

# Oklahoma Law Review

---

Volume 73 | Number 2

---

2021

## Stare Decisis Is for Pirates

Jesse D.H. Snyder

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Jesse D. Snyder, *Stare Decisis Is for Pirates*, 73 OKLA. L. REV. 245 (2021),  
<https://digitalcommons.law.ou.edu/olr/vol73/iss2/3>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [darinfox@ou.edu](mailto:darinfox@ou.edu).

# STARE DECISIS IS FOR PIRATES

JESSE D.H. SNYDER\*

## *I. Introduction*

The legal podcast *Strict Scrutiny* has adopted, and is merchandising, the catchy phrase, “Stare decisis is for suckers.”<sup>1</sup> Doubtless the phrase is a rally cry for a podcast whose platform is “unvarnished, respectfully irreverent takes” on the U.S. Supreme Court.<sup>2</sup> But before purchasing the hat or hoodie with the phrase emblazoned, it is worth asking to whom are the suckers the podcast is referring?

Professor Richard Re suggests that stare decisis is a jurist-centered concept, where “precedent works as a *shortcut* by helping judges and justices decide cases quickly and lawfully by telling them that it is allowable to follow the path laid by past rulings,” while “operat[ing] as a *shield* by encouraging judges who have been critical of precedent to put aside their past views (whether publicly expressed or not) and start respecting stare decisis.”<sup>3</sup> Perhaps sensing the tenor of the times, Circuit Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit, writing on the losing end of a 2-1 decision in March 2020, accused his panel members of “rely[ing] on strength in numbers rather than sound legal principles in order to reach their desired result in [a] specific case.”<sup>4</sup> He

---

\* 2016–2017 Law Clerk to the Honorable Eugene E. Siler, Jr. of the U.S. Court of Appeals for the Sixth Circuit; 2015–2016 Law Clerk to the Honorable Jimmie V. Reyna of the U.S. Court of Appeals for the Federal Circuit; 2012–2013 Law Clerk to the Honorable Jorge A. Solis of the U.S. District Court for the Northern District of Texas. I earned my J.D., *summa cum laude*, from Texas Wesleyan University and my B.S. from the United States Air Force Academy. I would like to thank the entire staff of the *Oklahoma Law Review*, particularly the top-notch work of Allyson E. Shumaker, Hammons P. Hepner, and Michael F. Waters. I also would like to give a warm shout out to my wife, Amy, for all her support.

1. See *Merchandise*, STRICT SCRUTINY PODCAST, <https://strict-scrutiny-podcast-shop.myshopify.com> (last visited Sept. 1, 2020).

2. See *About*, STRICT SCRUTINY PODCAST, <https://strictscrutinypodcast.com/about/> (last visited Sept. 1, 2020).

3. Richard M. Re, *Is “Stare Decisis . . . for Suckers”?*, PRAWFSBLAWG (Mar. 24, 2020, 8:30 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/03/is-stare-decisis-for-suckers.html>.

4. *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 952 F.3d 591, 603 (5th Cir.) (Smith, J., dissenting) (quoting *June Med. Servs. L.L.C. v. Gee*, 913 F.3d 573, 574 (5th Cir. 2019) (mem.), *rev'd sub nom.* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020)), *vacated and reh'g en banc granted*, 953 F.3d 381 (5th Cir. 2020).

then observed something never before uttered in a publicly available, published opinion: “[S]tare decisis is for suckers.”<sup>5</sup> And, as singer/rapper Lizzo is wont to say, “Truth hurts.”<sup>6</sup> But are there suckers out there with greater importance beyond judges and justices?

The “struggle . . . over the role of stare decisis” is real when parties request that the Supreme Court overrule its own precedent.<sup>7</sup> And with conservatives and progressives “largely talking past each other, the debate is certain to continue, unabated and unresolved” for the foreseeable future.<sup>8</sup> Endemic in this struggle is that the justices, at times, disagree about what standard or considerations (if any) should apply when deciding whether to adhere to stare decisis or overrule caselaw.<sup>9</sup> When the current justices have articulated some of their considerations used to decide whether to overrule decisions, those considerations appear cabined to “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.”<sup>10</sup> Lack of consensus has led some justices to claim in dissent that “it is not enough that five Justices believe a precedent wrong,” and that each overruling “can only cause one to wonder which cases the Court will overrule next.”<sup>11</sup> Although not always appreciated, the public are certainly among those wondering along with the dissenters.

---

5. *Id.*

6. LIZZO, *Truth Hurts*, on CUZ I LOVE YOU (SUPER DELUXE) (Atlantic Records 2019).

7. Stephen Wermiel, *SCOTUS for Law Students: Supreme Court Precedent*, SCOTUSBLOG (Oct. 2, 2019, 9:54 AM), <https://www.scotusblog.com/2019/10/scotus-for-law-students-supreme-court-precedent/>.

8. *Id.*

9. *Compare* *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (“In my view, if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent.”), *with id.* at 1969 (majority opinion) (“[I]n constitutional cases, a departure from precedent ‘demands special justification.’ . . . This means that something more than ‘ambiguous historical evidence’ is required before we will ‘flatly overrule a number of major decisions of this Court.’” (first quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); and then quoting *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987))), *and id.* at 2008 (Gorsuch, J., dissenting) (“And when ‘far-reaching systemic and structural changes’ make an ‘earlier error all the more egregious and harmful,’ *stare decisis* can lose its force.” (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018))).

10. *See* *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citations omitted).

11. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2189, 2190 (2019) (Kagan, J., dissenting) (citation omitted).

The modern conversation about stare decisis, tellingly, is largely jurist-centric, relegating the interests of individuals in established precedent to the discrete category of “reliance.”<sup>12</sup> The hyper-focus on quality of reasoning and jurisprudential workability has led to a philosophical debate red in tooth and claw among the justices and lower-court judges, not least because that level of abstraction resists limits and dulls objectivity.

But if the focus shifted toward the public as the would-be sucker, as opposed to the justices and judges, then a system built to serve the former will orient toward how best to protect them when the latter contemplate whether to overrule cases. This shift recognizes that individuals are the ones who stand to gain or lose the most when judges decide whether stare decisis matters. If judges are no longer the primary suckers who matter, the outsize debate about precedent gravitates away from erudition and correctness. The untrammled lens of stare decisis, sharpened by evidentiary and quantifiable considerations, instead can focus on how people have arranged their affairs and acclimated to a prior decision. In other words, norms overtake theory.

October Term 2019 produced a decision that could serve as a model for a more norms-based, less jurist-centric, approach to stare decisis. The decision considered whether North Carolina could be sued for copyright infringement over its use of materials covering the pirate ship, *Queen Anne’s Revenge*.<sup>13</sup> In *Allen v. Cooper*, the Supreme Court demonstrated how to focus less on the learnedness of past decisions and more on the parties’ ability to provide evidence justifying society’s demand that a past decision be discarded.<sup>14</sup> The Court admitted that Eleventh Amendment

---

12. See *Hyatt*, 139 S. Ct. at 1499.

13. See *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020).

In 1717, the pirate Edward Teach, better known as Blackbeard, captured a French slave ship in the West Indies and renamed her *Queen Anne’s Revenge*. The vessel became his flagship. Carrying some 40 cannons and 300 men, the *Revenge* took many prizes as she sailed around the Caribbean and up the North American coast. But her reign over those seas was short-lived. In 1718, the ship ran aground on a sandbar a mile off Beaufort, North Carolina. Blackbeard and most of his crew escaped without harm. Not so for the *Revenge*. She sank beneath the waters, where she lay undisturbed for nearly 300 years.

*Id.*

14. See *id.* at 1003 (“Allen offers us nothing special at all; he contends only that if the Court were to use a clause-by-clause approach, it would discover that *Florida Prepaid* was wrong (because, he says again, the decision misjudged Congress’s authority under the Intellectual Property Clause).”).

precedents are rooted in reasoning “nowhere explicitly set out in the Constitution.”<sup>15</sup> No big deal. That is so because the Court adjusted its focus from a critique of the past to an inquisition into whether the parties could supply evidence justifying why the current result should differ under analogous facts.<sup>16</sup> In applying an approach tilted away from the justices and their predecessors, the Court accepted and applied the relevant precedents, explained that the parties proffered “nothing special” to deviate from them, and concluded without much trouble that Congress did not properly abrogate state sovereign immunity for lawsuits alleging piracy of copyrighted materials.<sup>17</sup> The decision was civil, without concurring or dissenting aspersions. And it was punctilious to the point where only a sunken pirate ship could make the case lively. Yet the Court’s analysis made it clear that if any sucker was going to walk the plank in failed faith to stare decisis, it was the parties’ burden to nudge them along by showing how society had changed.

This Article argues that the fraught debate about the role of stare decisis cannot depressurize unless and until the focus of its application shifts away from baroque analysis of judicial erudition and towards the ways in which normative expectations of society have adjusted, and continue to adjust, to precedent. The Article proceeds in two parts. It first explains the role of stare decisis in the American legal system. It then observes how *Allen v. Cooper* offers an exemplar in decision-making on the application of stare decisis. The decision demonstrates less concern for judges qua judges, according greater attention instead to how people are impacted by the prospect of overruling a decision. No one wants to be a sucker. Certainly not judges. Nor pirates. To these ends, adjusting the telescopic lens of stare decisis to accentuate norms-based, public concerns avoids consigning litigants and the public writ large to something even worse than being a sucker—an afterthought.

## *II. The Role of Stare Decisis in the American Legal System*

Stare decisis is a malleable concept, not least because it is moored in common-law traditions that resist easy formulation.<sup>18</sup> The justices and

---

15. *Id.* at 1000.

16. *See id.* at 1003.

17. *See id.* at 1003, 1005–07.

18. *See Gamble v. United States*, 139 S. Ct. 1960, 1982–83 (2019) (Thomas, J., concurring).

judges, then, ultimately decide whether stare decisis is a default rule or an exception to the normal operation of deciding cases. This Part discusses the development of stare decisis in the American legal system and then explains its role as applied by the current Supreme Court justices.

