rules has never posed a problem for the Supreme Court. From the start, the Court was able to go about interpreting the Constitution with little difficulty. This is because the Constitution did not displace all the law that came before it; the new republic inherited the common law and its associated traditions. Just as common-law doctrines regarding property and contract persisted, so too continued common-law traditions governing interpretation of doctrine.

Of course, the Court never formally announced all the adjudicatory rules or metadoctrinal principles it adopted from the common law. Rather, the rules and principles guiding Court deliberations were organically revealed in its published opinions starting in 1791. Careful analysis of these opinions indicates that the common-law maxim *stare decisis et non quieta movere* (“to stand by things decided, and not to disturb settled points”) played a role in Court adjudication from the Founding. However, this analysis also shows that early-era stare decisis discourse differed significantly from modern stare decisis doctrine.

2.2.1 *The Early Era*

For purposes of this inquiry, the early era of the Court’s stare decisis jurisprudence extends from 1791 until 1916. The era begins in the year the Court issued its first written opinion and ends when Louis Brandeis became an Associate Justice.⁸ During this 125-year period, the phrase “stare decisis” appeared in only 40 published decisions.⁹ Closer examination reveals that stare decisis was invoked in 22 majority opinions, 15 dissenting opinions, one concurring opinion, and five reported

⁸ See *West v. Barnes*, 2 U.S. 401 (1791) (first published opinion by the Court), and *Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153 (1916) (first Brandeis opinion for the Court).

⁹ This number is based on a simple keyword search for “stare decisis” in Westlaw’s comprehensive Supreme Court database. This search produces 45 separate decisions published before 1916. However, I eliminated five of these decisions because the phrase did not appear in an actual opinion or summary of counsel’s argument.

arguments of counsel.¹⁰ The vast majority of these early stare decisis references involved no analysis of the concept. Instead, invocation of the maxim usually served a simple rhetorical function in arguments about following precedent. A brief survey of these early decisions uncovers the typical usage.

The very first reported reference to stare decisis in the *United States Reports* is actually both typical and atypical. In 1800's *Pennsylvania v. Cox*, the Court considered an action seeking to force the Secretary of the Land Office to issue patents to the Holland Company for lands that had been warranted to the company by act of the Pennsylvania General Assembly.¹¹ In his argument, counsel for the Holland Company stated: "*Stare decisis*, is a maxim to be held forever sacred, on questions of property; and, in the present instance, applies with particular force, as the rule was given by the state herself, through the medium of her officers."¹²

This reference is typical in its use of stare decisis to support a generic appeal to follow existing law and also in its suggestion that precedent applies with special force on questions of property. However, the reference is atypical because it urges adherence not to a Supreme Court precedent, but rather to an act of the Pennsylvania legislature. Early-era appeals to stare decisis normally concerned fidelity to Court precedent alone. Stare decisis was not usually understood to require the Court to follow law set down by inferior or foreign courts, much less by a state legislature.

Although the earliest references to stare decisis in the *United States Reports* surfaced in arguments of counsel, the concept soon found rhetorical use in majority and dissenting opinions alike. Thus, in 1831's *Ex parte Crane*, Justice Henry Baldwin dissented from the majority's conclusion that the Supreme Court had a previously unrecognized *mandamus* power.¹³ After surveying the "embryo system of American jurisprudence," Baldwin concluded that "this court is called on to assert a power, which in the 42 years of its existence it has never exercised," and so announced, "I must follow my own judgment, and dissent in the threshold: *obsta principiis—stare decisis*."¹⁴

Where Baldwin deployed stare decisis to summarize his argument about absence of precedent, others used the phrase to summarily justify fidelity to existing precedent. 1847's *Cook v. Moffat* supplies a representative example. In that case, the Court affirmed a line of decisions regarding discharge of contracts under state insolvent laws.¹⁵ Justice Grier concluded his majority opinion by observing:

[I]n order to meet the views of the learned counsel for the plaintiff in error, we should be compelled to overrule every case heretofore decided But ... [¶] [s]o far, at least, as the

¹⁰These numbers are based upon an examination of the decisions discussed in note 9 above. Although modern Supreme Court reports do not separately summarize the arguments of counsel, this practice is evident in early-era reporting as late as 1870. See *Legal Tender Cases*, 79 U.S. 457, 459–528 (1870) (devoting 69 pages to reporting arguments of counsel).

¹¹See *Pennsylvania v. Cox*, 4 U.S. 170 (1800).

¹²*Id.* at 192 (emphasis in original).

¹³See generally *Ex parte Crane*, 30 U.S. 190 (1831).

¹⁴See *id.* at 221, 222 (Baldwin, J., dissenting).

¹⁵*Cook v. Moffat*, 46 U.S. 295 (1847).

present case is concerned, the court do not think it necessary or prudent to depart from the safe maxim of *stare decisis*.¹⁶

Not all early-era discussions of *stare decisis* advocated following the maxim in such a conclusory fashion. Indeed, some opinions that argued for overruling precedent featured more-extensive analysis about the Court's obligation to its own prior decisions. The oldest exemplar of this genre is Chief Justice Roger Taney's majority opinion in 1850's *The Genesee Chief*. The case held that federal admiralty jurisdiction extended to certain navigable lakes and rivers, which effectively overruled an 1825 decision called *The Thomas Jefferson*.¹⁷ Acknowledging this change in the law, Taney first explained that *The Thomas Jefferson* "did not decide any question of property, or lay down any rule by which the right of property should be determined."¹⁸ He then argued that when Court precedent concerns property rights, "*stare decisis* is the safe and established rule of judicial policy, and should always be adhered to."¹⁹ However, since *The Thomas Jefferson* concerned jurisdiction only, and because the Court was "convinced that the former decision was founded in error [that would] produce serious public as well as private inconvenience and loss," Taney concluded that the case should be overruled.²⁰

Chief Justice Taney's suggestion that *stare decisis* had less force in jurisdictional questions was implicitly contested in a fascinating case decided just 3 years later: 1853's *Marshall v. Baltimore & Ohio Railroad Co.*²¹ The plaintiff in the case, a shady character named Marshall, had allegedly contracted with the Baltimore and Ohio Railroad Company to peddle influence in the Virginia legislature in order to obtain passage of a law favorable to the corporation. The law passed, but the corporation refused to pay. Marshall then audaciously sued the railway company in federal court. After losing below, Marshall appealed to the Supreme Court, where he faced numerous objections—including the very existence of federal diversity jurisdiction.²² Marshall, a citizen of Virginia, claimed diversity existed because the corporation was a "citizen" of Maryland.

On the jurisdictional question, the Court held for Marshall. Citing *Louisville Railroad v. Letson*, an 1844 decision that recognized corporate citizenship for diversity purposes, Justice Robert Grier's majority opinion explained:

[*Letson*] has, for the space of ten years, been received by the bar as a final settlement of the [jurisdictional] questions which have so frequently arisen under this clause of the Constitution.... There are no cases, where an adherence to the maxim of "*stare decisis*" is

¹⁶ *Id.* at 309 (emphasis in original).

¹⁷ See *The Genesee Chief*, 53 U.S. 443, 458–59 (1851) (overruling *The Thomas Jefferson*, 23 U.S. 428 (1825)).

¹⁸ *The Genesee Chief*, 53 U.S. at 458.

¹⁹ *Id.* (emphasis in original).

²⁰ *Id.* at 459.

²¹ 57 U.S. 314 (1853).

²² Diversity jurisdiction refers to federal courts' exercise of authority over cases involving parties who are citizens of different states and an amount in controversy greater than a statutory minimum. See 28 U.S.C. § 1332.

so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts. For this reason alone, *even if the court were now of opinion that the principles affirmed in the case ... were not founded on right reason*, we should not be justified in overruling them.²³

Here Grier articulated a very robust vision of stare decisis. He insisted that 10 years of reliance on *Letson* rendered the correctness of the precedent's reasoning wholly irrelevant, effectively insulating the decision from overruling.

