

# **FLEXIBLE PREDICTABILITY: STARE DECISIS IN OHIO**

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I.	Introduction .....	15
II.	A Changing Judiciary Changes The Law .....	17
III.	Flexibility Predictability: Ohio's New Stare Decisis Rule.....	22
IV.	The Durability of the <i>Galatis</i> Standard for Stare Decisis....	29
V.	Conclusion .....	32

## **I. INTRODUCTION**

For centuries, Anglo-American jurisprudence has been grounded by the doctrine of stare decisis, which holds that similar cases should be decided by similar legal principles rather than by the personal views of an ever-changing judiciary. For if the law is not predictable, it can be undermined as arbitrary and capricious. Nevertheless the passage of years sometimes reveals a dynamic and changing common law that requires reconsideration of prior judicial precedent. For if the law is not flexible, it can be undermined as extreme.

There is an inherent tension in the law between predictability, on the one hand, and flexibility, on the other. This tension is most vividly on display when prior legal precedents confront new jurists who disagree with them. Flexibility may demand a modification or overruling of such precedent, but to do so may undermine legal relationships throughout society that have been ordered by such precedent for years or decades. This adjustment is no small matter. Overruling precedent to provide justice in a particular case between particular parties may lead to turmoil across a larger population that had ordered its affairs upon the decisions of the past. Moreover, in states like Ohio where judges are elected, if all that is needed to change the law is political control of the judiciary, then whenever politics change, the law will change—complicating the lives

of all members of society.

To successfully navigate between the poles of predictability and flexibility, the judiciary needed a rule that weighed both—that neither unduly limited the common law to the opinions of long gone jurists nor commanded change simply because the judiciary had changed.

Chief Justice Maureen O'Connor,<sup>1</sup> and the majority that joined her, may have brought Ohio such a rule in *Westfield Insurance Co. v. Galatis*.<sup>2</sup> *Galatis* provides that, to overrule existing precedent of the Ohio Supreme Court, three factors must coalesce: (1) the Court must conclude that “the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision must defy practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.”<sup>3</sup> This Article explores the need for a doctrine permitting, but limiting, the overruling of prior precedent; Ohio’s adoption of such a rule; and whether the current standard will endure. To fully appreciate the need for a rule that permits but also limits the overruling of prior Supreme Court precedent, it is helpful to understand the historical context in which the *Galatis* rule developed. Section II of this Article discusses the political and ideological changes that swept the Ohio judiciary in the early 1990s with the election of two new Justices to the

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1. Throughout this article, I refer to Chief Justice O’Connor at various times as either “Justice O’Connor” or “Chief Justice O’Connor” depending upon her position at the time of the events being related. She became Chief Justice in 2011. Her full biography can be found online at *Chief Justice Maureen O’Connor*, SUPREME CT. OF OHIO, <http://www.supremecourt.ohio.gov/SCO/justices/oconnor/default.aspx> (last visited Dec. 7, 2014).

2. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. I had the privilege of serving as counsel for the prevailing insurer in *Galatis*, which, despite the case caption, was not “Westfield Insurance Company” but rather “Aetna Casualty and Surety Company (Travelers).” My now-deceased mentor and friend, Henry A. Hentemann, was my co-counsel. I am much in his debt for many things, including my involvement in the case.

3. *Id.* at ¶ 48.

Ohio Supreme Court. The new Justices quickly set about changing Ohio's legal landscape by striking down legislation and overruling judicial precedent. Section III reveals that, within a decade, opposing interests mobilized their political base leading to a new and different political/ideological majority. Rather than undertake yet another revision to Ohio's judicial precedent, Chief Justice O'Connor and the new majority crafted a new rule of stare decisis. This new rule promised to mitigate the instability of such political changes, yet still allow changes in the common law—providing both predictability and flexibility. Section IV explores the durability of the *Galatis* rule for overruling prior precedent of the Ohio Supreme Court. The question is: will it last?

The full historical context is much richer than such a short article can describe, but I hope to provide an accurate snapshot of that particular part with which I am well familiar.