*A. The Difficulty in Deciding Whether to Stand by the Past*

The Latin translation of stare decisis is “to stand by things decided.”<sup>19</sup> Stare decisis generally refers to standing by the rules established in prior cases.<sup>20</sup> The doctrine has two general strains: vertical and horizontal stare decisis. Put most simply, decisions from higher courts are binding on lower courts under vertical stare decisis, whereas decisions outside of a court’s hierarchy are viewed as merely persuasive under horizontal stare decisis.<sup>21</sup> Only a higher court’s consideration of its own binding precedent presents the stare decisis difficulty: overrule or follow.<sup>22</sup>

As explained by Professor Stephen Wermiel, the debate in the Supreme Court over whether to overrule precedent is all-consuming when interpreting the Constitution, as opposed to statutes, because “[i]f there is dissatisfaction with the court’s interpretation of a federal law, the logic goes, Congress can amend the law to correct the problem.”<sup>23</sup> “With constitutional interpretation, however, justices feel freer to change course if they believe correction is needed, because the only alternative is amending the Constitution.”<sup>24</sup> The sense of greater latitude to revisit constitutional decisions has contributed to the anxiety that anything and everything could change, constitutionally speaking, as one justice is nominated, confirmed, and replaces another.<sup>25</sup> Justice Byron R. White all but admitted as much

---

19. Wermiel, *supra* note 7 (internal quotation marks omitted).

20. *Id.*

21. Adam Feldman, *Empirical SCOTUS: The Strength of Precedent Is in the Justices’ Actions, Not Words*, SCOTUSBLOG (Nov. 28, 2018, 2:11 PM), <https://www.scotusblog.com/2018/11/empirical-scotus-the-strength-of-precedent-is-in-the-justices-actions-not-words/>.

22. See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1910 (2014) (“Not only do lower courts lack the authority to overrule Supreme Court decisions, but their localized efforts at narrowing also pose much greater risks of creating doctrinal fragmentation.” (footnote omitted)); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994) (“A lower court must *always* follow a higher court’s precedents.”).

23. Wermiel, *supra* note 7.

24. *Id.*

25. See *id.* (“[Justice] Breyer warned that it is ‘dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question.’”).

when he quipped, as each new justice joins the Court, “it’s a different court.”<sup>26</sup> If so, the Court has been an evolution in progress since the eighteenth century.

Sir William Blackstone explained in 1765 that stare decisis “[e]stablished customs” along with “rules and maxims” articulated by judges.<sup>27</sup> Under the common-law tradition, “judicial decisions [were] the principal and most authoritative evidence, that [could] be given, of the existence of such a custom as shall form a part of the common law.”<sup>28</sup> Sir Blackstone admonished that “precedents and rules must be followed, unless flatly absurd or unjust,” because a judge must make decisions “according to the known laws and customs of the land,” and not “according to his private sentiments” or “own private judgment.”<sup>29</sup> Judge-made decisions thus “were seen as principles that had been discovered rather than new laws that were being made.”<sup>30</sup> Writing in *Federalist 78*, Alexander Hamilton also emphasized the important purpose of stare decisis: to “avoid an arbitrary discretion in the courts, it is indispensable” that federal judges “should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>31</sup>

Although rarely discussed explicitly in current cases, there is no reasonable dispute that constitutional interpretation remains a modern-day exercise in discovering meaning through common-law traditions.<sup>32</sup> The Supreme Court made this point clear in the nineteenth century:

It is common sense and not merely the blessing of the Framers that explains this Court’s frequent reminders that: “The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed

---

26. Linda Greenhouse, *Every Justice Creates a New Court*, N.Y. TIMES (May 26, 2009), <https://www.nytimes.com/2009/05/27/opinion/27greenhouse.html>.

27. 1 WILLIAM BLACKSTONE, COMMENTARIES \*68–69.

28. *Id.* at \*69.

29. *Id.* at \*69–70.

30. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 129 (1988).

31. THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

32. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) (“In our constitutional scheme, a federal court generally may not hear a suit brought by any person against a nonconsenting State. That bar is nowhere explicitly set out in the Constitution.”).

in the language of the English common law, and are to be read in the light of its history.”<sup>33</sup>

That is so because the document “nowhere defines the meaning of” many of its words and phrases, suggesting that “it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.”<sup>34</sup> Any denial of federal common law refuses to grapple with, at least, how courts have interpreted—and continue to interpret—the Constitution.<sup>35</sup> The tradition of Sir Blackstone, then, is constitutional interpretation through discovery and reliance on past discoveries to find new ones. Only once “flatly absurd or unjust” does an interpretation become “*not law*.”<sup>36</sup>

The Supreme Court did not address stare decisis in a meaningful way until the mid-nineteenth century. In *Cook v. Moffat*, Justice Robert Cooper Grier plainly paid respect to the jurists who had authored the precedent just twenty years earlier: “But as the questions involved in it have already received the most ample investigation by the most eminent and profound jurists, both of the bar and the bench, it may be well doubted whether further discussion will shed more light, or produce a more satisfactory or unanimous decision.”<sup>37</sup> He concluded that, “at least, as the present case is concerned, the court do[es] not think it necessary or prudent to depart from the safe maxim of *stare decisis*.”<sup>38</sup> The Supreme Court never again described stare decisis as a “safe maxim” in those exact words. Indeed, if stare decisis once offered safety, that virtue appears drowned by later justifications, both for and against, following precedent.

Roughly fifty years later, toward the turn of the twentieth century, judicial attitudes about stare decisis began to change. In a dispute over customs and duties, Justice David Josiah Brewer became one of the first justices to attribute the outcome of a case to a change in the Court’s

---

33. *Colgrove v. Battin*, 413 U.S. 149, 175–76 (1973) (Black, J., dissenting) (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888)).

34. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) (citations omitted).

35. *See Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (explaining that there is “no federal general common law” but “[i]nstead, only limited areas exist in which federal judges may appropriately craft the rule of decision”).

36. BLACKSTONE, *supra* note 27, at \*70.

37. *See Cook v. Moffat*, 46 U.S. (5 How.) 295, 309 (1847).

38. *Id.*



composition: “A change in the personnel of a court should not mean a shift in the law. Stare decisis is the rule, and not the exception.”<sup>39</sup>

Rules and their exceptions, however, can change places. Over 100 years after Justice Brewer’s statement, Justice John Paul Stevens crystalized that underlying sentiment in his forceful dissent to in *Citizens United v. FEC*, a decision that overruled precedent permitting limits on federal campaign expenditures:

Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law. . . . But if [stare decisis] is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine.<sup>40</sup>

He also castigated the majority’s refusal to acknowledge evidence in favor of stare decisis:

Yet the basic shape and trajectory of 20th-century campaign finance reform are clear, and one need not take a naïve or triumphalist view of this history to find it highly relevant. The Court’s skepticism does nothing to mitigate the absurdity of its claim that *Austin* and *McConnell* were outliers. Nor does it alter the fact that five Justices today destroy a longstanding American practice.<sup>41</sup>

Then, as now, Justice Brewer was onto something that grew as the twentieth century progressed.

In 1938, one year after *West Coast Hotel Co. v. Parrish* abrogated the freedom of contract principle announced in *Lochner v. New York*<sup>42</sup> and

---

39. *Hartranft v. Meyer*, 149 U.S. 544, 545, 547 (1893) (Brewer, J., dissenting).

40. 558 U.S. 310, 395, 398, 408 (2010) (Stevens, J., concurring in part and dissenting in part).

41. *Id.* at 434 n.59.

42. *Compare* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (“There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.”), *with* *Lochner v. New York*, 198 U.S. 45, 64 (1905) (“[I]n a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees[,] . . . the freedom of master and employee to contract with each other in

ushered in a new epoch on constitutional views of the Commerce Clause and Fourteenth Amendment, Justice Hugo Lafayette Black dissented in an opinion in which he explained why, notwithstanding stare decisis, he did “not believe the word ‘person’ in the Fourteenth Amendment includes corporations.”<sup>43</sup> His dissent further expounded that “[t]he doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law,” where “[t]his Court has many times changed its interpretations of the Constitution when the conclusion was reached that an improper construction had been adopted.”<sup>44</sup>

Justice Black’s statement seemed to capture what every justice had silently come to understand. He just said the silent part out loud. It echoed, too, Justice Louis D. Brandeis’s remark that “no case is ever finally decided until it is rightly decided.”<sup>45</sup>

And true enough, breaking from stare decisis has produced some of the Supreme Court’s greatest moments. In a case overruling precedent on the government’s ability to compel forced flag saluting, Justice Robert H. Jackson edified that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>46</sup> Yet the difficulty in stare decisis lies in understanding when to exercise the awesome power the public licenses to its servants. For fixed stars can always burn out, and constellations can likewise fade from view depending on where you stand.

Chief Justice Earl Warren’s unanimous decision in *Brown v. Board of Education* (including Justice Black’s vote as a former Klansman<sup>47</sup>) appears to be the first analysis to command a majority in which countervailing

---

relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.”).

43. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

44. *Id.* (internal quotation marks omitted) (footnote omitted) (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring)).

45. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 223 (1952) (“Mr. Justice Brandeis used to say that no case is ever finally decided until it is rightly decided.”).

46. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628–29, 642 (1943).

47. Nicandro Iannacci, *Hugo Black, Unabashed Partisan for the Constitution*, NAT’L CONST. CTR. (Aug. 12, 2019), <https://constitutioncenter.org/blog/hugo-black-unabashed-partisan-for-the-constitution>.

social circumstances overwhelmed *stare decisis*.<sup>48</sup> In overruling the constitutional interpretation that separate-but-equal facilities are consistent with the Fourteenth Amendment's promise of equal protection, the Court's analysis looked not within itself at past decisions, but rather to forward-leaning societal evidence on "the effect of segregation itself on public education":

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>49</sup>

Chief Justice Warren relied on evidence about how the precedents at issue were affecting American life in 1954 and into the foreseeable future:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>50</sup>

---

48. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that segregation negatively affects educational development] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.") (footnote omitted)).

49. *Id.* at 492–93.

50. *Id.* at 493.

And in overruling nearly fifty years of precedents, Chief Justice Warren still gave the justices who decided *Plessy* and its progeny the benefit of the doubt. As opposed to scrutinizing “the quality of the decision’s reasoning,”<sup>51</sup> the Court charitably suggested that modern evidence was not available at the time of those decisions.<sup>52</sup> Instead of dwelling on the past, Chief Justice Warren moved on.

Since the “single greatest moment in Supreme Court history,” at least according to Justice Brett M. Kavanaugh,<sup>53</sup> the Court’s treatment of stare decisis has devolved back to insular inquiries about past insight. *Planned Parenthood v. Casey*<sup>54</sup> stands as a notable exception. There, the Court candidly assessed not the quality of a past decision, but “whether the 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.”<sup>55</sup> It also considered “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>56</sup> Yet, with no precise formulation ever solemnized by the Court as to when to let precedent “stand,” applying stare decisis has proved as elusive and Delphic as when Sir Blackstone wrote about it years before the Constitution was a glimmer in the framers’ eyes.<sup>57</sup> The danger of a doctrine moored in tenets of predictability, ironically, is its unpredictability in application.