Although the majority ultimately ruled against Marshall, holding his contract void on public policy grounds, Grier's jurisdictional and stare decisis analyses did not go unchallenged. Indeed, Justice Peter Daniel vociferously dissented. Refusing to comment on "the settlement of the discreditable controversy," Daniel wryly suggested that the parties "settle their dispute by some standard which is cognate to the transaction in which they have been engaged."²⁴ He then frontally attacked the Court doctrine that recognized corporations as citizens. After detailing his critique, Daniel expressed his incredulity at the majority's appeal to stare decisis. He argued that the doctrine creating "this new class of citizen corporations" was "strictly a new creation, an alien and an intruder" that could "trace its being no farther back than" *Letson*.²⁵ Daniel then opined:

[Stare decisis] is doubtless a wholesome rule of decision when derived from legitimate and competent authority... but, like every other rule, must be fruitful of ill when it shall be wrested to the suppression of reason or duty, or to the arbitrary maintenance of injustice, of palpable error, or of absurdity.²⁶

Seeing *Letson's* doctrine as absurd, unjust, and devoid of constitutional reason, Daniel argued the precedent should not be saved by the principle of stare decisis. By appealing to the lack of soundness of a precedent's reasoning in deciding to overrule, Daniel thus voiced a weak view of stare decisis.

The debate in *Marshall* between Justices Grier and Daniel marks the first time in Supreme Court discourse that majority and dissent explicitly clashed over the interpretation and application of stare decisis. Remarkably enough, this conflict over the rights of corporations and the role of stare decisis preceded *Citizens United* by 157 years. Just as in *Citizens United*, the competing Justices in *Marshall* staked out opposite positions on whether stare decisis requires adherence to precedent despite disagreement with prior reasoning. However, unlike Kennedy and Stevens in *Citizens United*, neither Grier nor Daniel appealed to prior Court precedent to support his view of stare decisis. This failure to cite stare decisis precedent seems a real missed opportunity for Justice Daniel in particular: Daniel could have invoked Chief Justice Taney's then-recent analysis in *The Genesee Chief* for the proposition that Court precedents about jurisdiction have little stare decisis value. Citing *The*

²³ 57 U.S. at 325–26 (citing *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497 (1844)) (latter emphasis added).

²⁴ *Marshall*, 57 U.S. at 338 (Daniel, J., dissenting).

²⁵ *Id.* at 343.

²⁶ *Id.*

Genesee Chief might well have lent more authority to Daniel's argument in favor of overruling *Letson*.²⁷

Of course, hindsight is always 20-20. Critiquing Daniel's failure to cite *The Genesee Chief* now is probably unfair given the discursive norms of the time. Indeed, out of the 40 published opinions referencing stare decisis in the early era, only one relied on prior authority to justify an abstract argument about overruling precedent. This single exception to the rule—Justice Edward White's dissent in 1903s *Kean v. Calumet Canal & Improvement Co.*—is thus entirely unrepresentative of the era.²⁸ Far more representative are the opinions discussed and analyzed above: *Pennsylvania v. Coxe*, *Ex Parte Crane*, *The Genesee Chief*, and *Marshall v. Baltimore & Ohio Railroad Co.* Whether these cases mention stare decisis briefly or discuss the concept in some detail, they all show that stare decisis was originally understood as a common-law maxim rather than the subject of Court doctrine. Prior to the twentieth century, Supreme Court Justices simply did not frame arguments about the propriety of overruling precedent by reference to prior Court decisions.

2.2.2 *The Influence of Brandeis*

Louis Brandeis changed all that. In a series of dissenting opinions culminating in 1932's *Burnet v. Coronado Oil & Gas Co.*, Justice Brandeis developed an analysis of stare decisis based upon a rigorous empirical study of the Court's actual overruling practices. Brandeis so carefully mined and categorized the Court's own "precedent about precedent" in his opinions that his attendant framework for the proper application of stare decisis itself assumed canonical authority. In both content and form, Brandeis's *Coronado Oil* dissent established new discursive standards that effectively gave birth to the Court's modern stare decisis doctrine. Given its importance to the Court's current jurisprudence, a careful reading of *Coronado Oil* is in order.

The substantive context giving rise to Brandeis's famous dissent concerned the federal government's attempts to levy taxes against the Coronado Oil & Gas Company. This private corporation derived all of its income from oil fields that it leased from the State of Oklahoma; it claimed exemption from federal income taxation on the theory that its lease made it an instrumentality of the State. Five Justices agreed with the corporation. In his opinion for the majority, Justice James McReynolds singled out a 1922 precedent called *Gillespie v. Oklahoma* and argued that "the present claim of exemption cannot be distinguished from the one presented

²⁷ Of course, Grier might have responded that *The Genesee Chief* concerned the expansion of federal jurisdiction rather than its contraction. The merits of this distinction are irrelevant; the point is that Grier and Daniel did not debate it.

²⁸ See *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452, 505–07 (1903) (White, J., dissenting). Compared to Brandeis's subsequent use of "precedent about precedent," Justice White's argument for overruling was neither successful nor influential in Court discourse.

in [*Gillespie*].”²⁹ Because the “opinion in *Gillespie* ... has often been referred to as the expression of an accepted principle,” McReynolds concluded that the Court should “adhere to the rule there approved.”³⁰ Though he did not use the phrase, McReynolds clearly took refuge in the principle of stare decisis.

In dissent, Justice Brandeis minced no words, starting with his opening lines: “Under the rule of *Gillespie v. Oklahoma*, vast private incomes are being given immunity from state and federal taxation.... [T]hat case was wrongly decided and should now be frankly overruled.”³¹ From this direct framing of the issue, Brandeis launched immediately into his stare decisis analysis. His first sentence is oft-repeated: “Stare decisis is not, like the rule of *res judicata*, universal inexorable command.”³² Brandeis then concisely articulated the general arguments for and against the application of stare decisis. He began:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.³³

According to Brandeis, then, stability in the law was the overriding justification for the presumption in favor of following precedent. He saw stability in judicial decisionmaking as so critical that the burden to correct “bad” precedents should ordinarily fall on legislatures. However, that was not the whole story:

But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.³⁴

To Brandeis, the effectively unreviewable nature of the Court’s constitutional decisionmaking demanded an exception to the general presumption in favor of stare decisis. He therefore concluded that the Court should not hesitate to overrule precedents that contradict experience or good reason.

While sharp and succinctly put, Brandeis’s abstract analysis is not what gives the opinion its real rhetorical force. Rather, his footnotes are what jump off the page and

²⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 398 (1932) (citing *Gillespie v. Oklahoma*, 257 U.S. 501 (1922)).

³⁰ *Coronado Oil*, 285 U.S. at 398–99.

³¹ *Id.* at 405 (Brandeis, J., dissenting).

³² *Id.* *Res judicata* (“a thing adjudicated”) refers to the doctrine also known as “claim preclusion,” which bars the same parties from litigating a second lawsuit on the same claim. Brandeis actually cribbed his “universal inexorable command” phrase from a dissent he had penned 8 years earlier in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting). Like any sensible and productive writer, Brandeis borrowed freely from his own prior work.

³³ 285 U.S. at 406. Brandeis lifted the phrase “more important that a rule of law be settled, than that it be settled right” from a dissent he wrote 5 years earlier in *DiSanto v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

³⁴ 285 U.S. at 406–08.

seize the reader's attention. Brandeis drops three footnotes in the short paragraph just quoted—and those notes occupy two full pages of the *United States Reports*. The first footnote follows the sentence suggesting that stare decisis is especially wise policy when Court “error[s]” can be corrected by legislation. Dryly observing that the Court has “occasionally overruled its earlier decisions although correction might have been secured by legislation,” this footnote catalogs over a dozen non-Constitutional precedents and the subsequent cases that overruled them.³⁵ The second footnote lists nearly 30 overruled or abrogated Constitutional precedents as well as the cases that effected the change.³⁶ The third footnote features quotes from Chief Justice Taney as well as Justices Miller and Field, all approving the revisiting of precedent in light of better reasoning or the test of experience.³⁷

Cumulatively, these footnotes demonstrate to an empirical certainty that the Court had historically treated stare decisis as a discretionary principle. Brandeis cites authority *en masse* to prove that overruling was a realistic option and one frequently taken by the Court. Having established these general premises, Brandeis then brings home his specific argument for overruling *Gillespie*. Adherence to stare decisis is not advisable, he argues, when the challenged precedent is based on factual determinations “influenced by prevailing views as to economic or social policy which have since been abandoned.”³⁸ *Gillespie* suffered from this flaw since it rested on an essentially factual judgment that taxing a private company's lease profits would “interfere substantially with the functions of state government.”³⁹ Given that better reasoning suggested that *Gillespie* was wrong about this, Brandeis concludes the case should be overruled.

