
AMERICAN STARE DECISIS IN FLUX:

Kevin Patrick Yeary
Judge
Texas Court of Criminal Appeals

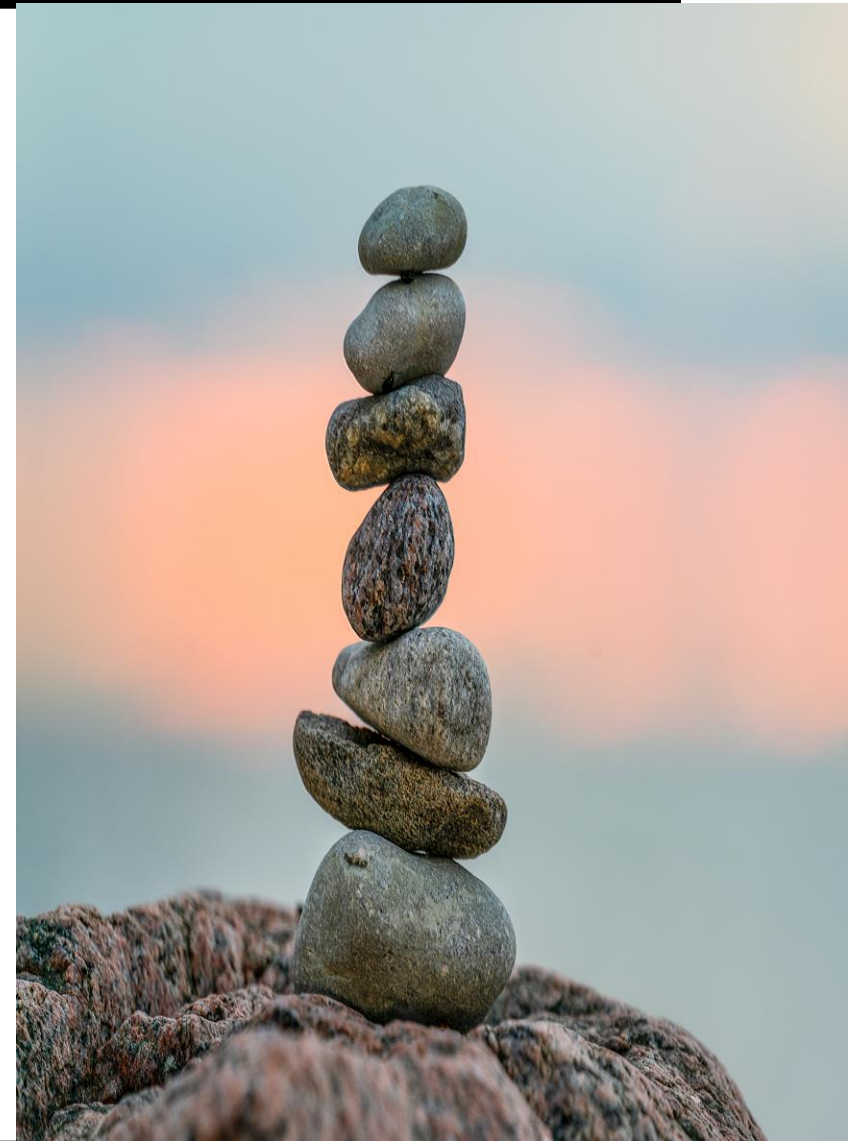
WHAT EVERY PRACTITIONER
SHOULD KNOW ABOUT NEW AND
COMPETING APPROACHES TO THE
POWER OF JUDICIAL REVIEW



STARE DECISIS-WHAT IS IT?

- Latin for “**Stand by the thing decided.**” AKA= Follow Precedents.
- A legal **Precedent** is a past decisions of a court.
- **Stare Decisis** is the **Principle** that Gives **Force and Effect** to **Precedent**.
- It is **Not Compelled** by constitution or statute.
- The Supreme Court calls it a “**principle of policy**”: **So not law.**
 - *Stare decisis* is “not an inexorable command”
 - It is “not a mechanical formula of adherence to the latest decision”

--*Payne v. Tennessee*, 501 U.S. 808, 828 (1991); quoting from *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940).





A LITTLE HISTORY ON STARE DECISIS.