---

51. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *see also* *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (“Among these factors are the ‘workability’ of the standard, ‘the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.’” (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009))).

52. *See* *Brown*, 347 U.S. at 494 n.11 (citing modern publications documenting the psychological effects of segregation).

53. Melissa Quinn, *Kavanaugh: Brown v. Board of Education ‘Single Greatest Moment in Supreme Court History’*, WASH. EXAMINER (Sept. 5, 2018, 2:31 PM), <https://www.washingtonexaminer.com/policy/courts/brett-kavanaugh-brown-v-board-of-education-single-greatest-moment-supreme-court-history>; *see also* *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411–12 (2020) (Kavanaugh, J., concurring in part).

54. 505 U.S. 833 (1992).

55. *Id.* at 854.

56. *Id.* at 855.

57. *See* *Wermiel*, *supra* note 7 (“[T]he judges do not appear to agree about what standards should govern the decision whether to overrule a prior case.”).

### *B. Default Rule or Mere Exception*

Any restraint posed by *stare decisis* has abated in recent years. The only consensus to emerge in this area appears to be that no one has been able to provide a satisfactory test, standard, or framework around which judges can coalesce. That is most likely because the doctrine has shrunk to something “purely permissive in nature.”<sup>58</sup>

The numbers bear out a diluted doctrine. Since the ratification of the Constitution on June 21, 1788,<sup>59</sup> the Supreme Court has overruled, implicitly or explicitly, its decisions over 300 times.<sup>60</sup> The last seventy years account for over 200 of those instances.<sup>61</sup> This phenomenon could be explained in two broad strokes. First, the Supreme Court is correcting past decisions with deleterious effects on society. Dean Erwin Chemerinsky has made clear his view that “[t]he Supreme Court has largely failed throughout American history at its most important tasks and at the most important times.”<sup>62</sup> So some measure of cleanup would seem necessary. Another perhaps more cynical view is that, once ensconced, each justice truly acts to create a “different court,” in which the temptation to overrule a disliked decision is far greater than the Framers could have anticipated.<sup>63</sup>

The current justices appear to agree that *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>64</sup> Yet the justices are just as quick to caution that *stare decisis* has never been “an inexorable command,” and it is “at its weakest when we interpret the Constitution.”<sup>65</sup>

All but one of the justices appear to espouse that a departure from precedent demands “‘special justification,’ over and above the belief ‘that

---

58. *See Re, supra* note 3 (suggesting that precedent may no longer have binding force).

59. NCC Staff, *The Day the Constitution Was Ratified*, NAT'L CONST. CTR. (June 21, 2020), <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>.

60. Feldman, *supra* note 21.

61. *See id.*

62. Erwin Chemerinsky, *A Supreme Failure*, POLITICO (Sept. 29, 2014), <https://www.politico.com/magazine/story/2014/09/the-supreme-court-has-failed-111450>.

63. *Cf. Greenhouse, supra* note 26 (“[T]he substitution of one personality for another matters in real life more than it might seem to matter on paper.”).

64. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019).

65. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

the precedent was wrongly decided.’”<sup>66</sup> During October Term 2018, Justice Clarence Thomas made unmistakable his view that the Court “should not follow” “a demonstrably erroneous precedent.”<sup>67</sup> Although he may have articulated similar views in the past, he had never been more emphatic that “[c]onsiderations beyond the correct legal meaning, including reliance, workability, and whether a precedent ‘has become well embedded in national culture,’ . . . are inapposite.”<sup>68</sup> In a separate opinion, Justice Neil M. Gorsuch suggested that “when ‘far-reaching systemic and structural changes’ make an ‘earlier error all the more egregious and harmful,’ *stare decisis* can lose its force.”<sup>69</sup> Yet Justice Gorsuch still seems amenable to referencing considerations beyond demonstrable error when deciding whether to overrule decisions.<sup>70</sup>

Aside from Justice Thomas, the current justices seem at least willing to consider four touchpoints before overruling a decision: “[1] the quality of the decision’s reasoning; [2] its consistency with related decisions; [3] legal developments since the decision; and [4] reliance on the decision.”<sup>71</sup> In April 2020, Justice Kavanaugh suggested a slight refinement of these touchpoints in a solo opinion. Special justifications exist, Justice Kavanaugh argued, when the decision “is egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests.”<sup>72</sup> Around that time, at least five justices also suggested to varying degrees that *stare decisis* is undermined when a decision or rule is tainted with “racist origins.”<sup>73</sup> To the extent there is some consensus on a

---

66. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)); *see also Gamble*, 139 S. Ct. at 1969 (“[A] departure from precedent ‘demands special justification.’”) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

67. *See Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring).

68. *Id.* at 1986 (quoting STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 152 (2010)).

69. *Id.* at 2008 (Gorsuch, J., dissenting) (footnote omitted).

70. *See id.* at 2009 (“[I]f it is clear that a practice is unlawful, individuals’ interest in its discontinuance clearly outweighs any law enforcement ‘entitlement’ to its persistence.”) (footnote omitted).

71. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citations omitted).

72. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1420 (2020) (Kavanaugh, J., concurring in part).

73. *See Leah Litman, Ten Thoughts on Ramos v. LA, TAKE CARE* (Apr. 20, 2020), <https://takecareblog.com/blog/ten-thoughts-on-ramos-v-la> (“The majority and separate writings by Justice Sotomayor and Justice Kavanaugh emphasize the racist origins of Louisiana’s non-unanimous jury rule.”).

framework or standard, actual *application* bedevils any cohesion and betrays a court “in crisis.”<sup>74</sup>

Surveying these and other recent cases, Professor Re suggests that stare decisis is best understood as “thinking about precedent as a permission, not a constraint.”<sup>75</sup> He argues that “maybe precedent’s applicability does or should function not as a mandate to rule in a particular way, but rather as reassurance that a particular approach is lawful.”<sup>76</sup> Although Professor Re portrays stare decisis as “for everyone,” his justification for stare decisis could not be more jurist-centric.<sup>77</sup> He offers two reasons as to why precedent should be viewed less as a “mandate” and more as providing “reassurance” that a past approach was correct.<sup>78</sup> First, “precedent works as a *shortcut* by helping judges and justices decide cases quickly and lawfully by telling them that it is allowable to follow the path laid by past rulings.”<sup>79</sup> Second, “precedent operates as a *shield* by encouraging judges who have been critical of precedent to put aside their past views (whether publicly expressed or not) and start respecting stare decisis.”<sup>80</sup> Put differently, stare decisis is an optional judicial aid in decision-making that should promote reassurance.

Yet for a doctrine moored in predictability and stability, its cornerstones are crumbling apace. About 71% of the decisions overruling precedent under Chief Justice John G. Roberts Jr. are 5-4.<sup>81</sup> This record contrasts with his immediate predecessor, William H. Rehnquist, whose tenure as chief justice oversaw only 31% of overrulings cast in 5-4 votes.<sup>82</sup> Perhaps this collision of unyielding positions helps explain why more than half of Americans believe that the justices are unable to set aside their personal and

---

74. Linda Greenhouse, *A Precedent Overturned Reveals a Supreme Court in Crisis*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/opinion/supreme-court-precedent.html>.

75. Re, *supra* note 3.

76. *Id.*

77. *See id.*

78. *See id.*

79. *Id.*

80. *Id.*

81. Ian Millhiser, *The Supreme Court Handed Down a Unanimous Decision that Bodes Ill for the Future of Civil Rights*, VOX (Mar. 25, 2020), <https://www.vox.com/2020/3/25/21192320/supreme-court-comcast-decision-civil-rights-mixed-motive-lawsuits>.

82. *Id.*

political views when deciding constitutional cases.<sup>83</sup> It is as if two sides have ossified, “largely talking past each other.”<sup>84</sup>

This perception is shaped not just by numbers, but also rhetoric. For example, in a decision overruling a forty-year-old case about whether a state can require payment of agency fees to assist public-sector unions, the majority stressed in 2018 that the past decision “was poorly reasoned,”<sup>85</sup> its rule was “impossible to draw with precision,”<sup>86</sup> the “ascendance of public-sector unions has been marked by a parallel increase in public spending,”<sup>87</sup> and “reliance does not carry decisive weight.”<sup>88</sup> The dissent claimed that this overruling “will have large-scale consequences,” not least because, “[a]cross the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.”<sup>89</sup> The dissent also accused the majority of “bursting with pride over what it has accomplished”<sup>90</sup> by “weaponizing the First Amendment”<sup>91</sup> to overrule precedent with no justification beyond that “it never liked the decision”<sup>92</sup> and “because it wanted to.”<sup>93</sup>

The following year, Justice Stephen G. Breyer, dissenting for himself and three others, explained the difficulty that the justices face when weighing the application of stare decisis. He made manifest that, while a course-correction temptation is ever present, stability matters:

And I understand that, because opportunities to correct old errors are rare, judges may be tempted to seize every opportunity to overrule cases they believe to have been wrongly decided. But the law can retain the necessary stability only if this Court resists

---

83. See Kalvis Golde, *Recent Polls Show Confidence in Supreme Court, with Caveats*, SCOTUSBLOG (Oct. 22, 2019, 10:03 AM), <https://www.scotusblog.com/2019/10/recent-polls-show-confidence-in-supreme-court-with-caveats/> [hereinafter Golde, *Confidence with Caveats*].

84. Wermiel, *supra* note 7.

85. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479, 2486 (2018).

86. *Id.* at 2481.

87. *Id.* at 2483.

88. *Id.* at 2484.

89. *Id.* at 2487 (Kagan, J., dissenting).

90. *Id.* at 2501.