## II. A CHANGING JUDICIARY CHANGES THE LAW

In 1993, the Supreme Court of Ohio underwent one of its periodic political shakeups as Justices Francis Sweeney and Paul Pfeifer joined sitting Justices Andrew Douglas and Alice Robie Resnick on the high court. Together, the Justices formed one of the most potent 4-3 voting blocks in recent history. Over the next decade, these four Justices deeply impacted Ohio insurance law—particularly in the area of uninsured/underinsured motorist (“UM/UIM”) coverage.<sup>4</sup>

Among their decisions were the following:

- In 1993, they held that certain anti-stacking provisions were unenforceable and revised the manner in which setoff of tortfeasor liability provisions were interpreted.<sup>5</sup>
- In 1994, they held that insurers could not exclude UM/UIM coverage for non-covered automobiles.<sup>6</sup>
- In 1996, they retroactively invalidated most rejections of

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4. Their reach went beyond insurance law and extended to such areas as tort reform and public school financing (in which the high court demanded a \$1 billion-plus reorganization of state school funding). See JONATHAN H. ADLER & CHRISTINA M. ADLER, *FEDERALIST SOC'Y, A MORE MODEST COURT: THE OHIO SUPREME COURT'S NEWFOUND JUDICIAL RESTRAINT* 3 (2008), available at <https://www.fed-soc.org/publications/detail/a-more-modest-court-the-ohio-supreme-courts-newfound-judicial-restraint>.

5. See *Savoie v. Grange Mut. Ins. Co.*, 620 N.E.2d 809, 814 (Ohio 1993). For a more detailed look at *Savoie*, see Matthew Devery McCormack, Comment, *Tracking Ohio Insurance Coverage: The Genesis and Demise of Savoie*, 20 U. DAYTON L. REV. 293 (1994).

6. See *Martin v. Midwestern Grp. Ins. Co.*, 639 N.E.2d 438, 441 (Ohio 1994). For a more detailed look at *Martin*, see Alan E. Mazur, Note, *Martin v. Midwestern Group Insurance Co.: Something For Nothing*, 24 CAP. U. L. REV. 667 (1995).

UM/UM coverage by creating extra-statutory UM/UM offer requirements.<sup>7</sup>

- In 1999:
  - they held that general liability policies could provide UM/UM coverage by operation of law thereby extending the application of Ohio's UM/UM statute beyond traditional automobile liability policies;<sup>8</sup> and
  - in *Scott-Pontzer v. Liberty Mutual Insurance Co.*, they held that standard commercial automobile policies provided UM/UM coverage to employees and their residential family at all times, regardless of whether they were in a vehicle owned by their employer or performing work for that employer.<sup>9</sup>
- In 2000:
  - they again retroactively invalidated most rejections of UM/UM coverage by creating additional extra-statutory offer elements;<sup>10</sup> and
  - they held that insurers could not limit UM/UM coverage to insureds who had actually suffered bodily injury, but must extend such coverage for loss of consortium claims even though the Ohio General Assembly had ostensibly amended Ohio's UM/UM statute to permit such limitations in 1994.<sup>11</sup>

These cases were particularly vexing for insurers for a variety of reasons, the most important of which were that the cases often overruled recent judicial precedent<sup>12</sup> and the cases were retrospective in

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7. See *Gyori v. Johnston Coca-Cola Bottling Grp., Inc.*, 669 N.E.2d 824, 827 (Ohio 1996).

8. See *Selander v. Erie Ins. Grp.*, 709 N.E.2d 1161, 1165 (Ohio 1999).

9. See *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 1116, 1119-20 (Ohio 1999); see also *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 715 N.E.2d 1142, 1143 (Ohio 1999) (following *Scott-Pontzer*).

10. See *Linko v. Indem. Ins. Co. of N. Am.*, 739 N.E.2d 338, 342 (Ohio 2000). For the Ohio Department of Insurance's summary of the *Scott-Pontzer* and *Linko* decisions and their impact, see OHIO DEPARTMENT OF INSURANCE, UNINSURED AND UNDERINSURED MOTORIST COVERAGE IN OHIO: REPORT REQUIRED BY SENATE BILL 97, at 2-4 (2003) [hereinafter "UM/UM Report"], available at [http://www.insurance.ohio.gov/Legal/Reports/Documents/Senate\\_Bill\\_97\\_Report.pdf](http://www.insurance.ohio.gov/Legal/Reports/Documents/Senate_Bill_97_Report.pdf).