- “The history . . . begins in the common law.” Thomas Healy, Stare Decisis as a Constitutional Requirement, 104 W. Va. L. Rev. 43, 56-57 (2001).
- *Ex parte Bollman*, 8 U.S. 75 (1807).
 - Bollman’s counsel, Mr. Harper, invoking stare decisis, argued for the issuance of the writ.
 - Chief Justice Marshall refocused on the importance of enacted authority in our constitutional republic. He explained:
 - [T]his court . . . disclaims all jurisdiction not given by the constitution, or by the laws of the United States.
 - Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, . . . courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.
 - [F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

STARE DECISIS- DIFFERENT KINDS

- **Vertical Stare Decisis**

- Vertical stare decisis is absolute, as it must be in a hierarchical system with “one supreme Court.” U. S. Const., Art III, § 1. In other words, the state courts and the other-lower federal courts have a constitutional obligation to follow a precedent of a higher Court unless and until it is overruled by the Court that established it.

- **Horizontal Stare Decisis**

- Horizontal stare decisis—that is, the respect that a Court owes to its own precedents and the circumstances under which a Court may appropriately overrule its own precedents. -- **My comments here focus mostly on this.....**

-----*Ramos v. Louisiana*, 590 U.S. 83, 124 n. 5 (2020)

(Kavanaugh, J., concurring).

- **Rule-Imposed Stare Decisis: TRAP 41.3**

- A transferee Court “must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if” it would make a difference.
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STARE DECISIS— REASONS FOR IT...

- “[T]he doctrine of stare decisis is of **fundamental importance to the rule of law.**” *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 494 (1987).
 - Has been said that **sometimes it is more important** that an issue “be **settled than** that it be **settled right.**” *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015).
 - It ensures that “Courts don’t have to **continually analyze issues from scratch**” or “repeatedly analyze[] the same question[s]” over and over. Amy Coney Barret, *Listening to the Law*, p. 209 (Penguin Random House 2025).
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STARE DECISIS—REASONS FOR IT...

- It “[P]romotes the **evenhanded**, **predictable**, and **consistent** development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).
 - “[S]tare decisis . . . is rooted in the **psychologic need** to **satisfy** reasonable **expectations**.” *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).
 - Respecting precedent **conveys to the public** that the courts are **neutral and disciplined**. *Mitschke v. Borromeo*, 645 S.W.3d 251, 266 (2022).
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STARE DECISIS – WEIGHT

- High in cases involving “**property and contract rights**, where reliance interests are involved” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).
- “[E]nhanced when a decision . . . interprets **a statute**” . . . the Legislative branch of government “can correct any mistake it sees.” *Kimble v. Marvell Entertainment*, 576 U.S. 446, 456 (2015).
- Low when interpreting “**the Constitution** because [the Court’s] interpretation can be altered only by constitutional amendment[.]” *Agostini v. Felton*, 521 U.S. 203, 235 (1997).
- High again in cases “involving **procedural and evidentiary rules**.” *Payne*, at 828
- “**When neither party defends the reasoning** of a precedent . . . stare decisis is diminished.” *Citizens United v. F.E.C.*, 558 U.S. 310, 364 (2010).





STARE DECISIS – TRADITIONAL FACTORS

- The workability of the precedent
- The antiquity of the precedent
- Any reliance interests at stake, and
- Whether the decision was well reasoned.

----*Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009)

STARE DECISIS--OVERRULED

- The US Supreme Court says it has, “even in constitutional cases . . . departure from precedent [must] be supported by some ‘**special justification**.’” *Dickerson v. US*, 530 U.S. 428 (2000) (refusing to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)).
- “[S]pecial justification” must be “**over and above the belief that the precedent was wrongly** decided.” *Kimble*, at 455-456.
- For example: when **subsequent developments** have undermined their doctrinal underpinnings, through **precedent** or **legislative** action. *Patterson v. McLean Credit*, 491 U.S. 164, 173 (1989)



CASE STUDIES:

(1) *PAYNE V. TENNESSEE*, 501 U.S. 808 (1991).

Rehnquist, CJ, delivered the opinion of the Court.

Overruling *Booth v. Maryland*, 482 U.S. 496 (1987) & *South Carolina v. Gathers*, 490 U.S. 805 (1989).

“Eight Amendment erects no per se bar” to admission of victim impact evidence.

----They were **decided by the narrowest of margins**

----**Over spirited dissents** challenging the basic underpinnings of the decisions

----They have been **questioned by members of the Court** in later decisions

----They have **defied consistent application** by the lower courts.