91. *Id.*

92. *Id.*

93. *Id.*



that temptation, overruling prior precedent only when the circumstances demand it.<sup>94</sup>

And similar to Justice Brewer in 1893 and Justice Stevens in 2010, Justice Breyer said the silent part out loud: “Today’s decision can only cause one to wonder which cases the Court will overrule next.”<sup>95</sup> One month later, and after another 5-4 overruling, Justice Elena Kagan reiterated the same concern: “Well, that didn’t take long. Now one may wonder yet again.”<sup>96</sup>

Around this time, the legal podcast *Strict Scrutiny* adopted the moniker, “Stare decisis is for suckers.”<sup>97</sup> Perhaps sensing the zeitgeist of the legal moment, Fifth Circuit Judge Jerry Smith accused fellow panel members in March 2020 of “rely[ing] on strength in numbers rather than sound legal principles in order to reach their desired result” in a politically charged appeal that questioned the constitutionality of the Consumer Financial Protection Bureau’s structure.<sup>98</sup> His dissent then suggested something never before expressed in a published opinion by a federal court: “[S]tare decisis is for suckers.”<sup>99</sup>

Many spectators believe that this “trend is likely to accelerate” for three reasons: historic reversal rates, lack of restraint among jurists when questioning the motives of their colleagues, and the appointment of “staunchly conservative Justice Brett Kavanaugh” to replace “the relatively moderate conservative Justice Anthony Kennedy.”<sup>100</sup> These circumstances have caused the progressive justices to stomach, on stare decisis grounds, precedent that they may not prefer because “they fear their conservative colleagues plan to overrule many seminal decisions in the future.”<sup>101</sup> In other words, without five votes, the only offense for progressives is a good defense.

---

94. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

95. *Id.*

96. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

97. See *Merchandise*, STRICT SCRUTINY PODCAST, <https://strict-scrutiny-podcast-shop.myshopify.com> (last visited Sept. 1, 2020).

98. *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 952 F.3d 591, 603 (5th Cir.) (Smith, J., dissenting) (quoting *June Med. Servs. L.L.C. v. Gee*, 913 F.3d 573, 574 (5th Cir. 2019) (mem.), *rev'd sub nom.* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020)), *vacated and reh'g en banc granted*, 953 F.3d 381 (5th Cir. 2020).

99. See *id.*

100. See Millhisser, *supra* note 81.

101. *Id.*

Bolstered with numbers, inexorable pressure exists for conservatives to press their advantage.<sup>102</sup> For example, Professor Adrian Vermeule advocated, in the middle of a pandemic, that in a world where “in recent years, legal conservatism has won the upper hand in the Court and then in the judiciary generally” conservative justices and judges should turn away from originalist precepts and seize their opportunity to instantiate “a substantive moral constitutionalism.”<sup>103</sup> Several maxims would dominate under this conservative theory of “common-good constitutionalism”:

[R]espect for the authority of rule and of rulers; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers’ unions, trade associations, and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to “legislate morality”—indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority.<sup>104</sup>

As a result, says the Harvard law professor, the government should, and possibly must, “judge the quality and moral worth of public speech,” reject an individual’s right “to define one’s own concept of existence,” enforce “duties of community and solidarity in the use and distribution of resources,” and deny “the selfish claims of individuals to private rights.”<sup>105</sup> All is necessary, according to Professor Vermeule, “to ensure that the ruler has the power needed to rule well.”<sup>106</sup> Perceived power, in its barest form based on counting judicial votes, animates this “ambitious project, one that abandons the defensive crouch of originalism and that refuses any longer to play within the terms set by legal liberalism.”<sup>107</sup> Professor Vermeule’s

---

102. See Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/>.

103. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

104. *Id.*

105. *See id.* (internal quotation marks omitted).

106. *Id.*

107. *Id.*

assessment of the status of the American legal system—and its potential—is astonishingly and breathtakingly honest.

Whatever one might think about a progressive vision of the Constitution or the conservative legal project more generally, the fact that the Court is overruling with greater frequency and less consensus is worse than problematic. The Court's current application of *stare decisis*—largely through hindsight about the quality of decision-making—is difficult to explain in a consistent way without betraying the cynical view that constitutional law is nothing more than politics disguised in black robes. It leads scholars like Professor Garrett Epps to suggest that certain justices are acting out of hubris, not least because the “‘I know best about everything’ attitude is excusable (though annoying) in a law professor, whose views cut no real-world ice with anyone, but they ill-become a judge.”<sup>108</sup> “The claim of authority” to second-guess all precedents, Professor Epps continues, “is outlandish, and verges on the delusional.”<sup>109</sup> For even Justice Antonin Gregory Scalia would admit some restraint is necessary: “I am an originalist, but I am not a nut.”<sup>110</sup> These sentiments harken back to the bygone era of Justice Jackson when he said in 1949, in a different time but not entirely different circumstances: “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”<sup>111</sup>

Perhaps to provide some stability and doctrinal guardrails, Professor Michael Gerhardt, “an authority on Supreme Court uses of precedent,” has attempted to define certain decisions that are off limits to reconsideration:

Super precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions (often but not always in more than one area of constitutional law). Super precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time. Super precedents are deeply embedded into our law and lives through the subsequent activities of the other branches. Super precedents seep into the

---

108. See Garrett Epps, *Clarence Thomas Is in the Wrong Line of Work*, ATLANTIC (Mar. 7, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/clarence-thomas-thinks-he-knows-best/584263/>.

109. *Id.*

110. *Id.*

111. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

public consciousness, and become a fixture of the legal framework.<sup>112</sup>

Professors Robert Post and Reva Siegel posit a similarly normative approach in which “constitutional interpretations are truly and finally settled only when the people accept their wisdom, not simply when the Supreme Court speaks.”<sup>113</sup>

Public confidence and trust are the rally points for our “least dangerous” branch of government.<sup>114</sup> And to build back what, to some, has been lost requires recalibrating stare decisis from an almost pure question of “the preferences of five justices for overturning settled doctrine” to how much citizens have empirically relied on, oriented their lives to, and continued to acclimate to a decision.<sup>115</sup>

When the justices extoll stare decisis as “promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process,”<sup>116</sup> it is worth asking to whose benefit are those virtues directed? The obvious answer, which no judge would gainsay, is that these virtues benefit society and the public to whom they are servants. And the legal system is built for judges to serve the people. The stare decisis difficulty, then, should be resolved based upon how those people cope with and arrange their lives around decisions penned by a historical majority upholding its good-faith oath to the Constitution. It is not that the quality of past decision-making does not matter. It is just not the most relevant question to ask.

The stare decisis difficulty can be solved by norms—not theory. Traditional methods of reviewing a past decision for erudition, quality of reasoning, and consistency should, of course, play a role in deciding whether a decision was and is correct. Those touchpoints also can figure

---

112. Epps, *supra* note 108 (quoting University of North Carolina law professor Michael Gerhardt).

113. Robert Post & Reva Siegel, *Democratic Constitutionalism*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Sept. 5, 2020).

114. See Joshua D. Hawley, *The Most Dangerous Branch*, NAT. AFFAIRS, <https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch> (last visited Sept. 5, 2020) (quoting Alexander Hamilton).

115. Wermiel, *supra* note 7.

116. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

into whether a decision needs to be overruled. But those jurist-centric, largely value-laden calls should not supplant how people handle precedent. Confidence and trust benefit the American legal system writ large when judges care most about what the evidence says about the facts on the ground now and later.

This is not a new concept. In 1908, then-attorney Louis D. Brandeis pioneered what is now known as the “Brandeis Brief,” where he defended the constitutionality of certain Oregonian labor laws by presenting “a barrage of social scientific evidence to show the relationship between long hours, worker health, and public welfare.”<sup>117</sup> And it worked: the Supreme Court upheld the constitutionality of the labor laws just three years removed from *Lochner*, which had struck down similar laws as violating certain constitutional liberty interests.<sup>118</sup> The effect of a constitutional decision on the public, all told, should perform the heavy lifting when considering stare decisis. What is right, or what is wrong, is less salient, especially when case outcomes turn on only slight majorities.

To envision how a case would look in which judges care less about their predecessors might seem difficult at first blush. Yet October Term 2019 offers such an example. And perhaps most fittingly, it was a case about a sunken pirate ship and salvaging its wreckage, so everyone can learn from and enjoy it.

### *III. Salvaging an Approach to the Stare Decisis Difficulty*

The difficulty judges face when fighting the impulse to overrule disfavored decisions can be tamed. That can happen if stare decisis is viewed through the lens of how society has adapted to the good-faith efforts of those in the past to distill meaning from the “majestic generalities and ambiguities of”<sup>119</sup> phrases written in the late 1700s. It is therefore ironic that a dispute over a 300-year-old sunken pirate ship materialized into a civil discussion, which could serve as a model for deciding when to overrule precedent. This Part discusses the development of state sovereign

---

117. Nicholas Mosvick, *On This Day, the Supreme Court Upholds Limits on Women and Factory Work Hours*, NAT'L CONST. CTR. (Feb. 24, 2020), <https://constitutioncenter.org/blog/on-this-day-the-supreme-court-upholds-limits-on-women-and-factory-work-hours>.

118. *See id.*

119. *See* Randy Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution*, ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> (quoting Vermeule, *supra* note 103).

immunity, details how a case about a sunken pirate ship was able to dock at the Supreme Court, and explains how the Court's decision can serve as an archetypical guide to a more norms-based approach to stare decisis.

*A. A Sunken Ship and Buried Precedents*

A case from North Carolina brought together copyrights, patents, bankruptcy, sovereign immunity, pirates, and (of course) stare decisis. Edward Teach, better known as Blackbeard, captured a French slave ship in the West Indies in 1717 and renamed her *Queen Anne's Revenge*.<sup>120</sup> Boasting roughly forty cannons and a crew of around 300 sailors, *Queen Anne's Revenge* became Blackbeard's flagship for pirate-related exploits along the Caribbean and North American coast.<sup>121</sup> But just one year later, her reign over the seas ended when she ran aground on a sandbar about one mile off the coast of Beaufort, North Carolina.<sup>122</sup> Although Blackbeard and most of his crew survived, the ship sank and lay dormant for nearly three centuries.<sup>123</sup> Yet during those 300 years, while the wreckage awaited discovery, legal developments occurred apace, some of which would ultimately decide the fate of Blackbeard's ship.

Ratified in 1788, sixty years after *Queen Anne's Revenge* submerged, Article I of the Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>124</sup> Five years later, in *Chisholm v. Georgia*, the Supreme Court concluded that individuals could sue states in federal court because “[w]hen a state, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.”<sup>125</sup> Just one year after the Supreme Court handed down *Chisholm*, the states responded by ratifying the Eleventh Amendment to the Constitution, which explicitly superseded parts of *Chisholm*, providing that the “Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State.”<sup>126</sup> Although

---

120. *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020).

121. *Id.*

122. *Id.*

123. *Id.*

124. U.S. CONST. art. I, § 8, cl. 8.

125. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 452, 463 (1793).