11. See *More v. State Auto. Mut. Ins. Co.*, 723 N.E.2d 97, 101-02 (Ohio 2000).

12. See *Savoie v. Grange Mut. Ins. Co.*, 620 N.E.2d 809, 813 (Ohio 1993) (overruling *State Farm Auto Ins. Co. v. Rose*, 575 N.E.2d 459 (Ohio 1991) and *Burris v. Grange Mut. Cos.*, 545 N.E.2d 83 (Ohio 1989)); *Martin v. Midwestern Grp. Ins. Co.*, 639 N.E.2d 438, 441-42 (Ohio 1994) (overruling *Hedrick v. Motorists Mut. Ins. Co.*, 488 N.E.2d 840 (Ohio 1986)).

application.<sup>13</sup> At the time, Ohio had a 15-year statute of limitations on related actions, which allowed a great many “closed” personal injury files to be “resurrected.”<sup>14</sup> This triggered a huge increase in the number of UM/UIM claims. First, virtually all UM/UIM rejections were retroactively invalidated, thus driving up the number of claims. Next, because the commercial UM/UIM coverage was expanded, more claimants were considered “underinsured.” This was due to the fact that personal auto policy limits of tortfeasors were usually much less than the limits of commercial UM/UIM coverage.<sup>15</sup> Further, UM/UIM insurers were more likely to require claimants to make claims with other triggered UM/UIM insurance to seek the benefit of other insurance provisions.<sup>16</sup>

These problems had a dramatic effect on the insurance industry. By 2001, insurance industry observers were estimating that the 1999 *Scott-Pontzer* decision alone had cost insurers over \$1.5 billion.<sup>17</sup> To put this in context, after only two years and with no end in sight, *Scott-Pontzer* alone had compelled insurers to pay about twice the damage reported to have been suffered as a result of Hurricane Irene (which also occurred in 1999).<sup>18</sup> After 2000, the Ohio Department of Insurance reported that commercial UM/UIM rates increased by an average of 170%.<sup>19</sup>

With such money flowing, it was predictable that UM/UIM litigation activity would increase. Ohio’s courts of common pleas were the frontline for the corresponding litigation explosion. From 1999 to 2003, these courts saw related new civil case filings increase nearly

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13. See *Ross v. Farmers Ins. Grp. of Cos.*, 695 N.E.2d 732, 738 (Ohio 1998) (noting the general rule regarding retroactivity established in *Peerless Elec. Co. v. Bowers*, 129 N.E.2d 467, 468 (Ohio 1955)).

14. See UM/UIM REPORT, *supra* note 10, at 4.

15. See *Clark v. Scarpelli*, 744 N.E.2d 719, 724 (Ohio 2001); see also UM/UIM REPORT, *supra* note 10, at 2-3. At the time, state minimum financial responsibility limits in Ohio were \$12,500 per person and \$25,000 per accident while commercial UM/UIM coverage was often provided at limits of greater than \$500,000 per accident. Matthew J. Cavanaugh, *Slamming the Lid on Pandora’s Box: How the Ohio Legislature Compensated the Insurance Industry for Scott-Pontzer at the Expense of Ohio Drivers*, 55 CASE W. RES. L. REV. 997, 1023-26 (2005).

16. See, e.g., *Halliwill v. State Farm Ins. Co.*, No. 21488, 2003-Ohio-6809, at ¶¶ 2-4 (Ct. App. Dec. 17, 2003); *Justus v. Allstate Ins. Co.*, No. 02AP-1222, 2003-Ohio-3913, at ¶¶ 1-14 (Ct. App. July 22, 2003).

17. See, e.g., *Gibson v. New Hampshire Ins. Co.*, 178 F. Supp. 2d 921, 922 n.1 (S.D. Ohio 2001). I have not seen reliable estimates on the combined costs of the other decisions.

18. LIXION A. AVILA, NATIONAL HURRICANE CTR., PRELIMINARY REPORT: HURRICANE IRENE 13-19 OCTOBER, 1999, at 3 (1999), available at [http://www.nhc.noaa.gov/data/tcr/AL131999\\_Irene.pdf](http://www.nhc.noaa.gov/data/tcr/AL131999_Irene.pdf).