----They were **wrongly decided.**



(2) DOBBS V. JACKSON WOMEN'S HEALTH, 597 U.S. 215 (2022).

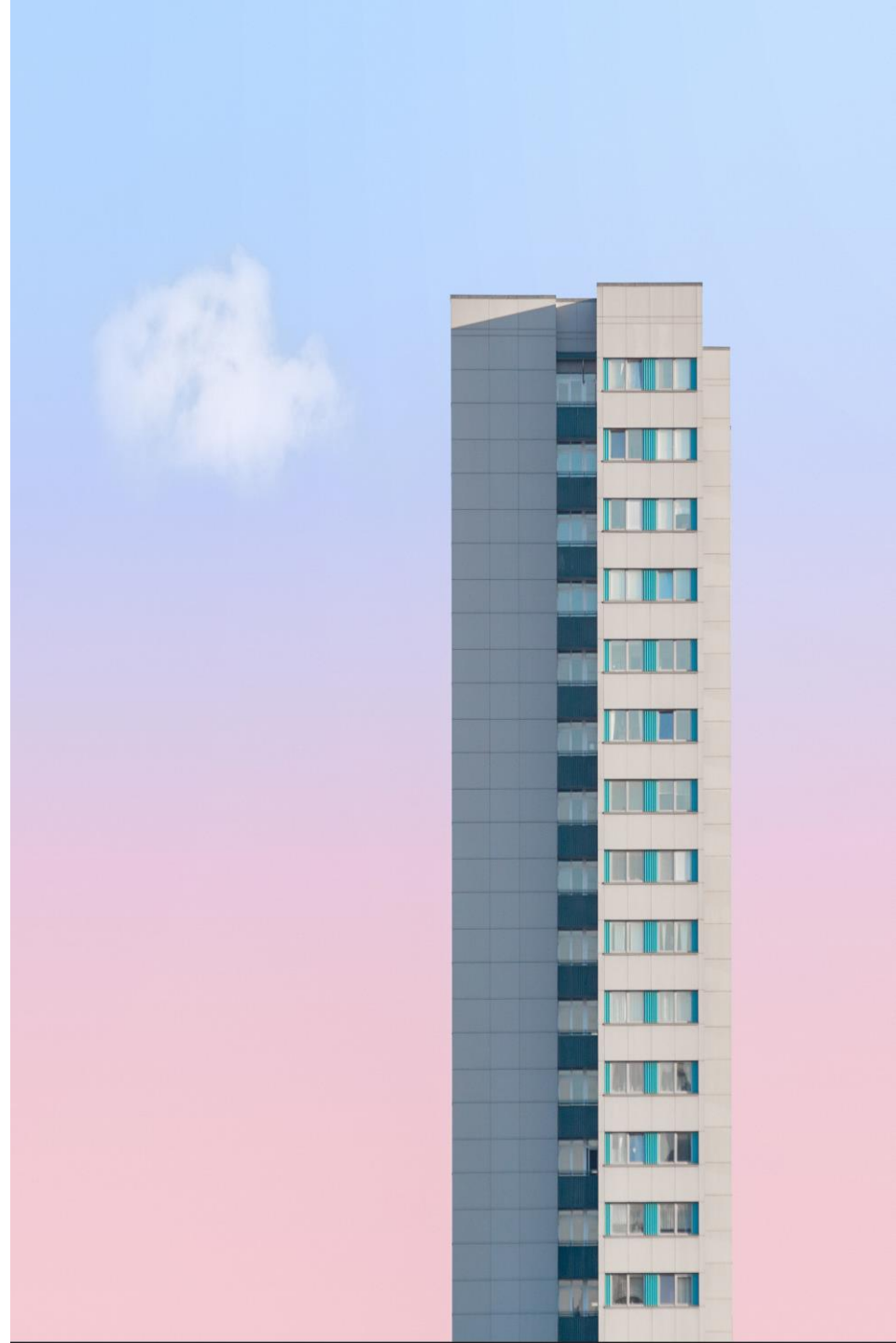
- Alito, J., delivered the opinion of the Court.
- Overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
- But when it comes to interpretation of the Constitution. . . we place a high value on having the matter “settled right.”
- Some of our most important constitutional decisions have overruled prior precedents. We mention three:
 - Brown v. Board of Education*, 347 U.S. 483 (1954), overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding separate but equal);
 - West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding a law setting minimum wages for women violated the “liberty” protected by Fifth Amendment's Due Process Clause);
 - West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (which held that public school students could not be compelled to salute the flag in violation of their sincere beliefs).