History shows that Brandeis's argument succeeded brilliantly, if not quite immediately. On the federal income tax question, the Court did indeed frankly overrule *Gillespie* six short years after the *Coronado Oil* majority declined to do so.⁴⁰ More than this, Brandeis's influence on the Court's subsequent stare decisis jurisprudence was profound. In three separate opinions written between 1936 and 1944, Justice (and then Chief Justice) Stone specifically cited Brandeis's *Coronado Oil* dissent and its extraordinary footnotes to support propositions about the Court's ability to overrule its constitutional precedents.⁴¹ By 1949, Justice Wiley Rutledge had similarly referred to “the trenchant discussion by Mr. Justice Brandeis of the lesser impact of stare decisis in the realm of constitutional construction” and had noted that the “[i]nstances in which this court has overruled

³⁵ *Id.* at 406 n.1.

³⁶ *Id.* at 407 n.2.

³⁷ *Id.* at 408 n.3.

³⁸ *Id.* at 410, 412.

³⁹ *Id.* at 412.

⁴⁰ See *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 387 (1938) (overruling *Gillespie*).

⁴¹ See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 93 (1936) (Stone, J., concurring); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 & n. 10 (1938); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 579 (1944) (Stone, C.J., dissenting).

prior constitutional determinations are catalogued in” *Coronado Oil*.⁴² Brandeis’s dissent thus quickly assumed canonical authority.

Brandeis dramatically impacted both the substance and the form of the Court’s stare decisis jurisprudence. Substantively, Brandeis’s analysis about the proper conditions for adhering to precedent still resonates. Justices to this day quote or paraphrase his most famous aphorisms, including “stare decisis is not an inexorable command” or “it is more important that the law be settled than that it be settled right.” Formally, Brandeis made it *de rigueur* for Justices to cite Court authority when discussing stare decisis. After *Coronado Oil*, no Court opinion has ever again described stare decisis as merely a maxim. Abstract debates about overruling precedent instead proceed by reference to the Court’s own prior pronouncements on the topic. In short, Brandeis transformed stare decisis from common-law maxim to Supreme Court doctrine.

2.3 Mapping the Dialectic of Stare Decisis Doctrine

Contemporary stare decisis doctrine may owe its existence to Brandeis, but it also exhibits a dialectical form. As demonstrated by the debate in *Citizens United*, the discourse now features two distinct general views regarding when the Court can rightly overrule its own precedents. The first view advocates what I call a “weak” conception of stare decisis that sanctions overruling if a challenged precedent suffers from “bad reasoning.” The second view promotes what I call a “strong” version of stare decisis—one that requires a “special justification” for overruling beyond mere belief that the challenged precedent was “wrongly decided.” Given the existence of two competing approaches to stare decisis, it seems unlikely that *Coronado Oil* alone—a single source—gave rise to contemporary doctrine.

So how did these weak and strong conceptions of stare decisis emerge in modern discourse? This section answers this question by tracing back to their doctrinal roots the competing stare decisis approaches advocated by Justices Kennedy and Stevens in *Citizens United*. This process of doctrinal tracing is visually represented through a series of “opinion maps” that illustrate the relationships among the competing opinions in the weak and strong stare decisis traditions. The opinion maps initially confirm that both traditions share common ancestry in Brandeis’s *Coronado Oil* dissent. However, analysis of the doctrinal history also reveals that the stare decisis debate in *Citizens United* effectively carries on an argument first engaged between Chief Justice William Rehnquist and Justice Thurgood Marshall in 1991’s *Payne v. Tennessee*. It is the debate in *Payne* that provides the real blueprint for the Court’s contemporary dialectic of stare decisis doctrine.

⁴² See *National Mut. Ins. Co. of District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582, 618 n. 11 (1949) (Rutledge, J., concurring).

As of this writing, *Citizens United* stands as the latest major installment in the Court's ongoing argument over stare decisis. The stare decisis debate in the case stemmed from the majority's controversial decision to expand the First Amendment rights of corporations. To reach this result, the majority had to overrule a 1990 precedent called *Austin v. Michigan Chamber of Commerce*.⁴³ Writing for the majority, Justice Kennedy applied a weak stare decisis approach to conclude that overruling *Austin* was justified. In dissent, Justice John Paul Stevens relied upon a strong conception of stare decisis when he protested that the Court's doctrine actually required adherence to *Austin*. Since Kennedy and Stevens invoked competing opinions to establish their competing approaches, it makes sense to look back at those opinions, as well as the opinions they in turn relied on, to uncover the roots of the dialectic between the strong and weak schools.

Before applying this citation-tracing method to the stare decisis approaches advocated by Kennedy and Stevens in *Citizens United*, I should emphasize that neither jurist used the adjectives "weak" or "strong" to describe their competing conceptions. Rather, I have introduced these terms to distinguish between conflicting doctrinal formulations of the proper inquiry the Court should use when deciding whether to overrule one of its precedents. The weak approach is so called because it effectively grants stare decisis less constraining power to prevent overruling than the strong approach. Once again, I want to be clear that the actual doctrinal formulations do not use phrases like "constraining power." Instead, as shown below, the linguistic difference turns on the role of "reasoning" or "justification."

2.3.1 *The Weak and Strong Traditions*

Consider first the origins of the weak stare decisis approach. Directly quoting 2009's *Montejo v. Louisiana*, Kennedy posited in his *Citizens United* majority opinion that the "relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course *whether the decision was well reasoned*."⁴⁴ (The emphasis on the soundness of the precedent case's reasoning signals that Kennedy is adopting the weak approach.) As it happens, Justice Scalia wrote the majority opinion in *Montejo*—and he, in turn, relied on at least two earlier opinions to authorize this formulation of the appropriate stare decisis approach. Those earlier opinions again invoked prior cases, and so on. This chain of opinions that effectively constitute the weak tradition is represented in Fig. 2.1 below.

⁴³ See *Citizens United*, 130 S. Ct. at 913 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)). The Court notably also overruled another, more-recent precedent, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

⁴⁴ *Citizens United*, 130 S. Ct. at 912 (quoting *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009)) (latter emphasis added).