19. See UM/UIM REPORT, *supra* note 10, at 6.

20%.<sup>20</sup> Ohio's intermediate courts of appeals saw new civil case filings increase nearly 10% during the same timeframe.<sup>21</sup> By 2003, the Ohio Supreme Court had over 100 related appeals pending, addressing various nuances of the *Scott-Pontzer* phenomenon.<sup>22</sup>

Tension within the legislature also increased. In the seven years between 1994 and 2001, the Ohio General Assembly amended Ohio's UM/UM statute<sup>23</sup> five times in a race to keep up with the pronouncements flowing from Ohio's high court.<sup>24</sup> This contest culminated in the 2001 Senate Bill 97 amendments, which eliminated mandatory offers of UM/UM coverage and precluded the possibility of judicial imposition of UM/UM coverage "by operation of law."<sup>25</sup>

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20. See generally THE SUPREME COURT OF OHIO, THE OHIO COURTS SUMMARY (1999-2003), available at <http://www.supremecourt.ohio.gov/Publications/default.asp>. The Ohio Supreme Court reports the following categories for common pleas courts: professional tort, product liability, other torts, workers compensation, foreclosures, administrative appeals, complex litigation, other civil and criminal. UM/UM cases were not individually tracked, so the percentages were obtained by comparing the combined "other torts" and "other civil" categories by year. There could be other reasons for spikes in filings (for example, House Bill 350 tort reform in 1997), but none was apparent from the data for 1999 to 2003.

21. See *id.* The Ohio Supreme Court does not report civil appeals by category. Accordingly, the percentages were obtained by simply comparing the "new cases filed" by year.

22. *In re Uninsured & Underinsured Motorists Coverage Cases*, 100 Ohio St. 3d 302, 2003-Ohio-5888, 798 N.E.2d 1077.

23. OHIO REV. CODE ANN. § 3937.18 (West, Westlaw through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014)).

24. See *id.* The amendments included: 2001 S 97, eff. 10-31-01; 2000 S 267, eff. 9-21-00; 1999 S 57, eff. 11-2-99; 1997 H 261, eff. 9-3-97; 1994 S 20, eff. 10-20-94.

25. S.B. 97, 124th Gen. Assemb., Reg. Sess. (Ohio 2001). The uncodified provisions of S.B. 97 provide, in pertinent part, that the General Assembly's intent was the following:

(B) Express the public policy of the state to:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

...

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;

...

(E) To supersede the holdings of the Ohio Supreme Court in [*Linko v. Indemnity Insurance Co. of N. America*] (2000), 90 Ohio St.3d 445, [*Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*] (1999), 85 Ohio St.3d 660 ... [*Gyori v. Johnston Coca-Cola Bottling Group, Inc.*] (1996), 76 Ohio St.3d 565, and their progeny.

Despite dire predictions that S.B. 97 would cause a "race to the bottom," in which insurers sought to avoid providing UM/UM altogether, the Ohio Department of Insurance reports that the percentage of policies providing UM/UM coverage remained "fairly stable" following S.B. 97. UM/UM REPORT, *supra* note 10, at 4-5.

All of the foregoing suggested that a political change might be coming to the Ohio Supreme Court. And in 2003, it did.

In 2002, Justice Douglas retired. In the wake of his retirement, Maureen O'Connor, who was a common pleas court judge when the UM/UIM phenomenon began, was elected to the Ohio Supreme Court.<sup>26</sup> She joined the high court in January 2003.<sup>27</sup> With Chief Justice Thomas Moyer, Justice Evelyn Lundberg Stratton, and Justice Deborah Cook, there was apparently a new 4-3 conservative majority on the Ohio Supreme Court.<sup>28</sup> The question quickly arose: did a new conservative majority on the high court mean that the recent UM/UIM decisions would be short-lived? The question was fully engaged in *Galatis*.

*Galatis* arose from a fatal traffic accident that occurred a decade prior.<sup>29</sup> The decedent's family had long since settled with the tortfeasor and their personal UM/UIM insurers.<sup>30</sup> After *Scott-Pontzer* was decided, however, a plaintiff could—and these plaintiffs did—seek commercial UM/UIM coverage from their employers' policies even though the accident had nothing to do with those employers.<sup>31</sup> Both the trial court and the court of appeals, for different reasons, rejected the resurrected claims, and their lawyers appealed to the Ohio Supreme Court.<sup>32</sup>

In July 2002, the high court accepted the appeal. During the briefing, the insurer challenged whether *Scott-Pontzer* was a valid statement of Ohio law, and the parties fully briefed the issue.<sup>33</sup> The case was argued in March 2003, and Ohioans would wait for the next eight months to learn *Scott-Pontzer*'s fate.<sup>34</sup> *Galatis* created a fairly strict standard for overturning prior precedent of the Ohio Supreme Court—one that attempted to serve the interests of predictability and stability of prior precedents but also provide enough flexibility to permit overturning prior precedent to prevent unnecessary rigidity in Ohio law. Under this standard, the *Galatis* Court limited the *Scott-Pontzer* decision

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26. See ADLER & ADLER, *supra* note 4, at 5.