DOBBS CONTINUED . . .

- The preservation of public approval of the Court weighs heavily in favor of retaining *Roe*.
- But several factors weighed strongly in favor of overruling *Roe* and *Casey*.
- *Roe* was also **egregiously wrong** and deeply damaging.
- *Roe* was on a **collision course with the Constitution** from the day it was decided, and *Casey* perpetuated its errors.
- Wielding nothing but “raw judicial power,” **the *Roe* Court usurped the power** to address a profound moral and social question that the Constitution unequivocally left for the people.
- *Roe* was more than just wrong. It **stood on exceptionally weak grounds**. Academic commentators, even those that agreed on policy, were unsparing in their criticism.
- *Casey*’s “undue burden” test **scored poorly on the workability** scale.
- *Roe* and *Casey* **led to the distortion of many important** but unrelated **legal doctrines**,
- In *Casey*, the controlling opinion conceded that **traditional reliance interests were not implicated** by *Roe* because abortion is generally “unplanned” and “reproductive planning could take [] immediate account of [] sudden restoration of state authority to ban abortions.”

STARE DECISIS— THE MODERN TEXAS VIEW.

- *Mitschke v. Borromeo*, 645 S.W.3d 251 (Tex. 2022)
- Justice Evan Young for the Texas Supreme Court
- Overruling *Philbrook v. Berry*, 683 S.W.2d 378 (Tex. 1985).
- *M v. B* allowed for a timely filed motion for new trial, even though filed under the wrong cause number, to extend the time for filing notice of appeal.
- Explained well the Texas Supreme Court's current view of Stare Decisis.



MITSCHKE V. BORRAMEO, CONTINUED...

- “Stare decisis is not an inexorable command,” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), but it is far more than a mere presumption.
- [T]he doctrine exists to protect wrongly decided cases. We hardly need stare decisis to adhere to precedents that we regard as correct; we would do that anyway.
- [O]ne key advantage of stare decisis, for the public and the courts, is that settled law generally may be taken as a given without continually subjecting each precedent to renewed scrutiny.
- That benefit would disappear if stare decisis only protected correctly decided cases, because every time a precedent arose, we would labor from scratch to decide whether it was correct.



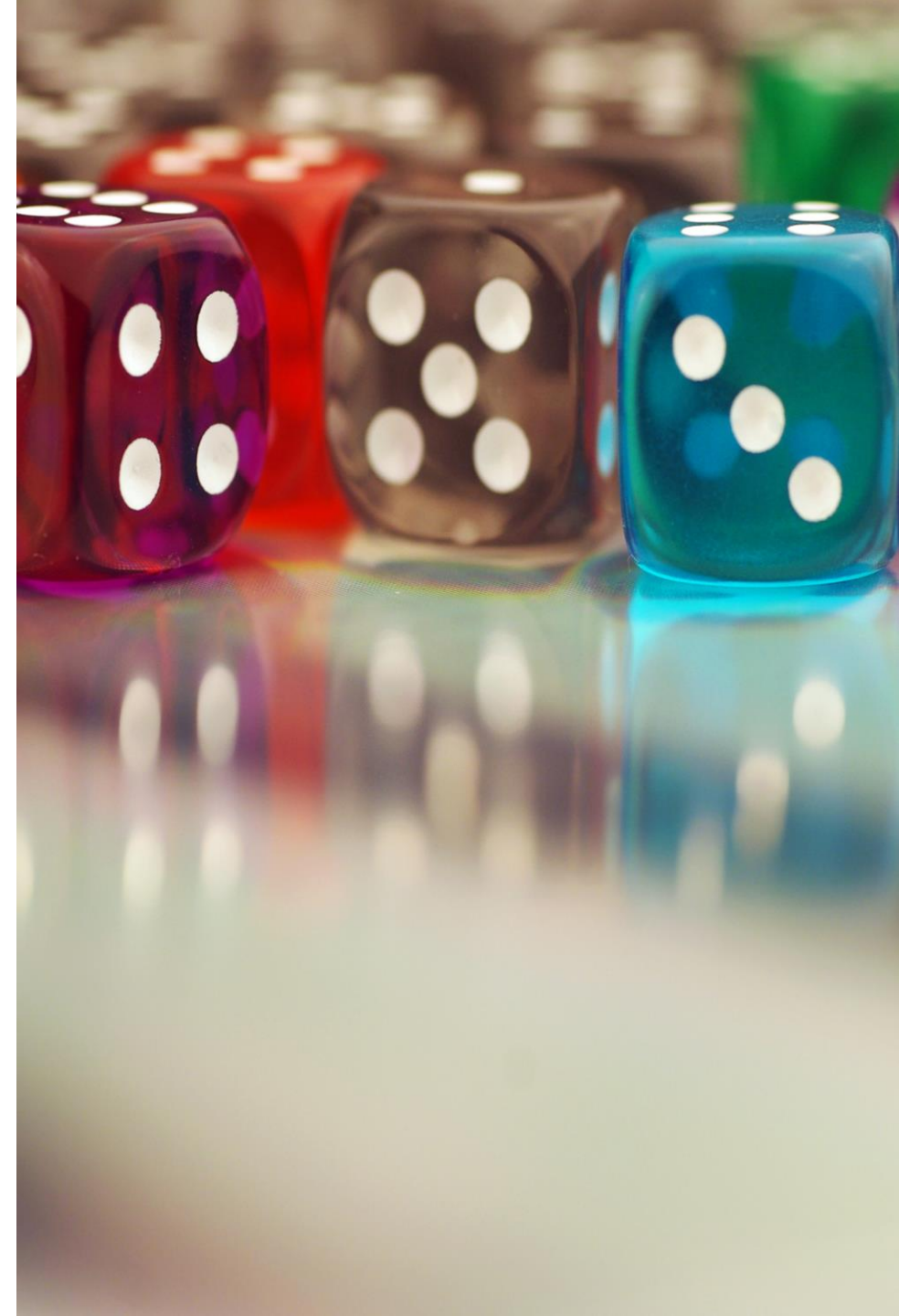
MITSCHKE V. BORRAMEO, CONTINUED...