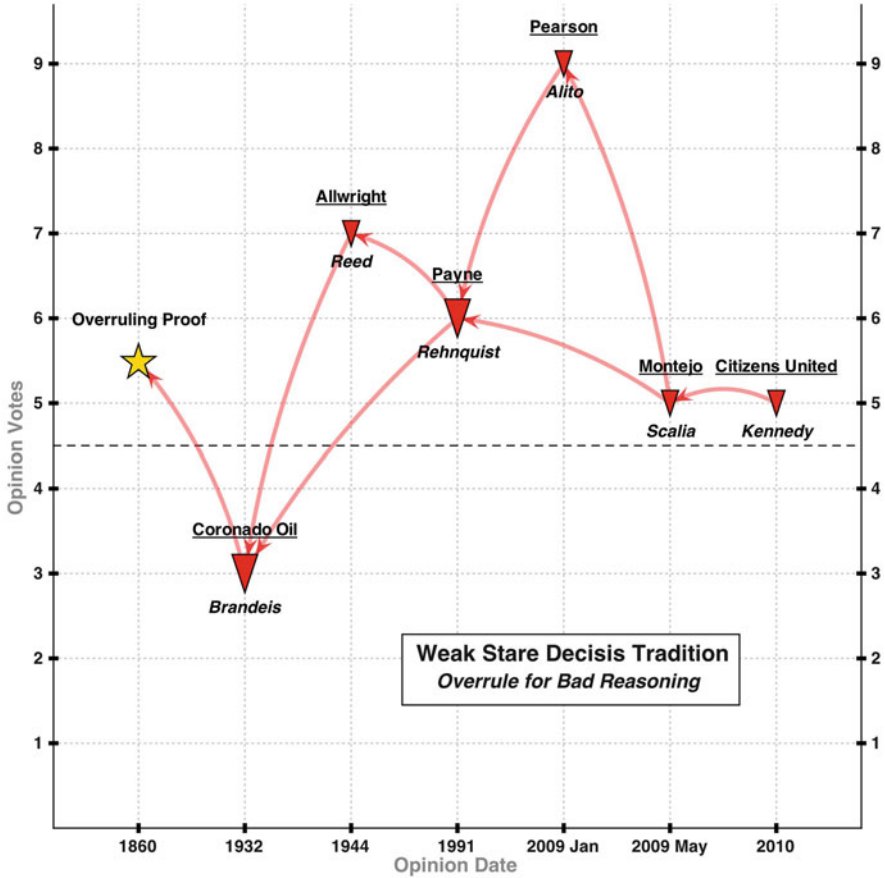


Fig. 2.1 Weak stare decisis tradition: Overrule for bad reasoning

Since this is the first opinion map presented, a brief introduction to the schema is in order.⁴⁵ Each triangle on the map represents a Court opinion; the case name appears above the opinion and its author’s name appears below. The X-axis indicates the year the opinion case was decided. The Y-axis shows the number of votes the opinion received on the Court—how many of the Court’s nine Justices joined in the opinion. Under this schema, all points above the dashed line are thus majority opinions. Solid arrows connecting opinions indicate that the latter opinion directly cited the earlier one. The resulting picture is of continuous lines of authority that stand for a particular proposition in Court discourse.

⁴⁵ For a thorough discussion of the theory animating this doctrinal mapping schema, see “Exile on Main Street: Competing Traditions and Due Process Dissent” (Starger 2012a) and “Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of *Brady v. Maryland*” (Starger 2012b).

Figure 2.1 illustrates the connections between opinions endorsing the “weak” stare decisis tradition—the proposition that stare decisis permits overruling a precedent on grounds of “bad reasoning.” While no opinion in this tradition has ever precisely explained what constitutes a “well reasoned” or “badly reasoned” decision, specific consideration of the challenged precedent’s quality of reasoning is the distinctive characteristic of the weak stare decisis approach. As the map demonstrates, Kennedy’s assertion that a relevant factor in overruling is whether a precedent is “well reasoned” traces all the way back to Brandeis’s *Coronado Oil* dissent. The exact chain of citation connects, in reverse-chronological order, the following opinions: *Citizens United* (Justice Kennedy for the Court, 2010);⁴⁶ *Montejo* (Justice Scalia for the Court, 2009);⁴⁷ *Pearson v. Callahan* (Justice Alito for the Court, 2009);⁴⁸ *Payne* (Chief Justice Rehnquist for the Court, 1991);⁴⁹ *Smith v. Allwright* (Justice Reed for the Court, 1944);⁵⁰ and *Coronado Oil* (Justice Brandeis dissenting, 1932).⁵¹

Although the earliest opinion in Fig. 2.1 is *Coronado Oil*, a further arrow extends back to a star labeled “Overruling Proof.” This is intended to represent the “proof” (the voluminous case citations) set forth in the footnotes of Brandeis’s famous dissent. As discussed in the previous section, these footnotes definitively showed that—at least prior to 1932—the Court had overruled its constitutional precedents when dissatisfied with their underlying reasoning. The form and content of Brandeis’s proof exerted great influence over the subsequent discourse. In 1944, for example, Justice Reed argued in *Allwright* that “when convinced of former error, this Court has never felt constrained to follow precedent.”⁵² To prove this proposition, Reed first cited to Brandeis’s footnotes and then dropped his own footnote documenting a dozen new overrulings that had occurred since 1932.⁵³ Then in 1991, Chief Justice Rehnquist employed the same technique in *Payne* when he carefully cataloged 33

⁴⁶ 130 S. Ct. 876 (2010). *Citizens United* was a five-to-four decision. Justice Kennedy wrote the majority opinion. Chief Justice Roberts wrote a separate concurrence, which was joined by Justice Alito. Justice Stevens’s dissent received four votes.

⁴⁷ 556 U.S. 778 (2009). *Montejo* was a five-to-four decision. Justice Scalia wrote the majority opinion. Justice Alito wrote a separate concurrence. Justice Stevens’s dissent received four votes.

⁴⁸ 555 U.S. 223 (2009). *Pearson* was a nine-to-zero decision. Justice Alito wrote the majority opinion.

⁴⁹ 501 U.S. 808 (1991). *Payne* was a six-to-three decision. Chief Justice Rehnquist wrote the majority opinion. Justice Scalia wrote a separate concurrence that received three votes. Justice Marshall’s dissent received three votes.

⁵⁰ 321 U.S. 649 (1944). *Allwright* was an eight-to-one decision. Justice Reed wrote the majority opinion which received seven votes. Justice Frankfurter concurred in result only. Justice Owen Roberts wrote a solo dissent.

⁵¹ 285 U.S. 393 (Brandeis, J., dissenting). *Coronado Oil* was a five-to-four decision. Justice McReynolds wrote the majority opinion. Justice Stone’s dissent received four votes. Justice Brandeis’s dissent received three votes.

⁵² *Allwright*, 321 U.S. at 665.

⁵³ *Id.* at 665 n.10.

constitutional decisions that had been overruled in the prior 20 years.⁵⁴ The empirical reality of the Court's overruling practice thus stands as the ultimate backing for the weak stare decisis tradition.

What about the competing strong tradition? To uncover the doctrinal origins of the strong stare decisis tradition, it makes sense to once again start with *Citizens United* and work backward. In his *Citizens United* dissent, Stevens argued that stare decisis demands "significant justification, beyond the preferences of five Justices, for overturning settled doctrine."⁵⁵ Directly quoting 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Stevens elaborated, "[a] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."⁵⁶ *Casey*, of course, rejected a constitutional challenge to the right to an abortion and adhered to *Roe v. Wade* primarily on stare decisis grounds. To support its view that in the absence of "special justification" stare decisis requires adherence to precedent, the joint opinion in *Casey* inevitably cited earlier decisions.

Figure 2.2 represents the connections among opinions endorsing the strong stare decisis proposition that overruling Court precedent is prohibited absent "special justification." At the outset, it is apparent that this map is more complicated than that presented in Fig. 2.1. This reflects the rather complex origins of the "special justification" formulation of the stare decisis test. To understand the map's depiction of this origin story, further explanation is required. Note how the map uses both blue and red triangles to depict opinions. The blue triangles point upward to indicate that they are opinions that affirmed a challenged precedent case (or, if written in dissent, advocated affirming the precedent). By contrast, the red triangles point downward to indicate that they are opinions that overruled a challenged precedent (or advocated overruling).⁵⁷ Thus, although the chain of citation extends from Stevens's dissent in *Citizens United* back to Brandeis's dissent in *Coronado Oil*, the map shows that Justice O'Connor's 1984 opinion in *Rumsey v. Arizona*⁵⁸ is actually the earliest opinion in the strong stare decisis tradition that adhered to a challenged precedent.

This reveals a key difference between the strong and weak traditions. While all the opinions in the weak stare decisis line ultimately advocate overruling a challenged precedent, the opinions in the strong stare decisis line are not similarly uniform in advocating adherence to a challenged precedent. Before I explore this apparent contradiction, a formal listing of the opinions in Fig. 2.2 will be useful. In reverse chronological order, they are: *Citizens United* (Justice Stevens dissenting,

⁵⁴ See *Payne*, 501 U.S. at 828 n.1.

⁵⁵ *Citizens United*, 130 S. Ct. at 938 (Stevens, J., dissenting).

⁵⁶ *Id.* at 938 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992)).

⁵⁷ This second map also introduces dotted arrows to connect opinions despite the lack of a formal citation relationship. I use dotted arrows to assert that the opinions are nonetheless connected and form part of the same tradition. Specific justifications for these dotted arrows are provided below in discussions of the particular opinions.