126. U.S. CONST. amend. XI.

non-textual,<sup>127</sup> the “Court has interpreted [the Eleventh Amendment] to grant states and state agencies broad immunity from private suit by private individuals, for any remedy, in any court, for violations of federal law.”<sup>128</sup>

Following the Civil War, the states ratified the Fourteenth Amendment, which provides under Section 1 that no state can “deprive any person of life, liberty, or property, without due process of law,”<sup>129</sup> and under Section 5 that “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”<sup>130</sup> And in a similarly non-textual approach, appropriate legislation under Section 5 enforcing the substantive provisions of the Fourteenth Amendment “must create a statutory right that is ‘congruent and proportional’ to the constitutional right Congress seeks to enforce or vindicate.”<sup>131</sup>

Toward the end of the twentieth century, and against the backdrop of these constitutional powers, Congress passed the Copyright Remedy Clarification Act of 1990 (CRCA), providing that a State “shall not be immune, under the Eleventh Amendment . . . or any other doctrine of sovereign immunity, from suit in Federal court” for copyright infringement,<sup>132</sup> and that a state will be liable, and subject to remedies, “to the same extent as” a private party.<sup>133</sup> The CRCA served as “the model for the Patent and Plant Variety Protection Clarification Act (Patent Remedy Act),” which became law two years later and denied state sovereign immunity to allegations of patent infringement in a similar manner.<sup>134</sup>

Around the time *Queen Anne’s Revenge* awoke from her 300-year slumber, the Supreme Court heard three cases with portents bearing on the ship. In 1996, in *Seminole Tribe of Florida v. Florida*, the Court concluded that Congress could not abrogate sovereign immunity through the exercise

---

127. See *Allen*, 140 S. Ct. at 1000 (“In our constitutional scheme, a federal court generally may not hear a suit brought by any person against a nonconsenting State. That bar is nowhere explicitly set out in the Constitution.”).

128. Howard M. Wasserman, *Aaarrgument Preview: Copyright and Sovereign Immunity in Davy Jones’ Locker*, SCOTUSBLOG (Oct. 29, 2019, 1:00 PM), <https://www.scotusblog.com/2019/10/aaarrgument-preview-copyright-and-sovereign-immunity-in-davy-jones-locker/> [hereinafter Wasserman, *Aaarrgument Preview*].

129. U.S. CONST. amend. XIV, § 1.

130. U.S. CONST. amend. XIV, § 5.

131. Wasserman, *Aaarrgument Preview*, *supra* note 128.

132. 17 U.S.C. § 511(a) (2018).

133. *Id.* § 511(b).

134. *Allen v. Cooper*, 140 S. Ct. 994, 999 n.1 (2020).

of its powers under the Indian Commerce Clause.<sup>135</sup> The decision planted some cardinal guideposts to help determine whether Congress may permissibly pass laws holding states liable. Writing for a 5-4 majority overruling certain precedents on congressional power, Chief Justice Rehnquist observed that “the States’ immunity from suit must be obvious from ‘a clear legislative statement.’”<sup>136</sup> He then sweepingly declared that “Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”<sup>137</sup> Justices Breyer and Ruth Bader Ginsburg joined a dissent written by Justice David H. Souter, arguing that Congress may abrogate state sovereign immunity consistent with Article I and the Eleventh Amendment when the lawsuit invokes a federal interest between a state and one of its citizens.<sup>138</sup>

Three years later, in another 5-4 decision by Chief Justice Rehnquist, the Court concluded in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* that Congress did not abrogate sovereign immunity through the Patent Remedies Act, not just because “Congress may not abrogate state sovereign immunity pursuant to its Article I powers,”<sup>139</sup> but also because the statutory rights created under the Patent Remedies Act were not congruent and proportional to the constitutional right not to be deprived of property without due process.<sup>140</sup> Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer, maintaining that “[i]t is quite unfair for the Court to strike down Congress’ Act based on an absence of findings supporting a requirement this Court had not yet articulated.”<sup>141</sup> Justice Stevens also criticized the merits of the 5-4 decision, which he claimed “threaten[ed] to read Congress’ power to pass prophylactic legislation out of § 5 altogether.”<sup>142</sup>

---

135. 517 U.S. 44, 47 (1996).

136. *Id.* at 55 (citation omitted).

137. *Id.* at 73.

138. *See id.* at 184–85 (Souter, J., dissenting) (asserting that sovereign immunity should function differently in the context of cases in federal court by way of federal-question jurisdiction).

139. 527 U.S. 627, 636, 647–48 (1999) (“These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*.”).

140. *See id.* at 647 (“The Patent Remedy Act’s indiscriminate scope offends this principle [of proportionality and congruence], and is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy.”).

141. *Id.* at 654 (Stevens, J., dissenting).

142. *Id.*



Clinching a relevant trilogy on state sovereign immunity, the Court handed down *Central Virginia Community College v. Katz* in 2006, representing yet another 5-4 decision.<sup>143</sup> This time, however, Justice Stevens wrote for the majority, holding that Congress could subject states to suit under laws enacted under Article I's Bankruptcy Clause.<sup>144</sup> To recalibrate the sweeping language of *Seminole Tribe* and *Florida Prepaid* that nothing in Article I could provide a congressional source of power to suspend state sovereign immunity, Justice Stevens clarified that "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."<sup>145</sup> Justice Thomas argued for the dissenters that "nothing in Article I of the Constitution establishes" the power of Congress to abrogate state sovereign immunity, which "the Court today casts aside . . . to hold that the States are subject to suit by a rather unlikely class of individuals—bankruptcy trustees seeking recovery of preferential transfers for a bankrupt debtor's estate."<sup>146</sup>

State sovereign immunity, although of suspect origin in the constitutional text, continued to swell in its usage as a defense from suit brought by private individuals until *Katz*.<sup>147</sup> The question after *Katz* was whether the decision signaled a retreat from, and possible jettison of, precedents.

#### *B. The Rediscovery of Both a Pirate Ship and State Sovereign Immunity*

Returning to Blackbeard: just as the Supreme Court began handing down decisions more fully interpreting and explaining the contours of state sovereign immunity, Intersal Inc., a Palm Bay, Florida, salvage and research company, discovered the wreckage of *Queen Anne's Revenge* in 1996, the same year the Court issued *Seminole Tribe*.<sup>148</sup> Under established federal and state law, the wreck belongs to North Carolina.<sup>149</sup> Intersal

---

143. 546 U.S. 356 (2006).

144. *See id.* at 359, 379.

145. *Id.* at 363 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821)).

146. *Id.* at 379 (Thomas, J., dissenting).

147. *See* Michael C. Dorf, *Supreme Court Gives States the Green Light to Infringe Copyrights*, VERDICT JUSTIA (Mar. 30, 2020), <https://verdict.justia.com/2020/03/30/supreme-court-gives-states-the-green-light-to-infringe-copyrights> (explaining the high bar Congress must meet to abrogate state sovereign immunity).

148. Jess Bravin, *Yo Ho Ho: Justices Ponder Rights to Blackbeard Ship-Salvage Images*, WALL ST. J. (Nov. 5, 2019, 5:13 PM ET), <https://www.wsj.com/articles/yo-ho-ho-justices-ponders-rights-to-blackbeard-ship-salvage-images-11572992004>.

149. *See* 43 U.S.C. § 2105(c) (2018) ("[T]he title . . . to any abandoned shipwreck . . . is transferred to the State in or on whose submerged lands the shipwreck is located."); N.C.

agreed to salvage the vessel, acknowledging North Carolina's ownership of the ship, while receiving the right to keep any proceeds from documentary video and photography.<sup>150</sup> In 1998, one year before the Court decided *Florida Prepaid*, Intersal engaged Fayetteville, North Carolina-based videographer Fredrick Allen and his company, Nautilus Productions LLC, to produce videos and photos of the wreck.<sup>151</sup> The parties agreed that North Carolina could "publish accounts and other research documents relating to the artifacts, site area, and project operations for noncommercial educational or historical purposes."<sup>152</sup> For over a decade, during which the Court completed its precedential trilogy with *Katz*, Allen created videos and photos of efforts to salvage guns, anchors, and other remains from the wreckage.<sup>153</sup> And he registered copyrights in those works.<sup>154</sup>

After North Carolina began to publish some of his videos and photos, Allen initially protested in 2013 that the state was exceeding the agreement and infringing his copyrights.<sup>155</sup> Nautilus and the state agreed to settle the dispute, with the state paying \$15,000, taking down its infringing uses, promising not to use the material in the future, and marking any of Allen's material with a time stamp and watermark.<sup>156</sup> The *détente* was short-lived.

Allen complained shortly after the settlement that North Carolina had "impermissibly posted five more of his videos online and used one of his photos in a newsletter."<sup>157</sup> And when Allen and Nautilus demanded that the state take the new material down, the state responded by enacting "Blackbeard's Law," which designated as a public record all photographs, video recordings, and other documentary materials of shipwrecks, all while voiding any previous settlement agreement on wreckage materials.<sup>158</sup> With that, a lawsuit 300 years in the making came to fruition.

In 2015, Allen and Nautilus sued North Carolina and its various officials in the U.S. District Court for the Eastern District of North Carolina.<sup>159</sup> The

---

GEN. STAT. § 121–122 (1967) (“[T]he title to all shipwrecks . . . which have remained unclaimed . . . is hereby declared to be in the State of North Carolina . . .”).

150. See *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020).

151. Wasserman, *Aaarrgument Preview*, *supra* note 128.

152. Bravin, *supra* note 148.

153. *Allen*, 140 S. Ct. at 999.

154. *Id.*

155. *Id.*

156. Wasserman, *Aaarrgument Preview*, *supra* note 128.

157. *Allen*, 140 S. Ct. at 999; see also Bravin, *supra* note 148.