- “The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.” Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 139 (1997).
- “Respecting stare decisis means sticking to some wrong decisions.” *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015).
- For a case to be a candidate for overruling, it is therefore necessary, but not nearly sufficient, for that case to be wrong.
- “adhering to a precedent that is **EGREGIOUSLY WRONG** or that has lost its underpinnings **does not foster legitimacy.**”



STARE DECISIS –THE *GAMBLE* CHALLENGE

- **Gamble v. United States**, 587 U.S. 678 (2019) (Thomas, J., Concurring).
- Thomas, J. writes separately “to address the proper role of the doctrine of stare decisis.”
- He says: The Court’s typical formulation of the stare decisis standard does not comport with our judicial duty under Article III.
- It elevates **DEMONSTRABLY ERRONEOUS** decisions—meaning decisions outside the realm of permissible interpretation—**over the text of the Constitution and other duly enacted federal law.**





GAMBLE CONTINUED...

- Stare decisis, is “a principle of policy” that balances several factors “to decide whether the scales tip in favor of overruling precedent.”
- Among the factors are: (1) the “workability” of the standard, (2) the “antiquity” of the precedent, (3) the “reliance interests at stake,” and (4) whether the decision was “well reasoned.”
- The influence of this last factor “tends to ebb and flow with the Court's desire to achieve a particular end.”
- This approach “might have made sense in a common-law legal system in which courts systematically developed the law through judicial decisions apart from written law.”

A red die is the central focus, resting on a green board game. The die has five holes visible on its top and front faces. In the background, there are other game pieces: a blue one, a yellow one, and a white one. The board has various numbers and symbols on it, including a blue '8' and a blue '9'. The background is slightly blurred, showing more of the game board and pieces.

GAMBLE CONTINUED...

- But “our federal system is different.”
- ”The Constitution tasks the political branches—not the Judiciary—with systematically developing the laws that govern our society.”
- “The Court's role, . . . is to exercise the ‘judicial power,’ faithfully interpreting the Constitution and the laws enacted by those [political] branches.”
- “[I]f a 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.” (There is a little wiggle room).

GAMBLE CONTINUED . . .

- “Courts may, but are not required, to adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law.”
- A demonstrably incorrect judicial decision, “is tantamount to making law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.”
- “I am aware of no legitimate reason why a court may privilege a demonstrably erroneous interpretation of the Constitution over the Constitution itself.”