⁵⁸ 467 U.S. 203 (1984).

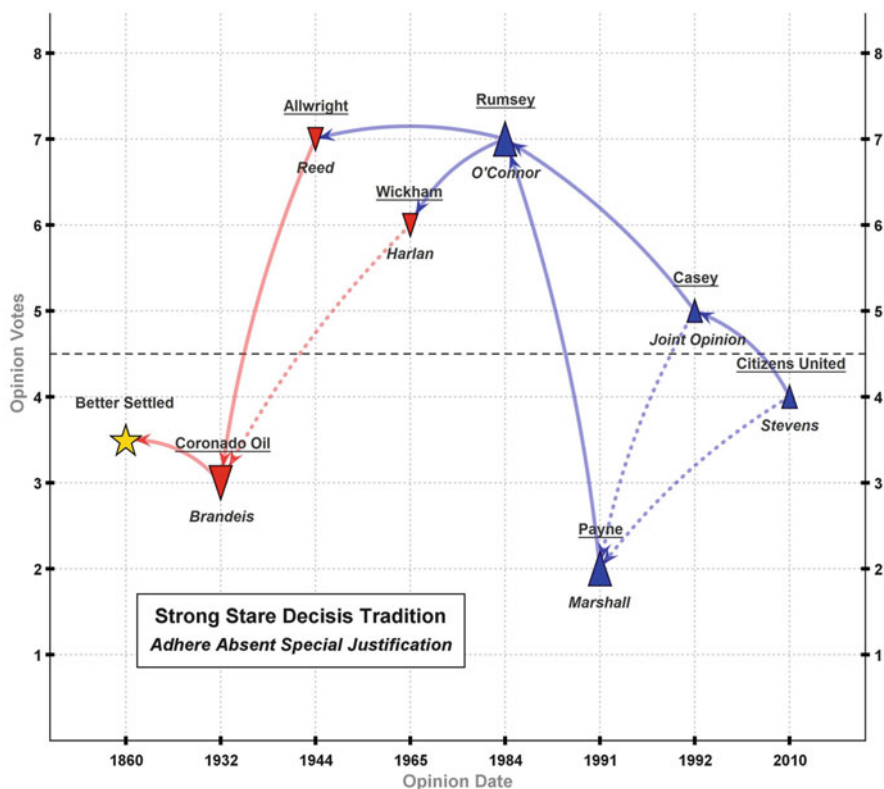


Fig. 2.2 Strong stare decisis tradition: Adhere absent special justification

2010);⁵⁹ *Casey* (joint plurality opinion by O'Connor, Kennedy, and Souter, 1992);⁶⁰ *Payne* (Justice Marshall dissenting, 1991);⁶¹ *Rumsey v. Arizona* (Justice O'Connor for the Court, 1984);⁶² *Swift & Co. v. Wickham* (Justice Harlan for the Court, 1965);⁶³ *Allwright* (Justice Reed for the Court, 1944);⁶⁴ and *Coronado Oil* (Justice Brandeis dissenting, 1932).⁶⁵

⁵⁹ See note 46 above.

⁶⁰ 505 U.S. 833 (1992). *Casey* was a five-to-four decision. No single opinion commanded a majority. Justices O'Connor, Kennedy, and Souter authored a joint plurality opinion. Justices Stevens and Blackmun wrote separate solo opinions concurring in part. Chief Justice Rehnquist and Justice Scalia both wrote dissents that each received four votes.

⁶¹ See note 49 above.

⁶² 467 U.S. 203 (1984). *Rumsey* was a seven-to-two decision. Justice O'Connor wrote the majority opinion. Chief Justice Rehnquist wrote a dissent that received two votes.

⁶³ 382 U.S. 111 (1965). *Wickham* was a six-to-three decision. Justice Harlan wrote the majority opinion. Justice Douglas dissented and his opinion received three votes.

⁶⁴ See note 50 above.

⁶⁵ See note 51 above.

As noted, the apparent contradiction presented by Fig. 2.2 is that the strong stare decisis tradition traces its origins to three opinions that did not advocate adhering to precedent: *Wickham*, *Allwright*, and *Coronado Oil*. This contradiction is not altogether surprising given the tensions in Brandeis's foundational *Coronado Oil* dissent. Though the dissent clearly bowed to the force of better reasoning in constitutional decisionmaking, Brandeis also famously described stare decisis as the wise default policy because "in most matters, it is more important that the applicable law be settled than that it be settled right." On its own, this aphorism is consistent with the strong stare decisis notion that a decision to overrule should rest on more than "the belief that a prior case was wrongly decided." Figure 2.2 represents the connection between this aspect of *Coronado Oil* and the strong stare decisis tradition by extending an arrow back from the dissent to a star labeled "Better Settled."

Clearly, Brandeis's polite nod to the wisdom of stare decisis does not adequately explain the origins of the strong tradition embraced by Stevens in *Citizens United*. A more complete explanation requires a closer analysis of the doctrine. The focus should be etymological. This is because one hallmark phrase—"special justification"—is repeated enough in the doctrine that it fairly stands as shorthand for the entire strong stare decisis tradition. In the roots of this phrase lie the origins of the strong tradition's most consistent theme.

2.3.2 *Special Justification*

The basic etymological inquiry is simple enough. As scholars have previously acknowledged, Justice O'Connor introduced the phrase "special justification" into Court discourse in 1984's *Rumsey*.⁶⁶ O'Connor's opinion for the majority had granted relief to a criminal defendant via a relatively straightforward application of a 1981 double-jeopardy precedent. Seeking to avoid this result, the State of Arizona had in its briefing urged the Court to overrule the precedent. In response, O'Connor wrote: "We decline the invitation. Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification."⁶⁷

This simple sentence is the sole source of the Court's current "special justification" language, but it provoked no stare decisis debate at the time. Indeed, the phrase did not assume any real significance in the discourse until the doctrine-defining clash between Chief Justice Rehnquist and Justice Marshall 8 years later in *Payne*. It really was Marshall's dissent in *Payne* that provided the first unambiguous articulation of the strong stare decisis test. A review of O'Connor's

⁶⁶ See Emery G. Lee III's (2002) "Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases," tracing the origin of "special justification" to *Rumsey*.

⁶⁷ *Rumsey*, 467 U.S. at 212.

citations in *Rumsey* confirms that the earlier doctrine essentially adopted a weak stare decisis perspective.

For her “special justification” proposition, O’Connor directly cited two cases: *Wickham* and *Allwright*. As noted, both of those cases overruled rather than affirmed precedent. Yet O’Connor apparently relied on language in, rather than the results of, these decisions to support the “special justification” proposition. In *Wickham*, the Court overruled a 3-year-old precedent penned by Justice Frankfurter. Only tacitly admitting the stare decisis implications of this move, Justice Harlan wrote in his majority opinion: “The overruling of a six-to-two decision of such recent vintage, which was concurred in by two members of the majority in the present case, and the opinion in support of which was written by an acknowledged expert in the field of federal jurisdiction, demands full explication of our reasons.”⁶⁸ Harlan then explicated his reasons: Since it had been decided, the challenged precedent had sown confusion in the lower courts and proved unworkable. Though the unworkability of a precedent certainly counts as a special justification for overruling under current doctrine, it bears emphasis that Harlan did not frame his *Wickham* discussion as a general reflection on stare decisis. Instead, his insistence on a “full explication of [the Court’s] reasons” was inextricably linked to the enormity of overruling a 3-year-old Frankfurter opinion.

O’Connor’s “special justification” formulation is even more tenuously supported by her citation to *Allwright*. Decided in 1944, *Allwright* held that the Fifteenth Amendment prohibited racial discrimination in primary elections run by political parties, thereby overruling a unanimous 1935 precedent that had permitted such discrimination. The only language in Justice Reed’s majority opinion that even arguably promoted stare decisis was this: “In reaching this [overruling] conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions.”⁶⁹ However, Reed then strenuously insisted on the propriety of overruling precedent when convinced of former error. This discussion more squarely locates *Allwright* in the weak stare decisis tradition—an orientation confirmed by *Allwright*’s depiction in Fig. 2.1 above. Given this, O’Connor’s citation to *Allwright* is indeed puzzling. Perhaps she regarded the correction of a rank racial injustice as exemplifying a “special justification.”