158. See Bravin, *supra* note 148.

159. Wasserman, *Aaarrgument Preview*, *supra* note 128.

state then moved to dismiss certain claims on the basis of sovereign immunity under the Eleventh Amendment.<sup>160</sup> In an extraordinarily candid decision handed down in March 2017, District Judge Terrence W. Boyle refused to dismiss the copyright claims, not least because “[i]n this particular case Congress has clearly abrogated state immunity in cases arising under the CRCA, and such an abrogation is congruent and proportional to a clear pattern of abuse by the states.”<sup>161</sup>

In permitting copyright claims to progress in litigation, Judge Boyle explained that Supreme Court precedents interpreting the Eleventh Amendment are “flawed and contrary to the fundamental nature and meaning of the Constitution,”<sup>162</sup> for “[t]he doctrine of state sovereign immunity to federal law in federal court has frustrated the essential function of the federal courts to ensure the uniform interpretation and enforcement of the supreme law of the land.”<sup>163</sup> He described how the doctrine (1) “frustrates the ability of individuals to receive what may be the only practical remedy available to them as plaintiffs”; (2) “does not enhance constitutional protections or advance the ideals of our constitutional form of government in which the people are sovereign”; and (3) “has strangely turned our federal form of government and the Supremacy Clause on its head by leaving states free to resist at their pleasure that federal law which we claim is the supreme law of the land.”<sup>164</sup> Judge Boyle concluded by impugning “the soundness of such a doctrine being imported to words that, on their very face and plain meaning, do not extend so broadly,” while “call[ing] for the higher courts to reconsider this doctrine” because he “is constrained, under the absolute hierarchical system of courts in the federal judiciary, to hold that the defense of sovereign immunity is available to the states in federal court.”<sup>165</sup>

On appeal, Circuit Judge Paul Victor Niemeyer reversed on the issue of state sovereign immunity in July 2018, concluding that the claims against North Carolina and its officials must be dismissed.<sup>166</sup> The Fourth Circuit’s analysis was succinct: *Florida Prepaid* controls the outcome, Congress did

---

160. *Allen v. Cooper*, 244 F. Supp. 3d 525, 531 (E.D.N.C. 2017).

161. *See id.* at 540.

162. *Id.* at 535.

163. *Id.* at 538.

164. *Id.*

165. *Id.* at 540.

166. *Allen v. Cooper*, 895 F.3d 337, 343 (4th Cir. 2018).

not “validly abrogate Eleventh Amendment immunity,” and the sovereign-immunity provision under the CRCA is invalid as a result.<sup>167</sup>

Allen filed a petition for review in the Supreme Court presenting this question: “Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act in providing remedies for authors of original expression whose federal copyrights are infringed by states.”<sup>168</sup> The Supreme granted certiorari a few months later.<sup>169</sup>

The merits-stage briefing offered differing takes on what the precedential trilogy meant.<sup>170</sup> Allen argued that Congress properly abrogated state sovereign immunity under both Article I and Section 5 of the Fourteenth Amendment because *Katz* overruled the dicta in *Seminole Tribe* upon which *Florida Prepaid* relied.<sup>171</sup> *Katz* established a clause-by-clause analysis, Allen asserted, which clarified that the text of Article I gives Congress exclusive power over copyrights and that state encroachment in this area would be “repugnant” to that power.<sup>172</sup> In support of Congress’s authority under Section 5, Allen maintained that the CRCA is congruent and proportional to the constitutional protections against both deprivation of property without due process and uncompensated takings of property, not least because Congress “compiled a robust legislative record, showing a pattern of copyright infringement by states and the absence of any satisfactory remedy” other than state-law damages actions.<sup>173</sup> North Carolina responded by arguing that *Florida Prepaid* should control the outcome and that *Katz*—rather than overruling *Florida Prepaid sub silentio*—“rested on the unique features of bankruptcy.”<sup>174</sup>

The vast majority of amicus briefs favored Allen’s position, including those submitted by the U.S. Chamber of Commerce, Copyright Alliance, and Dow Jones & Company.<sup>175</sup> Beyond formal filings, Professor Adam Mossoff’s commentary in the *Wall Street Journal* asserted that the original meanings of Article I and the Eleventh Amendment suggest that states

---

167. *Id.* at 354.

168. Aurora Barnes, *Petitions of the Week*, SCOTUSBLOG (Mar. 1, 2019, 9:39 AM), <https://www.scotusblog.com/2019/03/petitions-of-the-week-33/>.

169. *Allen v. Cooper*, 139 S. Ct. 2664, 2665 (2019) (mem.).

170. See Wasserman, *Aarrgument Preview*, *supra* note 128.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Allen v. Cooper*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/allen-v-cooper/> (last visited Sept. 5, 2020).

cannot plunder property with impunity.<sup>176</sup> In support of North Carolina, the Association of Public and Land-Grant Universities and the Association of American Universities offered a perspective not covered in the other briefs. “Preserving state sovereign immunity helps protect [the] strong public purpose of state universities,” the associations argued.<sup>177</sup> “The unlawful abrogation of state sovereign immunity,” they continued, “will cause state universities to face numerous meritless copyright-infringement suits for damages.”<sup>178</sup>

When the Supreme Court heard the case in November 2019, Professor Howard Wasserman suggested that some of the justices seemed skeptical of blatant attempts by states to pirate copyrighted material in reliance on their sovereign immunity.<sup>179</sup> Derek Shaffer, the attorney representing Allen and Nautilus, fielded questions from Justices Ginsburg, Samuel A. Alito Jr., Kagan, and Kavanaugh about *Florida Prepaid* and whether that precedent controls the outcome.<sup>180</sup> In an exchange with Justice Sonia M. Sotomayor, Shaffer argued that it would be “‘antithetical’ to say that any government can infringe the rights Congress has secured.”<sup>181</sup> After Justices Alito and Kagan asked why a congressional record of sixteen documented instances of copyright infringement were enough when eight instances of patent

---

176. Adam Mossoff, *Stop the States' Copyright Plunder*, WALL ST. J. (Nov. 4, 2019, 6:11 PM ET), <https://www.wsj.com/articles/stop-the-states-copyright-plunder-11572909070?shareToken=st3d1d0fb9cb0649beb30efa4903b9cce7> (“Founders intended that states be bound by the same copyright laws as individuals and private organizations, and Congress recognized the problem of state copyright piracy and enacted the Copyright Remedy Clarification Act of 1990 to abrogate state sovereign immunity and allow claims such as Mr. Allen’s.”).

177. Mark Walsh, *U.S. Supreme Court Rules on Race-Bias in Contracting, Copyright Immunity*, EDUC. WK. (Mar. 23, 2020, 5:05 PM), [http://blogs.edweek.org/edweek/school\\_law/2020/03/supreme\\_court\\_issues\\_rac.html](http://blogs.edweek.org/edweek/school_law/2020/03/supreme_court_issues_rac.html).

178. *Id.*

179. See Howard M. Wasserman, *Argument Analysis: Justices Pillage State Arguments for Sovereign Immunity for Copyright Infringement*, SCOTUSBLOG (Nov. 6, 2019, 11:20 AM), <https://www.scotusblog.com/2019/11/argument-recap-justices-pillage-state-arguments-for-sovereign-immunity-for-copyright-infringement/> (“[Justice Brett] Kavanaugh and Justice Stephen Breyer questioned Park about the possibility of multiple, rampant state uses of copyrights for which the authors receive nothing. . . . [Justice] Ginsburg suggested that there is ‘something unseemly’ about a state’s being able to hold copyrights and sue for infringement of their copyrights but also to say, ‘we can infringe to our heart’s content and be immune from any compensatory damages.’”) [hereinafter Wasserman, *Argument Analysis*].

180. *Id.*

181. *Id.*

infringement did not create a sufficient record in *Florida Prepaid*, Shaffer responded, “the reality is Congress saw the tip of the iceberg of this problem.”<sup>182</sup> Justice Kagan pressed further about the difference between *Florida Prepaid* and this case: “Now what’s the difference between the two—other than eight” documented instances of infringement.<sup>183</sup> Shaffer attempted to mollify that point by observing that “patent infringement could be innocent,” whereas copyright infringement involves some measure of intentionality.<sup>184</sup>

North Carolina Deputy Solicitor General Ryan Park received difficult questioning about the state’s brazen appropriation of copyrighted works.<sup>185</sup> Justice Ginsburg commented that this case “sounds pretty intentional to me,” and that there is “‘something unseemly’ about a state’s being able to hold copyrights and sue for infringement” but also maintain that it “can infringe to [its] heart’s content and be immune from any compensatory damages.”<sup>186</sup> Justice Breyer questioned whether a state could create its own online streaming service by “charging \$5 or something to run ‘Rocky,’ ‘[Captain] Marvel,’ ‘Spider-Man’ and perhaps ‘Groundhog Day,’” all of which would result in “[s]everal billion dollars flow[ing] into the treasury.”<sup>187</sup> “Now, if you win,” he pressed Park, “why won’t that happen?”<sup>188</sup> Justice Sotomayor likewise reflected on how she found Blackbeard’s Law “deeply troubling,” but also wondered what could be done after *Florida Prepaid*.<sup>189</sup> Toward the end of the argument, Justice Breyer posed a hypothetical about the prospect of “the University of California making 50,000 unauthorized copies of a Norman Mailer book available to students.”<sup>190</sup> He expressed concern about “the risk of unfairness to authors and inventors alike,” lamenting that Congress “could perhaps try again to abrogate state immunity in a way that passes constitutional muster.”<sup>191</sup>

Although the import of *Florida Prepaid* dominated the argument, many predicted that Allen would prevail. Writing for *USA Today*, Richard Wolf

---

182. Bravin, *supra* note 148 (internal quotation marks omitted).

183. *Id.* (internal quotation marks omitted).

184. See Wasserman, *Argument Analysis*, *supra* note 179.

185. *See id.*

186. *Id.*

187. Bravin, *supra* note 148 (internal quotation marks omitted).

188. *Id.* (internal quotation marks omitted).

189. *Id.* (internal quotation marks omitted).

190. Walsh, *supra* note 177 (internal quotation marks omitted).

191. *Id.*

seemed confident that “[t]he Supreme Court appeared likely Tuesday to rule that North Carolina’s display of a 300-year-old pirate ship’s salvage operation amounts to piracy.”<sup>192</sup> So too did Professor Wasserman.<sup>193</sup> But a lot changed in the world between November 2019 and March 2020.