GAMBLE CONTINUED...

- If a prior decision demonstrably erred, . . . **judges should exercise the judicial power**—not perpetuate a usurpation of the legislative power—and correct the error.
 - A contrary rule “would permit judges to ‘substitute their own pleasure’ for the law.” He quotes from *Federalist No. 78* that “**there is no liberty if the power of judging be not separated from the legislative and executive powers**”.
 - To **restore** our **stare decisis** jurisprudence, we judges must go back to “**mer[e] judgment**,” which, he explained “can be achieved through **adherence to the correct, original meaning** of the laws we are charged with applying.” “**Anything less**,” he contends, **would invite** “**arbitrariness** into judging.”
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MY OWN VIEW – I AGREE WITH THOMAS!

- Quote me: We need more *recte decide* and less horizontal stare decisis.
- Our founders understood human nature.
- That is why they divided the powers of government (Legislative; Executive; and Judicial) in the first place.
- The Constitution's structure demands that Judges restrain their power to the exercise of judgment. That means: don't make law or policy.
- “I can hardly think of a more corrupting influence on judges than to assure them that, no matter how badly they misconstrue the text of a statute or constitutional provision, the judges that next construe the same provision will protect and defend their erroneous construction as if it were the actual law.”



----*Navarro v. State*, 726 S.W.3d 436, 459 (Tex. Crim. App. 2025) (Yeary, J., Concurring)

MARKS V. STATE – YEARY, J., DISSENTING

- In *Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004), the CCA construed TCCP Article 12.05(b)
“The time during the pendency of an indictment, information or complaint shall not be computed in the period of limitations.”
- CCA conceded that, “[o]n its face, Article 12.05(b) does not require [] subsequent indictments . . . be based on the same conduct.” Had concerns about DAs’ power to file charges....
- It explained, “In this case, we are faced with **the task of rounding out the legislature's enactment** of Article 12.05(b)”
- “[**W**e hold that, . . . a prior indictment tolls . . . limitations . . . when [] indictments allege the **same conduct, same act, or same transaction.**”



MARKS V. STATE – CONTINUED . . .

- In *Marks*, the defendant argued his prior indictment did not allege “same conduct, same act, or same transaction.” The Court’s words...
- The parties called on the Court to interpret its own *made-up* words... and
- The CCA concluded it was “not at all clear that the same transaction, much less the same act or conduct, was alleged.” The **CCA affirmed the COA’s reversal of the judgment.**
- After vigorous discussions with his staff, **Yeary dissented.**
- Yeary dissented for the same reason in: *State v. West*, 632 S.W.3d 908 (Tex. Crim. App. **2021**).

OPINIONS
ARE NOT
THE LAW.

JUDGE KEVIN PATRICK YEARY



AND THEN THERE IS: *STATE V. WACHTENDORF*— YEARY, J., PLURALITY

- State argued in 2015 that the CCA’s opinion in *State v. Rosenbaum*, 818 S.W.2d 398, 402 (Tex.Crim.App.1991) deprived it of the right to appeal.
- Article 44.01(d) of the Texas Code of Criminal Procedure required the State to file notice of appeal within twenty days after an appealable order was “entered by the court.”
- *Rosenbaum* held that the triggering event to begin the period within which the State must file a notice of appeal—”entered by the Court”—happened when the trial judge signed the order.
- The plurality opinion explained, the CCA’s construction “has been ingrained in the law now for twenty-five years.”
- The CCA, Yeary, J., writing for the plurality, did not overrule *Rosenbaum*.
---*State v. Wachtendorf*, 475 S.W.3d 895 (Tex. Crim. App. 2015)

(Was this a permissible interpretation of the text?)

STARE DECISIS -- NUANCES

- Egregiously Wrong v. Demonstrably Erroneous
- Textually Permissible v. Textually Impermissible.
- Parties Driven Approach (adversarial) v. Judge Driven Approach (inquisitorial).



STARE DECISIS – TIPS FOR PRACTITIONERS

- There is a small but growing contingent of judges who are persuaded by Thomas's *Gamble* Challenge.
- Learn about our views on stare decisis and shape your arguments to reach us.
- Don't handicap your client's cases by being utterly tied to potentially erroneous precedent.
- Consider whether favorable or unfavorable precedents are potentially impermissible interpretations of legal texts.
- You will be better advocates for the effort!



QUESTIONS OR COMMENTS?