In any event, it is clear that neither *Wickham* nor *Allwright* supports a strong view of stare decisis. This mattered little at the time because *Rumsey* did not provoke a stare decisis debate: O’Connor’s general argument for adhering to precedent was not challenged on its merits. The reality is that in *Rumsey*, O’Connor did not use the phrase “special justification” in a rhetorically or doctrinally significant sense. The phrase only assumed such significance in *Payne*. Because of its centrality to the modern dialectic, *Payne* deserves a more detailed analysis.

⁶⁸ *Wickham*, 382 U.S. at 116 (overruling *Kesler v. Dep’t of Public Safety*, 369 U.S. 153 (1962)) (internal footnotes and citations omitted).

⁶⁹ *Allwright*, 321 U.S. at 665 (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

2.3.3 *Payne v. Tennessee*

The specific legal controversy in *Payne* turned on whether the Eighth Amendment permits jury consideration of victim-impact evidence. Previous majorities had prohibited victim-impact evidence in cases called *Booth* and *Gathers*.⁷⁰ Writing for a six-Justice majority, Chief Justice Rehnquist overruled these cases. In so doing, the Chief Justice advanced two central propositions about stare decisis doctrine. First, he argued that “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved,” while “the opposite is true in cases such as the present one involving procedural and evidentiary rules.”⁷¹ Second, Rehnquist suggested that *Booth* and *Gathers* were ripe for overruling because they had been “decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions.”⁷²

In dissent, Justice Marshall loudly objected to Rehnquist’s articulation of the stare decisis inquiry. Marshall accused Rehnquist of creating a “radical new exception to the doctrine of *stare decisis*” by suggesting that the Court could freely “discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree.”⁷³ Rejecting Rehnquist’s weak test, Marshall posited that “[t]he overruling of one of this Court’s precedents ought to be a matter of great moment and consequence.... Consequently, this Court has never departed from precedent without ‘special justification.’”⁷⁴ For this last proposition, Marshall naturally quoted Justice O’Connor’s opinion in *Rumsey*.

Marshall then elaborated on what he believed constituted “special justification.” In the main, legitimate justifications were major factual or legal developments that undermined a challenged precedent’s essential rationale. Turning to the precedents at hand, Marshall argued that no legal or factual developments justified overruling *Booth* and *Gathers*. He boldly suggested that the only notable change since those cases had been handed down was in the Court’s own personnel. Rather than provide the special justification required by stare decisis, this new majority had simply—and illegitimately—elevated the dissents from *Booth* and *Gathers* into the law of the land.

The razor-sharp vehemence of Marshall’s dissent attracted the attention of the other Justices. In his separate concurrence, Justice Scalia suggested that Marshall acted hypocritically by “demand[ing] of us some ‘special justification.’”⁷⁵ Justice Souter, who also concurred, took a less personal tack and argued that the Court did

⁷⁰ See *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989).

⁷¹ *Payne*, 501 U.S. at 828 (emphasis in original).

⁷² *Id.* at 829.

⁷³ *Id.* at 845 (Marshall, J., dissenting) (emphasis in original).

⁷⁴ *Id.* at 848–49 (Marshall, J., dissenting) (quoting *Rumsey*).

⁷⁵ *Id.* at 834 (Scalia, J., concurring).

indeed possess “special justification” for overruling *Booth* and *Gathers*.⁷⁶ The substantive merits of these competing claims are not relevant for this inquiry. What is relevant is that the language of “special justification” suddenly took center stage. Although the phrase had only been politely echoed in two cases since *Rumsey*, it now became the linguistic axis around which the stare decisis debate turned.⁷⁷ And it has played a lead role in the discourse ever since.

While this etymological account helps explain the original split between the strong and weak stare decisis traditions, the doctrinal history is not yet complete. Grasping the full rhetorical context requires one final look at Marshall’s *Payne* dissent. Confronting Rehnquist’s proposition that stare decisis has greater force in “cases involving property and contract rights,” Marshall warned that the majority was “send[ing] a clear signal that essentially *all* decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination.”⁷⁸ Furthermore, he argued,

[t]aking into account the majority’s additional criterion for overruling—that a case was decided or reaffirmed by a 5–4 margin “over spirited dissen[t]”—the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court.⁷⁹

To dramatize this charge, Marshall proposed a specific list of “endangered precedents” that he suggested might soon be overruled. The endangered precedents identified by Marshall were all liberal constitutional decisions potentially threatened by the new conservative majority. Marshall presciently included on his list three cases that the Rehnquist Court did in fact overrule within the decade after *Payne*.⁸⁰ And while the most prominent decision on his list—*Roe v. Wade*—has so far survived all overruling challenges, Marshall’s concern for *Roe* under a weak stare decisis framework was well warranted at the time. After all, Marshall retired from the Court months after *Payne* and a Republican President (George Bush) appointed a conservative successor (Clarence Thomas). And in the Term immediately following *Payne*, the Court in fact entertained a very serious challenge to *Roe*. As it happens, the debate in *Payne* effectively anticipated—perhaps even consciously—the epic stare decisis confrontation in that case, 1992’s *Planned Parenthood v. Casey*.

⁷⁶ *Id.* at 842 (Souter, J., concurring).

⁷⁷ For the only other invocations of *Rumsey*, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting).

⁷⁸ 501 U.S. at 851 (Marshall, J., dissenting) (emphasis in original).

⁷⁹ *Id.* (emphasis in original).

⁸⁰ See *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting v. F.C.C.*, 497 U.S. 547 (1990)); *United States v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)).

2.3.4 *Planned Parenthood v. Casey and Stare Decisis Doctrine After Payne*

In *Casey*, the Court reviewed the constitutionality of Pennsylvania laws restricting abortions. Although the Court was explicitly invited to overrule *Roe v. Wade*, a majority of the Court declined to do so. The majority opinion in *Casey* probably represents the zenith of the strong stare decisis tradition. This is because the opinion's joint authors (O'Connor, Kennedy, and Souter) explicitly argued that "the force of *stare decisis*" compelled them to accept *Roe* despite "the weight of the arguments" for its overruling and even their own "reservations" in reaffirming its central holding.⁸¹ In other words, the majority hinted that *Roe* might be "wrong" but argued that stare decisis compelled them to affirm it anyway. Given that *Roe* is also the Court's most persistently controversial constitutional precedent, the significance of the majority's strong stare decisis stance cannot be overstated.

At the same time, significance should not be confused with originality. The majority in *Casey* essentially advocated the same strong view of stare decisis that Marshall had championed in *Payne*. *Casey*'s now-famous analysis looked to "a series of prudential and pragmatic considerations" to decide whether overruling a precedent was appropriate, including the precedent's workability, reliance interests, related doctrinal development, and changed factual circumstances.⁸² This approach built upon Marshall's stare decisis considerations and relied on much of the same "precedent about precedent"—including *Rumsey*—that Marshall had invoked. And yet, the *Casey* joint authors noticeably failed to cite Marshall's dissent in their opinion. (To reflect this absence of a formal citation relationship, the arrow pointing from *Casey* to *Payne* in Fig. 2.2 is dotted rather than solid).

This failure-to-cite on the part of the *Casey* majority should not obscure the fact that Marshall's dissent in *Payne* effectively ushered in a doctrinally distinct strong stare decisis approach. Building on *Rumsey*, Marshall's *Payne* dissent had dubbed certain considerations as properly part of an overruling inquiry. The *Casey* majority further developed these same considerations. And like Marshall, the *Casey* majority did not include the "bad reasoning" of a precedent case as a relevant stare decisis consideration. Given that Marshall's *Payne* dissent also loudly signaled stare decisis as an important means of protecting liberal precedents targeted for overruling—*Roe* chief among them—it seems evident that the *Casey* majority picked up where Marshall left off.