*C. What Copyright Pirates of Pirate Copyrights Can Teach About Respect for Precedent*

The Supreme Court released its decision in *Allen v. Cooper* on March 23, 2020, affirming the Fourth Circuit and concluding that Congress did not properly abrogate state sovereign immunity when it passed the CRCA.<sup>194</sup> On that day, in a major departure from its normal practice due to COVID-19 concerns, the justices issued four opinions without taking the bench.<sup>195</sup> The public learned of the decisions released that day by checking the postings on the Court’s website.<sup>196</sup> The Court posted its first decision at 10:00 a.m.<sup>197</sup> and its decision in *Allen v. Cooper* roughly five minutes later.<sup>198</sup> This was the first time that the Court issued an opinion without taking the bench since *Bush v. Gore*—the case that “effectively decided the 2000 election”—which was “heard and decided over the justices’ winter break.”<sup>199</sup> It was, in many ways, eerie, especially for those who thought they “knew, that as sure as the cherry trees would bloom in the last two

---

192. Richard Wolf, *Aarr, Matey! Supreme Court Justices Frown on State’s Public Display of Pirate Ship’s Salvage Operation*, USA TODAY (Nov. 5, 2019, 2:42 PM ET), <https://www.usatoday.com/story/news/politics/2019/11/05/legendary-pirate-blackbeards-shipwreck-sails-supreme-court/4166346002/>.

193. See Howard Wasserman, *States Can Pirate and Plunder Copyrighted Material All They Want*, PRAWFSBLAWG (Mar. 23, 2020, 4:16 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/03/states-can-pirate-and-plunder-copyrighted-material-all-they-want.html> [hereinafter Wasserman, *Pirate and Plunder*].

194. See Howard M. Wasserman, *Opinion Analysis: Congress Cannot Subject States to Suit for Pirating and Plundering Copyrighted Material*, SCOTUSBLOG (Mar. 23, 2020, 2:43 PM), <https://www.scotusblog.com/2020/03/opinion-analysis-congress-cannot-subject-states-to-suit-for-pirating-and-plundering-copyrighted-material/>.

195. Kalvis Golde, *Live Blog of Orders and Opinions (Update: Completed)*, SCOTUSBLOG (Mar. 23, 2020, 8:45 AM), <https://www.scotusblog.com/2020/03/live-blog-of-orders-and-opinions-48/> [hereinafter Golde, *Live Blog*].

196. See *id.*

197. See *id.*

198. *Id.*

199. Jess Bravin & Brent Kendall, *Supreme Court Rules on Race, Copyright and Deportation*, WALL ST. J. (Mar. 23, 2020, 7:44 PM ET), <https://www.wsj.com/articles/supreme-court-rules-on-race-copyright-and-deportation-11585005759>.

weeks of March, the justices would be on the bench.”<sup>200</sup> Amid the handwringing about the value of precedent and perceived consequences of destabilizing the rule of law, hitting refresh on a computer to see newly issued opinions emphasized that having ivory-tower concerns is a luxury, easily displaced and never again to be taken for granted.<sup>201</sup>

Justice Kagan delivered the opinion of the Court.<sup>202</sup> Justice Thomas concurred in part and concurred in the judgment, while Justice Breyer, joined by Justice Ginsburg, concurred in the judgment.<sup>203</sup> And Justice Kagan’s opinion read like a paean to stare decisis, while still exemplifying how to craft a decision focused on the public’s interest in precedent and the parties’ burden to demonstrate why a departure is necessary.

Justice Kagan began by explaining that “our decision in *Florida Prepaid* compels the same conclusion” that Congress acted without proper authority in abrogating state sovereign immunity when it passed the CRCA.<sup>204</sup> Without derogating any precedent, the Court explained that, despite it “nowhere explicitly set out in the Constitution,” “[i]n our constitutional scheme, a federal court generally may not hear a suit brought by any person against a nonconsenting State.”<sup>205</sup> In assessing Allen’s arguments that Congress acted consistent with its powers under Article I and Section 5 of the Fourteenth Amendment, the Court made clear that “[t]he slate on which we write today is anything but clean,” and that “*Florida Prepaid*, along with other precedent, forecloses each of Allen’s arguments.”<sup>206</sup> In the spirit of fealty to precedent, the Court acknowledged that “*stare decisis* . . . is a ‘foundation stone of the rule of law.’”<sup>207</sup>

Addressing Congress’s powers under Article I to abrogate state sovereign immunity, the Court explained that *Florida Prepaid* “already rejected [this] theory,” which compelled the reasoning, “if not the Patent Remedy Act, not its copyright equivalent either, and for the same

---

200. Linda Greenhouse, *Will the Supreme Court Protect ‘Ministers’ from Their Church?*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/opinion/supreme-court-religion-discrimination.html?auth=login-email&login=email&searchResultPosition=1>.

201. *See id.*

202. *Allen v. Cooper*, 140 S. Ct. 994, 997 (2020).

203. *Id.* at 1007 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 1008 (Breyer, J., concurring in the judgment).

204. *Id.* at 999, 1007.

205. *Id.* at 1000.

206. *Id.* at 1001.

207. *Id.* at 1003 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).



reason.”<sup>208</sup> The Court also rejected the argument that *Katz* refined the analysis under *Florida Prepaid* and *Seminole Tribe*, explaining “the opinion reflects what might be called bankruptcy exceptionalism,” in which the Bankruptcy Clause is “*sui generis*—again, ‘unique’—among Article I’s grants of authority.”<sup>209</sup> Justice Kagan noted that, while the Court “view[s] bankruptcy as on a different plane,” there is “[n]othing in that understanding” which “invites the kind of general, ‘clause-by-clause’ reexamination of Article I that Allen proposes.”<sup>210</sup>

As for Congress’s power to pass the CRCA under Section 5 of the Fourteenth Amendment, the Court intoned that “*Florida Prepaid* again serves as the critical precedent.”<sup>211</sup> The Court observed how *Florida Prepaid* had “determined that the [Patent Reform Act’s] abrogation of immunity—again, the equivalent of the CRCA’s—was out of all proportion to what it found” to justify eliminating state sovereign immunity.<sup>212</sup> And in offering a model for how to apply precedent, the Court referenced its past analysis as both “the starting point of our inquiry here,” as well as “the ending point too unless the evidence of unconstitutional infringement is materially different for copyrights than patents.”<sup>213</sup> The Court then determined that “the concrete evidence of States infringing copyrights (even ignoring whether those acts violate due process) is scarcely more impressive than what the *Florida Prepaid* Court saw.”<sup>214</sup> In view of the “exceedingly slight” constitutional injuries that the Patent Remedy Act sought and the CRCA seeks to vindicate, “[i]t follows that the balance the laws strike between constitutional wrong and statutory remedy is correspondingly askew.”<sup>215</sup>

Justice Kagan also addressed *stare decisis* with an eye not toward rehashing old arguments, but instead addressing whether the parties provided evidence that society has adjusted to a point that now demands a different result.<sup>216</sup> This approach salvaged whatever bitter debates could have been reignited through relitigating which decisions are better reasoned than

---

208. *Id.* at 1002.

209. *See id.*

210. *Id.* at 1003.

211. *Id.* at 1005.

212. *Id.*

213. *Id.*

214. *Id.* at 1006.

215. *Id.* at 1007.

216. *See id.* at 1003 (“To reverse a decision, we demand a ‘special justification,’ over and above the belief ‘that the precedent was wrongly decided.’”).

others. For Allen to win, by the Court's accounting, he had to convince at least five justices that "'special justification,' over and above the belief 'that the precedent was wrongly decided'" warranted upsetting a "foundation stone of the rule of law."<sup>217</sup> That "*Florida Prepaid* was wrong" because "the decision misjudged Congress's authority,"<sup>218</sup> the Court concluded, is "nothing special at all."<sup>219</sup> A bare "charge of error alone . . . cannot overcome *stare decisis*."<sup>220</sup>

The decision also provided a pathway forward for Congress and litigants with hopes of "bring[ing] digital Blackbeards to justice."<sup>221</sup> After all, "going forward, Congress will know those rules," "would presumably approach the issue differently than when it passed the CRCA," and "if it detects violations of due process, then it may enact a proportionate response" to "effectively stop States from behaving as copyright pirates."<sup>222</sup> The same is true of advocates. That is because "*Florida Prepaid* all but prewrote" how lawyers should approach these issues.<sup>223</sup>

Justice Thomas concurred in part and concurred in the judgment, identifying "two disagreements and one question that remains open for resolution in a future case."<sup>224</sup> He first repeated his position from 2019 that the Court has an obligation to overrule "demonstrably erroneous" decisions.<sup>225</sup> He then admonished that courts should "not purport to advise Congress on how it might exercise its legislative authority, nor give [their] blessing to hypothetical statutes or legislative records not at issue here."<sup>226</sup> He concluded by suggesting that "whether copyrights are property within the original meaning of the Fourteenth Amendment's Due Process Clause remains open."<sup>227</sup>

Justice Breyer, joined by Justice Ginsburg, offered an almost farewell-to-arms-style concurrence in the judgment. He began by suggesting that, "when proven to have pirated intellectual property, States must pay for

---

217. *Id.* (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).

218. *Id.*

219. *Id.*

220. *Id.*

221. *See id.* at 1007.

222. *Id.*

223. *See id.*

224. *Id.* (Thomas, J., concurring in part and concurring in the judgment).

225. *Id.* at 1008 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)).

226. *Id.*

227. *Id.*

what they plundered.”<sup>228</sup> He then offered some optimism that “perhaps Congress will venture into this great constitutional unknown” and fashion a statute comporting with the majority’s reasoning. And his conclusion reiterated his enduring view that “something is amiss” with the Court’s sovereign-immunity precedents, citing various dissents he either joined or authored.<sup>229</sup> Yet, resigned to the conclusion that his “longstanding view has not carried the day, and that the Court’s decision in *Florida Prepaid* controls this case,” he concurred in the judgment simpliciter.<sup>230</sup> It was classy, displaying no grudge or disrespect to his colleagues past or present. And for a justice self-isolating due to COVID-19 with “his wife, daughter and three grandchildren” under one roof, all while regularly cooking Italian pot roast for his family, it was a peaceful opinion.<sup>231</sup>

Commentators hailed the decision as victory for the value of precedent and stare decisis. The hosts of *Strict Scrutiny* celebrated that “stare decisis is not for suckers, at least when Justice Kagan is writing.”<sup>232</sup> Lisa Soronen of the State and Local Legal Center remarked that it “is significant for states in the big picture because the [C]ourt held the line on its sovereign immunity precedent.”<sup>233</sup> Nina Totenberg of NPR suggested that the “opinion was couched in terms of deference to precedent—namely in this case, the precedents of the last 26 years.”<sup>234</sup> Professor Re offered that, despite a “famously controversial and complicated” area of the law, “instead of going to first-principles, members of the majority could coalesce easily around a shared analysis and conclusion, without having to reinvent the jurisprudential wheel.”<sup>235</sup> Professor Wasserman was succinct: “this is a 9-0 case—everyone agreeing that the statute is invalid in light of

---

228. *Id.* at 1009 (Breyer, J., concurring).