27. See generally Chief Justice Maureen O'Connor, *supra* note 1. Later that year, Justice Terrence O'Donnell replaced Justice Cook. In 2005, Justice Judith Lanzinger replaced Justice Sweeney. In 2007, Justice Robert Cupp replaced Justice Resnick. See ADLER & ADLER, *supra* note 4, at 4. After 2007, of the four Justices who began this article, only Justice Pfeifer remains.

28. See ADLER & ADLER, *supra* note 4, at 4.

29. Westfield Ins. Co. v. Galatis, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 3.

30. *Id.*

31. *Id.* at ¶ 4.

32. *Id.* at ¶¶ 6-8.

33. *Id.* at ¶¶ 70-74 (Resnick, J., dissenting)

34. *Galatis* was decided on November 5, 2003.

and overruled a companion case.<sup>35</sup>

### III. FLEXIBILITY PREDICTABILITY: OHIO'S NEW STARE DECISIS RULE

From the standpoint of conservatives, the political problem is always that conservative judges are less likely to reverse precedent than judges who are considered activist. This general, very unscientific observation was on display when Chief Justice Earl Warren retired from the United States Supreme Court in 1969. Questions then arose, asking whether a new Nixon-appointed conservative majority might wipe away many landmark decisions of the Warren Court. It was then observed, that the newly appointed conservatives would feel constrained, under principles including stare decisis, to adhere to the more liberal decisions of the Warren Court:

If the Warren Court's reforms were paraded back before them, the erstwhile dissenters might feel bound by the doctrine of stare decisis (stand by settled cases) and would not be willing to discard them so soon.

In fact, the "strict constructionists" that Mr. Nixon admires are the least likely agents of constitutional upheaval. Justice Harlan, who dissented against most of the landmark liberal cases, believes so strongly in stare decisis that he has recently written a few liberal decisions himself—and has been chided by Justice Hugo Black for hobbling law enforcement.<sup>36</sup>

Accordingly, there was concern in Ohio that, even if *Scott-Pontzer* was poorly decided and demonstrably unmanageable, Ohio's new conservative majority might be reluctant to overrule it.

Chief Justice Moyer, for one, had long been a strong advocate of stare decisis. His 1993 dissenting opinion in *Gallimore v. Children's Hospital Medical Center* expressed his views on the subject well—that the certainty, uniformity, and continuity of law wrought by stare decisis should be protected:

Blackstone said it in his Commentaries when he observed, "[p]recedents and rules must be followed, unless flatly absurd or unjust[.]" . . .

Oliver Wendell Holmes said it in Summary of Events (1873), 7 Am.L.J. 579, when he observed, "We sincerely hope that the editors

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35. See *id.* at ¶¶ 61-62.

36. Jon D. Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VAL. U. L. REV. 101, 101 (1969) (quoting another source).



[of the American Civil Law Journal] will fail in their expressed desire to diminish the weight of precedents with our courts. We believe the weight attached to them is about the best thing in our whole system of law.”

Benjamin N. Cardozo said it in *The Paradoxes of Legal Science* (1928) 29-30: “What has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct upon the faith of the pronouncement.” And Felix Frankfurter in *Helvering v. Hallock* (1940), 309 U.S. 106, 119 . . . said, “We recognized that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations.”

These statements regarding stare decisis need no elaboration except to say that they enunciate a fundamental element of American jurisprudence—consistency and predictability.<sup>37</sup>

Indeed, although Chief Justice Moyer had dissented in *Scott-Pontzer*,<sup>38</sup> his adherence to the principle of stare decisis had caused him to apply *Scott-Pontzer* as binding legal precedent in multiple subsequent decisions.<sup>39</sup> Moreover, his earlier opinion in *King v. Nationwide Insurance Co.*<sup>40</sup> had ostensibly formed the analytical foundation for *Scott-Pontzer*.<sup>41</sup> Thus, it was by no means clear that Chief Justice Moyer would join any “new conservative majority” in overruling *Scott-Pontzer*.<sup>42</sup> If the new majority were to tackle the vexing problems created by *Scott-Pontzer* and related UM/UIM decisions, the issue of stare decisis would be front and center.<sup>43</sup>

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37. *Gallimore v. Children’s Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1062 (Ohio 1992) (Moyer, C.J., dissenting).