On the flip side of the dialectic, the *Casey* dissenters clearly followed the example set by the *Payne* majority. In his dissent in the case, Chief Justice Rehnquist proclaimed that "authentic principles of *stare decisis*" require the Court "to bo[w] to the lessons of experience and the force of better reasoning."⁸³ Although he did not repeat his claim from *Payne* that constitutional precedents have less stare decisis

⁸¹ See *Casey*, 505 U.S. at 853 (emphasis in original).

⁸² *Id.* at 844–45.

⁸³ See *Casey*, 505 U.S. at 955 (Rehnquist, C.J., dissenting) (emphasis in original).

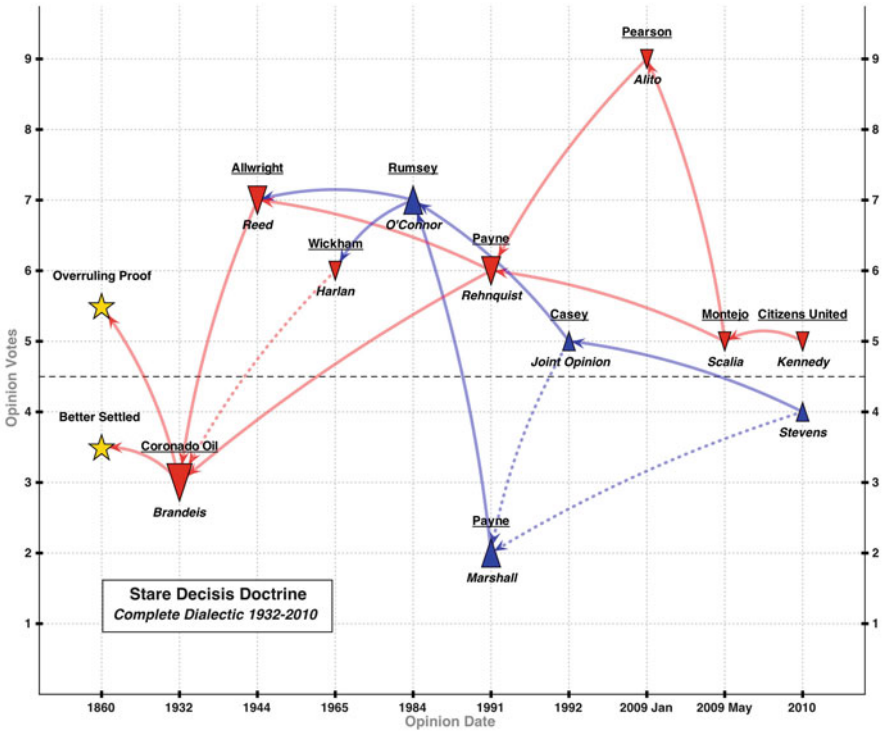


Fig. 2.3 Stare decisis doctrine: Complete dialectic 1932–2010

value when reached over “spirited dissents,” Rehnquist’s own spirited dissent in *Casey* quite obviously embraced the proposition. Meanwhile, Justice Scalia’s separate *Casey* dissent echoed similar core themes. After noting that the joint opinion failed to “squarely contend” that *Roe* was a correct application of “reasoned judgment,” Scalia suggested that a legitimate stare decisis inquiry would ask, “how wrong was the [original] decision on its face?”⁸⁴

After *Payne* then, the blueprint for the modern stare decisis dialectic was in place. Strong and weak schools split over whether “authentic principles” of stare decisis properly looked to the “correctness” of a precedent’s reasoning in overruling determinations. Put another way, the split concerned whether the strength of a prior dissent properly factored into decisions to adhere to a challenged precedent. This split emerged in *Payne* and has continued to play out in Court discourse from *Casey* to *Citizens United*.

Figure 2.3 combines Figs. 2.1 and 2.2 to provide a visual summary of the analysis in this section. It bears emphasis, however, that Fig. 2.3 does not purport to

⁸⁴ *Id.* at 982–83 (Scalia, J., dissenting).

represent every opinion in the dialectic of stare decisis doctrine. The map is not the territory. Complete accounts of both the weak and strong stare decisis traditions would undoubtedly include other opinions.⁸⁵ But the point of the map is not exhaustive detail. Rather, the idea is to represent the most influential and important opinions in the ancestry of the stare decisis debate in *Citizens United*. To deploy an analogy, Fig. 2.3 is like a constellation map. From a sparkling universe of opinions, it draws lines between the brightest stars in the dialectic. As has been shown, the brightest stars in stare decisis doctrine are Justice Brandeis's *Coronado Oil* dissent and the competing majority and dissenting opinions in *Payne*.

2.4 The Precedential Value of Stare Decisis Doctrine

With the origins of the strong and weak stare decisis traditions now mapped, this section critically examines the competing claims in the contemporary stare decisis dialectic. Specifically, this section confronts the question: Is either side “right” about what the doctrine of stare decisis really requires?

Given that the Court itself ultimately defines the requirements of stare decisis doctrine, the most literal answer to this question is “no.” As shown in the previous section, the Court does not speak with one voice about stare decisis. Debate rages on and outcomes are mixed. Since *Payne* initiated the modern dialectic, both traditions have won victories and suffered losses. Some controversial precedents have been affirmed (like *Roe* in *Casey*) while others have been overruled (like *Austin* in *Citizens United*). In this sense, stare decisis is like due process, equal protection, or any other endlessly contested Court doctrine—inherently subjective and utterly immune to “right” interpretation.

However accurate this answer may be as a descriptive matter, it fails to satisfy any normative yearnings. To scratch the normative itch, some judgment—even an imperfect one—is required. Here, judgment is called for on the central question that apparently divides the weak from strong approaches: the degree to which the soundness of a challenged precedent's reasoning is properly part of the stare decisis calculus. Of course, pinning down the precise disagreement between the competing traditions on this question is tricky since neither side speaks in absolutes. Both traditions pay lip service to adhering to precedent when necessary *and* to

⁸⁵ Figure 2.3 does not include all opinions from the weak stare decisis tradition. See, for example, *Casey*, 505 U.S. at 955 (Rehnquist, C.J., dissenting), and *Vasquez v. Hillery*, 474 U.S. 254, 269 (1986) (Powell, J., dissenting). For other affirmations of the strong stare decisis perspective, see *Dickerson v. United States*, 530 U.S. 428 (2000) (affirming *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (affirming *Runyon v. McCrary*, 427 U.S. 1960 (1976)); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting). *Dickerson* was interesting at the time because Chief Justice Rehnquist—a proponent of the weak stare decisis school in *Payne* and *Casey*—wrote the majority opinion. However, its enduring appeal seems limited, as no Justice cited it in *Citizens United*.

overruling precedent when justified. There is ambiguity in how the dueling stare decisis traditions understand “justification” and its relationship to the “reasoning” of precedent decisions.

Given this ambiguity, it makes sense to reframe the inquiry. A useful alternate framework for judgment concerns the competing attitudes toward the reasoning in dissents. After all, the weak stare decisis tradition generally has had no compunction about citing the dissents associated with challenged precedents and frankly adopting the dissent’s view of the argument when overruling. On the other hand, opinions in the strong stare decisis line have loudly decried the invocation of prior dissents as an illegitimate move incompatible with the rule of law. The competing sides thus seem to have staked out clear and conflicting positions on whether the force of a dissent’s reasoning should be given real weight when faced with an overruling decision. The question thus remains: Who has the better argument?

At the outset, the weak tradition’s approach of admitting the force of prior dissents’ reasoning into the stare decisis calculus seems the presumptive victor. This is because Justice Brandeis clearly embraced this position in *Coronado Oil*. Since Brandeis effectively transformed stare decisis from a common-law maxim into Court doctrine, his word on the doctrine’s content demands special deference. Of course, Brandeis did acknowledge, as all inheritors of the weak stare decisis tradition do, that sometimes the law is better settled than settled right. Yet Brandeis notably did not object to a subsequent overruling of a precedent based on the analysis in a prior dissent. After all, Brandeis was a famously successful dissenter himself, and the force of reasoning in his dissents—*Coronado Oil* not the least among them—helped change many areas of Court doctrine for the better.