229. *Id.* (collecting cases).

230. *Id.*

231. See Jess Bravin, *For a Supreme Court Justice on Lockdown, Debates Now Focus on Video Night*, WALL ST. J. (Apr. 1, 2020, 3:31 PM ET), <https://www.wsj.com/articles/for-a-supreme-court-justice-on-lockdown-debates-now-focus-on-video-night-11585769494>.

232. *Build a Bridge*, STRICT SCRUTINY PODCAST, <http://strictscrutinypodcast.com/podcast/build-a-bridge/> (last visited Sept. 7, 2020).

233. Lisa Soronen, *States Win SCOTUS Pirate/Sovereign Immunity Copyright Case*, NCSL (Mar. 23, 2020), <https://www.ncsl.org/blog/2020/03/23/states-win-scotus-pirate-sovereign-immunity-copyright-case.aspx>.

234. Nina Totenberg, *In Blackbeard Pirate Ship Case, Supreme Court Scuttles Copyright Claims*, NPR (Mar. 24, 2020, 5:06 AM ET), <https://www.npr.org/2020/03/24/820381016/in-blackbeard-pirate-ship-case-supreme-court-scuttles-copyright-claims>.

235. Re, *supra* note 3.

*Florida Prepaid*.<sup>236</sup> Professor Michael Dorf reflected that “*stare decisis*—the obligation of courts to adhere to precedents absent a ‘special justification’—pretty much commanded the result in *Allen*.”<sup>237</sup> He also put forth the idea that the progressive justices’ willingness to preserve state-rights precedents might have been offered to entice at least one conservative justice to vote in favor of certain progressive precedents.<sup>238</sup> Tom Goldstein, publisher of the inestimable SCOTUSblog, offered the nuanced view that a “generational divide” may exist among the progressive justices in which Justices Sotomayor and Kagan “seemingly accept” precedents that Justices Ginsburg and Breyer “would overrule.”<sup>239</sup>

These commentators are correct. But the decision could stand for more.

#### *D. Stare Decisis as a Norms-Based Solution*

Stare decisis scored a win in the result, but the real victory of *Allen v. Cooper* could be in its use as a template for deciding cases. Issues of first impression in constitutional law are infrequent, so the opportunity for modern judges to write *tableau rosa* is rare. And when the “slate on which [they] write . . . is anything but clean,”<sup>240</sup> there is a benefit to focusing less on whether precedent is erudite and more on whether evidence is available to show how society is ready and requires something different.

Justice Kagan did not praise or derogate the Court’s jurisprudence on state sovereign immunity, offering only the uncontroversial observation that the doctrine “is nowhere explicitly set out in the Constitution.”<sup>241</sup> And rather than revisiting old arguments and erstwhile views on federalism and our constitutional order, the two justices who dissented in the past simply acknowledged that their “longstanding view has not carried the day, and that the Court’s decision in *Florida Prepaid* controls this case.”<sup>242</sup> Although Justice Thomas maintained his pertinacious view on how to apply stare decisis, that separate writing in no way suggested that his colleagues either

---

236. Wasserman, *Pirate and Plunder*, *supra* note 193.

237. Dorf, *supra* note 147.

238. *See id.* (“By accepting controversial state sovereign immunity precedents that the Court’s conservative wing set in the 1990s, perhaps the Court’s liberal justices are offering a kind of deal: We will preserve your states’ rights precedents, so you should preserve our abortion rights precedents.”).

239. Golde, *Live Blog*, *supra* note 195.

240. *Allen v. Cooper*, 140 S. Ct. 994, 1001 (2020).

241. *Id.* at 1000.

242. *Id.* at 1009 (Breyer, J., concurring).

arrogated power or abdicated their duties.<sup>243</sup> That opinion also did not revive any of the dissenting positions from *Katz*.<sup>244</sup> Instead of a debate red in tooth and claw, it was clean, cordial, and even breezy.

Perhaps as a product of deflecting attention away from the justices' views on rightly and wrongly decided cases, legal commentators accepted *Allen v. Cooper*, despite misgivings that "the Court's sovereign immunity doctrine is a mess of its own making."<sup>245</sup> Some assert that the state sovereign immunity doctrine "rests on a highly dubious construction of the constitutional text, serves a largely symbolic interest in the 'dignity' of the states, and includes an extremely complex and mutually contradictory set of rules, exceptions, and exceptions to the exceptions."<sup>246</sup> And yet "[p]reserving the existing body of state sovereign immunity doctrine might be necessary to preserve other more valuable doctrines as part of a *stare decisis* bargain."<sup>247</sup> The decision, in effect, blunted criticism of "the product of a Court, which is the product of a law-profession culture,"<sup>248</sup> by couching the result in terms of what was foreordained by the past. This approach carries a constructive value to society, not least because the media's treatment of judicial decisions affects the public's perception of the courts.<sup>249</sup>

---

243. Compare *id.* at 1007–08 (Thomas, J., concurring in part and concurring in the judgment), with *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from the denial of certiorari) ("Regrettably, *Brand X* has taken this Court to the precipice of administrative absolutism. Under its rule of deference, agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations. *Brand X* may well follow from *Chevron*, but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence. Even if the Court is not willing to question *Chevron* itself, at the very least, we should consider taking a step away from the abyss by revisiting *Brand X*."), and *VF Jeanswear LP v. EEOC*, 140 S. Ct. 1202, 1204 (2020) (Thomas, J., dissenting from the denial of certiorari) ("This doctrine [of deferring to an agency's interpretation of its regulations] has rightly fallen out of favor in recent years, as it directly conflicts with the constitutional duty of a judge to faithfully and independently interpret the law.") (citations omitted)).

244. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (Thomas, J., dissenting).

245. *Dorf*, *supra* note 147.

246. *Id.*

247. *Id.*

248. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

249. See Katerina Linos & Kimberly Twist, *Legal Scholarship Highlight: The Supreme Court, the Media and Public Opinion*, SCOTUSBLOG (Feb. 24, 2017, 10:19 AM), <https://www.scotusblog.com/2017/02/legal-scholarship-highlight-supreme-court-media-public-opinion/>.

In raw terms of stare decisis becoming more of a solution than a problem, the decision bore legitimacy because society had oriented to the constitutional order dictated by precedent without fissuring to demand a different outcome. No justice can be accused of playing politics when precedent directs a certain result and the parties fail to marshal evidence or justifiable reasoning as to why society demands a different outcome. And when more than half of Americans believe that the justices cannot set aside their personal and political views when interpreting the Constitution, *Allen v. Cooper*'s telescopic shift in how cases are viewed and decided is a welcomed development.<sup>250</sup>

A retreat from a preoccupation over whether jurists of the past followed certain prescriptions of interpretation or held fidelity to a particular method or mode of analysis makes sense. After all, one aim of the American legal system is to fashion a rule that “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>251</sup> To these ends, it is the fluidity of society, not a change in who occupies a seat on bench, that should be the source of understanding when precedent loses evenhandedness or undermines the systematic integrity of the American legal system. Focusing on the public defangs the impulse to upset fighting faiths.

The decision further represents how norms, public expectations, and societal aspirations can play a cardinal role in cases touching on stare decisis. Norms take primacy, in this instance, over political philosophy. The Court was candid in its assessment of precedent; it was neither pugnacious nor tendentious. Its analysis tracked and explained what litigants must do for precedent to work in their favor. It also provided a pathway to reach a distinguishable result. And it clarified that, if outright overruling of precedent is required, convincing the justices that their predecessors' good-faith efforts were “wrong” by itself is “nothing special at all.”<sup>252</sup> Although the Court did not catalogue every ingredient that could go into crafting a special justification, it baked into the process an onus on litigants to provide evidence in their favor. And upon detection of previously unknown, or difficult to perceive as is, constitutional violations suffered by the public that come into view based on a matured understanding of society and its

---

250. See Golde, *Confidence with Caveats*, *supra* note 83.

251. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

252. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020).

future, precedent should not prevent judicial action “tailored” to “effectively stop” the government—state or federal—“from behaving as . . . pirates.”<sup>253</sup> So when the system begins thinking of the public as the suckers who suffer most when norms are bulldozed, their interests move from being an afterthought to a foreground influence. Being a sucker (or pirate) is not so bad under those terms.

In an insular world—one where only 439 lucky individuals can sit in the justice’s courtroom while in session—a more inclusive approach to decision-making could make the least accessible branch of government more attuned to the people it serves.<sup>254</sup> The stare decisis difficulty is only that if judges continue with a jurist-centric analysis. Nothing prevents judges from placing greater emphasis on precedent’s continued role in society and whether evidence might demonstrate a need for a fresh, revised approach. Depressurizing tension in this area may indeed demand this approach. Far from a difficulty, the latter would be the stare decisis solution. And for that, Justice Kagan’s opinion provides an example of how a decision should look forward, not into the past, to decide whether precedent should dictate the outcome of a dispute. *Allen v. Cooper*, in sum, represents hope.

#### IV. Conclusion

Citing Winston Churchill, Justice Gorsuch observed “that the world is divided into people who own their governments and governments who own their people, and it is vital we never cross that line.”<sup>255</sup> The American legal system belongs to the people. And their “[l]iberty finds no refuge in a jurisprudence of doubt.”<sup>256</sup> The fighting faiths of justices and judges will no doubt endure ad infinitum. But the privilege to have those faiths etched into legal history is a license granted to them by the people they serve. Normative expectations matter. And the difficulty of stare decisis is not so difficult when those fighting faiths yield to instead reflect on the public, the

---

253. *See id.* at 1007.

254. *See* Amy Howe, *Courtroom Access: The Nuts and Bolts of Courtroom Seating – and the Lines for Public Access*, SCOTUSBLOG (Apr. 1, 2020, 1:06 PM), <https://www.scotusblog.com/2020/04/courtroom-access-the-nuts-and-bolts-of-courtroom-seating-and-the-lines-to-gain-access-to-the-courtroom/>.

255. Calvin Terbeek, *Original Scholarship and Conservative Politics*, NEW RAMBLER (Oct. 9, 2019), <https://newramblerreview.com/book-reviews/law/originalist-scholarship-and-conservative-politics> (citation omitted).

256. *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

societal considerations upon which the legal system is built, and the rights that the system is designed to protect. Stare decisis provides reassurances that are shared by judges, lawyers, pirates, suckers, and all others. The public should trust and take courts at their word. Courts should do the same, unless society demonstrates that change is necessary.