38. *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 1116, 1122 (Ohio 1999) (Moyer, C.J., dissenting).

39. See *Bagnoli v. Northbrook Prop. & Cas. Ins. Co.*, 715 N.E.2d 125, 126 (Ohio 1999); *Estate of Dillard v. Liberty Mut. Ins. Co.*, 715 N.E.2d 126, 126; *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 715 N.E.2d 1142, 1143 (Ohio 1999).

40. *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380 (Ohio 1988).

41. See *Scott-Pontzer*, 710 N.E.2d at 1119 (citing *King*, 519 N.E.2d at 1380).

42. Adding to the uncertainty of court observers was the fact that Justice Cook had recently been nominated to the United States Court of Appeals for the Sixth Circuit and, therefore, would not participate in the *Galatis* decision. Instead, Judge Mary DeGenaro of Ohio’s Seventh Appellate District was appointed to sit for Justice Cook. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶¶ 63-64.

43. Because this article deals with the doctrine of stare decisis in the Ohio Supreme Court, it does not delve into related issues of the following: what constitutes judicial authority (see William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 329-34 (1985)); determination of when judicial precedent should be

At first glance, notwithstanding “rhetoric” such as that in Chief Justice Moyer’s *Gallimore* dissent, the doctrine of stare decisis might seem to be no more than a minor inconvenience to overruling *Scott-Pontzer*. After all, some may ask, since political change had come to the Ohio Supreme Court, should not a legal change follow? Throughout the history of Ohio and the Republic, legal commentators have noted periods of political or cultural change in which the influence of stare decisis on decision-making seemed stronger, and other periods when its influence appeared weaker.<sup>44</sup> The popular view may be that the doctrine is only invoked to stave off political change until such time as the faction out of power can orchestrate a return to decision-making power. However, the history and philosophy of the doctrine reveal a deeper, richer doctrine, which many conservative judges view as an organic part of the common law.

While one can trace the roots of the doctrine back for millennia, a practical analysis of its present manifestation is best begun with the Anglo-American experience of the 18th century. Blackstone considered the doctrine under the heading, “Of the Laws of England.”<sup>45</sup> He divided the civil law of England into *lex non scripta* (unwritten common law) and *lex scripta* (written or statutory law).<sup>46</sup> The former was generally comprised of longstanding “customs” which were *tacito et illeterato hominum consensus et moribus expressum*, that is, expressed by the silent and unwritten consent of men.<sup>47</sup> Such customs had to be longstanding, continuous, undisputed, reasonable, certain, compulsory, and consistent.<sup>48</sup> Of course, the question arose as to how these customs were to be determined, made known, and validated. Blackstone responded that written judicial decisions were the best evidence of such customs:

And indeed these judicial decisions are the principal and most authori-

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applied prospectively rather than retrospectively (*see* *DiCenzo v. A Best Products Co., Inc.*, 120 Ohio St. 3d 149, 2008-Ohio-5327, 897 N.E.2d 132, at paragraph one of the syllabus); or the relation, interaction, and differences between other limiting doctrines such as “law of the case” and res judicata/collateral estoppel (*see* *Grava v. Parkman Twp.*, 653 N.E.2d 226, 227 (Ohio 1995); *Nolan v. Nolan*, 462 N.E.2d 410, 412 (Ohio 1984)).

44. *See* Roscoe Pound, *What of Stare Decisis?*, 10 *FORDHAM L. REV.* 1, 1-3 (1941); William O. Douglas, *Stare Decisis*, 49 *COLUM. L. REV.* 735, 739 (1949); Robert D. Archibald, *Stare Decisis and the Ohio Supreme Court*, 9 *W. RES. L. REV.* 23, 34 (1957-1958); Nolan, *supra* note 36, at 118-21; John Wallace, Comment, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 *BUFF. L. REV.* 187, 201-08 (1994).

45. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*63.

46. *Id.*

47. *See id.* at \*64.