In order to overcome Brandeis’s presumptive authority, then, a pointed response to his dissent-embracing analysis is needed. Perhaps the best response here appeals to consistency as a means to preserve Court legitimacy. Though still invoked by the strong tradition, this argument has noble roots that pre-date Brandeis. Consider *Smith v. Turner*, a case decided in 1849. In the reported argument, counsel for one side asserted that his opponent could win only if the Court overruled an 1832 precedent called *Miln*. In the course of his argument for stare decisis, he observed:

This court remains, but its members change. Three of the five members who decided in favor of State rights in the case of *Miln* are gone. Where is Thompson? Where is Baldwin? Where is Barbour, who gave the opinion of the court in that case? Had these judges remained in the seats which they once adorned, this suit would never have been brought. Is it wise thus to invite speculation upon the sad changes which the inevitable doom that awaits us all must produce in this tribunal? If temporary majorities are to give the law of this court, its decisions, which should be as permanent as the republic, will become as fluctuating and mortal as its members.⁸⁶

The idea that Court precedent should not change with every new majority has intuitive appeal. Constitutional law should have more consistency than politics. As

⁸⁶ *Smith v. Turner*, 48 U.S. 283, 364 (1849) (argument of counsel).

Justice Brewer succinctly put it in 1893, “[a] change in the personnel of a court should not mean a shift in the law.”⁸⁷

Though advocates for the weak stare decisis tradition would likely agree with Brewer, his observation nonetheless presents a real challenge to Chief Justice Rehnquist’s *Payne* argument, which assigned less stare decisis value to precedents obtained by “the narrowest of margins, over spirited dissents.” By definition, five-to-four decisions are most vulnerable to changes in Court personnel. And new lineups can all too easily look to prior dissents to find “better reasoning” to rationalize a change in law actually motivated by ideology.

Major opinions in the weak stare decisis tradition can be plausibly interpreted as ideological overrulings made possible by change in the composition of the Court. In *Citizens United*, for example, Justice Stevens persuasively argued that the majority overruled *Austin* simply because it did not “like” *Austin* and characterized Justice Kennedy’s majority opinion as “essentially an amalgamation of resuscitated dissents.”⁸⁸ In fact, Justice Kennedy in *Citizens United* did favorably cite his very own dissent from *Austin* and did adopt its reasoning while making his case for overruling.⁸⁹ Similarly, Justice Scalia’s majority opinion in *Montejo* overruled *Michigan v. Jackson* while citing to Chief Justice Rehnquist’s prior *Jackson* dissent.⁹⁰ Finally, Rehnquist in *Payne* justified overruling *Booth* by directly invoking Justice White’s *Booth* dissent.⁹¹ In all of these cases, a new Court lineup looked to prior dissents to rationalize overruling liberal precedents.

Despite this, it would be a mistake to regard the weak stare decisis tradition as a ruse perpetrated by a conservative Court majority. While the post-*Payne* dialectic has frequently seen the members of the Court’s liberal wing appeal to stare decisis to defend older liberal precedents, the pattern is not monolithic. Over time, liberal Justices also have frequently advocated overruling based on prior dissents. Indeed, there is a flip side to the empirical reality of overruling first demonstrated by Brandeis: Changes in the composition of the Court demonstrably have facilitated overruling, and Justices of all political stripes have taken advantage of this reality.

More than this, individual Justices often have taken inconsistent positions on stare decisis doctrine. In *Payne*, for example, Justice Scalia observed that the “response to Justice Marshall’s strenuous defense of the virtues of stare decisis can

⁸⁷ *Cadawalader v. Wannamaker*, 149 U.S. 541, 547 (1893) (Brewer, J., dissenting). The *Casey* plurality made an essentially similar point almost a century after Brewer’s pronouncement when they controversially argued that the Court’s legitimacy required it to follow precedent in the face of political pressure. See *Casey*, 505 U.S. at 865–66 (“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.”).

⁸⁸ *Citizens United*, 130 S. Ct. at 941–2 (Stevens, J. dissenting).

⁸⁹ *Id.* at 903 (citing *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting)).

⁹⁰ See *Montejo*, 129 S. Ct. at 2091 (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). See also *id.* at 2087 (citing *Jackson*, 475 U.S. at 1404 (Rehnquist, C.J., dissenting)).

⁹¹ See *Payne*, 501 U.S. at 830, 825 (citing *Booth*, 482 U.S. at 517 (White, J., dissenting)).

be found in the writings of Justice Marshall himself.”⁹² Scalia quoted Marshall’s prior observation that stare decisis “is not an imprisonment of reason” and concluded that Marshall really agreed with the proposition that precedents “with plainly inadequate rational support” should be overruled.⁹³ In essence, Scalia charged Marshall with adopting the weak approach when he disapproved of the precedent in question and the strong approach when he approved. Meanwhile, though Chief Justice Rehnquist articulated a weak test in *Payne*, he later took a surprisingly strong stance toward stare decisis in *Dickerson v. United States*—a case that affirmed the notably liberal precedent *Miranda v. Arizona*.⁹⁴ When Justice Scalia dissented from this stare decisis analysis in *Dickerson*, Rehnquist subtly pointed to Scalia’s own inconsistency by quoting Scalia’s observation that a ruling’s “wide acceptance in the legal culture ... is adequate reason not to overrule it.”⁹⁵

Such examples of inconsistency could be multiplied. However, the basic point is brought home by the fact that Justice Kennedy both wrote the *Citizens United* majority opinion *and* was one of the joint opinion authors in *Casey*. He has thus advocated for and against including an analysis of a challenged precedent’s reasoning in the stare decisis calculus. In other words, the Court’s most prominent swing vote has swung wildly on the question of what authentic principles of stare decisis really require.

The widespread inconsistency of Justices towards the proper stare decisis test suggests that the Court’s “precedent about precedent” itself has little precedential value. From one case to the next, a single Justice may analyze overruling questions using different stare decisis tests. Whether the test advocated is weak or strong depends almost entirely on the result being justified. Strong stare decisis tests—disavowing inquiry into the reasoning of a challenged precedent—appear almost exclusively in opinions urging adherence.⁹⁶ On the flip side, weak tests that emphasize the force of reasoning in prior dissents only show up in opinions pushing for overruling.

Choosing sides in the debate over stare decisis doctrine is thus ill-advised. Consistency about stare decisis doctrine may sound like a good rule-of-law idea, but its theoretical value is challenged by the practical bottom line of strong versus weak views of stare decisis. When all is said and done, a weak view of stare decisis authorizes change in doctrine through overruling precedent while a strong view promotes stability by affirming precedent. It seems unfair (if not absurd) to expect any jurist to universally commit ahead of time to always supporting doctrinal change or

⁹² *Payne*, 501 U.S. at 833 (Scalia, J., concurring).

⁹³ *Id.* (quoting *Guardians Ass’n v. Civil Service Comm’n of New York City*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting)) (internal citation omitted).

⁹⁴ See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“Whether or not we would agree with *Miranda*’s reasoning ... in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”)

⁹⁵ *Id.* (quoting *Mitchell v. United States*, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting)).

⁹⁶ Some exceptions are depicted in Fig. 2.1 (Sect. 2.3.1 above) and discussed in the accompanying text.

always supporting doctrinal stability. Sometimes change is good. Sometimes stability is. Context matters immensely.

In the final analysis, stare decisis doctrine is all about context. It is a way of arguing about context—a rhetorical mode for debating first-order Court doctrine.⁹⁷ The competing opinions in the stare decisis dialectic effectively provide a list of ready-made arguments for and against overruling any given precedent. Justices frame their own particular cases for overruling or adhering to precedent by citing to earlier stare decisis discussions. These earlier discussions themselves cite back to even earlier opinions, and so on, in a chain, all the way back to Brandeis's dissent in *Coronado Oil*. Yet no opinion in the chain can ever stand completely apart from the particular overruling debate that precipitated it.

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⁹⁷ Aristotle's term for this kind of rhetorical mode was *topoi*—topics of invention (2007).

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