48. *See id.* at \*76-78.

tative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance . . . . For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.<sup>49</sup>

Once rendered, such “precedents and rules must be followed, unless flatly absurd or unjust.”<sup>50</sup> Where change was required because the precedent was “absurd or unjust,” Blackstone concluded, the change was made because the prior statements had not, in fact, been “the law” or “custom” at all, but had, instead, been adopted in error:

[T]he subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not the law; that is, that it is not the established custom of the realm, as has been erroneously determined.<sup>51</sup>

When such processes are followed, then “we may take it as a general rule, ‘that the decisions of the courts of justice are the evidence of what is common law’” and “this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.”<sup>52</sup> Thus, the judiciary did not create the “customs” upon which

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49. *Id.* at \*69.

50. *Id.* at \*70.

51. *Id.* Ohio currently follows a form of this rule, known as the “*Peerless Doctrine*.” See *Peerless Elec. Co. v. Bowers*, 129 N.E.2d 467, 468 (Ohio 1955) (“The general rule is that a decision of a court of supreme court jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law.”). See also *Ross v. Farmers Ins. Grp. of Cos.*, 695 N.E.2d 732, 737 (Ohio 1998) (following *Peerless*); *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 94-97 (1993) (applying similar doctrine under federal law).

52. BLACKSTONE, *supra* note 45, at \*71, \*74.

the common law was based, but rather observed and recorded those customs as “common law.”<sup>53</sup>

This view was carried into the American experience in the following decades. When the various attributes of a federal constitution were being considered, it was observed that if courts were endowed with positive power to make the law, as well as interpret it, personal freedom would be endangered: for “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”<sup>54</sup> Of the several limitations inherent in the nature of judicial power was the doctrine of stare decisis: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>55</sup> For this and other reasons, it was argued that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.”<sup>56</sup> Lifetime judicial appointments were championed in order to insulate the judiciary from political pressure and to allow “long and laborious study to acquire competent knowledge” of judicial precedent.<sup>57</sup> Courts were to declare “judgment” rather than “will” (which was left to the legislative and executive branches).<sup>58</sup> Accordingly, it was often difficult to separate the doctrine of stare decisis from the doctrine of separation of powers.

However, scholars later noted that the American experience with the doctrine was decidedly more relaxed than what was described by Blackstone or Hamilton.<sup>59</sup> American judges claimed exceptions to the

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53. As Pound observed in the mid-20th century:

Rightly understood, stare decisis is a feature of the common-law technique of decision . . . . The common-law technique is based on a conception of law as experience developed by reason and reason tested and developed by experience. It is a technique of finding the grounds of decision in recorded judicial experience, making for stability by requiring adherence to decision of the same question in the past, allowing growth and change by the freedom of choice from competing analogies of equal authority when new questions arise or old ones take on new forms.

Pound, *supra* note 44, at 5-6.

54. THE FEDERALIST NO. 78, 394 (Alexander Hamilton).

55. *Id.* at 399.

56. *Id.* at 393.

57. *Id.* at 399.

58. *Id.* at 396. Later legal commentators observed that the judiciary’s legitimacy would be measured by whether it could “demonstrate in reasoned opinions that it has, a valid theory, derived” from existing law rather than “merely impos[ing] its own value choices.” Robert H. Bork, *Neutral Principals and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

59. See Noland, *supra* note 36, at 102-03.

doctrine ranging from judicial discretion to the “spirit of the times”<sup>60</sup> and even “a personal matter for each judge who assumes” a “sacred oath” to uphold the Constitution.<sup>61</sup> Echoing such sentiment, the majority opinion in *Gallimore*, which had drawn Chief Justice Moyer’s strong dissent, pronounced:

When the common law has been out of step with the times, and the legislature, for whatever reason, has not acted, we have undertaken to change the law and rightfully so. After all, who presides over the common law but the courts? . . . The common law is not static. It is dynamic, and it must continue to evolve to keep up with the times . . . . Either the common law must be modernized to conform with present day norms, or it will engender a lack of respect as being out of touch with the realities of our time.<sup>62</sup>

Judges were no longer simply recorders of the common law; they had become fashioners of it. Such sentiment appears to be widely shared in the American judiciary and held by many of its luminaries. For instance, Oliver Wendell Holmes famously pronounced:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV . . . [especially] if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.<sup>63</sup>

Under such circumstances, Holmes noted all that was needed for change was “appetite.”<sup>64</sup> Of course, such sentiments did not make a very practical rule of law. As Justice William O. Douglas later explained:

I do not suggest that stare decisis is so fragile a thing as to bow before every wind. The law is not properly susceptible to whim or caprice. It must have the sturdy qualities required of every framework that is designed for substantial structures. Moreover, it must have uniformity when applied to the daily affairs of men.

Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities is impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. Stare decisis provides some moorings so that men may trade and arrange

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60. Wallace, *supra* note 44, at 191.

61. City of Rocky River v. State Emp’t Relations Bd., 539 N.E.2d 103, 108 (Ohio 1989).

62. Gallimore v. Children’s Hosp. Med. Ctr., 617 N.E. 2d 1052, 1059-60 (Ohio 1992).

63. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); Noland, *supra* note 36, at 103.

64. See Noland, *supra* note 36, at 103.

their affairs with confidence. Stare decisis serves to take the capricious element out of law and to give stability to a society.<sup>65</sup>

Thus, the practical American experience with the doctrine of stare decisis was shaped by two wings: the brooding predictability and stability of Blackstone and Hamilton and the flexible, declaratory impulses evidenced by the *Gallimore* majority. Both wings have been on display at various times in various courts throughout the nation.

But returning to our *Galatis* storyline: which wing would prevail when the Ohio Supreme Court considered the continued vitality of *Scott-Pontzer*? Eight months after oral argument, the Ohio Supreme Court released its decision in *Galatis*, which was authored by Justice O'Connor.<sup>66</sup> In her opening paragraph, Justice O'Connor went directly to the heart of the matter—the nature of stare decisis:

Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.<sup>67</sup>

But while she noted that “this court is no stranger to overruling precedent, we have not adopted a standard by which to judge whether a past decision should be abandoned.”<sup>68</sup> Such a standard would, hopefully, marry the two wings of American stare decisis and provide predictable flexibility for courts and litigants. Looking to precedent from the Supreme Court of Michigan, Justice O'Connor provided the following tripartite standard:

[I]n Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.<sup>69</sup>

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65. Douglas, *supra* note 44, at 736.

66. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

67. *Id.* at ¶ 1.

68. *Id.* at ¶ 45 (footnotes omitted).

69. *Id.* at ¶ 48. The United States Supreme Court has not announced such a definitive rule, but has looked to the same kinds of factors when considering whether to overrule precedent. *See, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362-63 (2010).

Importantly, the three factors are conjunctive—all must be met to justify overruling judicial precedent.

Applying this standard to *Scott-Pontzer*, the majority concluded that it must limit *Scott-Pontzer*, and must overrule *Ezawa*, its companion case.<sup>70</sup> First, the majority explained in detail that *Scott-Pontzer* was wrongly decided at that time, because the Court had interpreted the insurance contract in a manner that was inconsistent with longstanding Ohio law.<sup>71</sup> Second, the majority explained in detail that *Scott-Pontzer* was unworkable and had “muddied the waters of insurance coverage litigation, converted simple liability suits into complex multiparty litigation, and created massive and widespread confusion—the antithesis of what a decision of this court should do.”<sup>72</sup> Finally, the majority explained that there could be no legitimate reliance interests on the continuance of *Scott-Pontzer* due to the nature of the claims and because subsequent legislation had eliminated the claims moving forward.<sup>73</sup>

Chief Justice Moyer, one of those joining in the majority opinion, also penned a separate concurring opinion to laud the new standard for stare decisis, explaining:

The majority opinion . . . sets forth a tripartite standard that honors stare decisis by preventing arbitrary and discriminatory enforcement of the law while relieving courts of the obligation to apply stare decisis with “petrifying rigidity.” . . . We serve the bench and the bar by adopting a cogent, clear standard by which to test claims that our precedents should not be followed.<sup>74</sup>

#### IV. THE DURABILITY OF THE *GALATIS* STANDARD FOR STARE DECISIS

In the ensuing decade, the UM/UIM aspects of *Galatis* have faded into the past, but the tripartite stare decisis test has, thus far, shown lasting endurance. For example, in 2005, in *State ex rel. International Paper v. Trucinski*,<sup>75</sup> and in 2006, in *Cleveland Bar Ass’n v.*

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70. See *Galatis*, 2003-Ohio-5849 at ¶¶ 2, 49-63.

71. See *id.* at ¶¶ 9-42, 49.

72. *Id.* at ¶¶ 50-57.

73. See *id.* at ¶¶ 58-60.

74. *Id.* at ¶ 66 (Moyer, C.J., concurring). It may well be that without the clear standard, Chief Justice Moyer may not have joined the majority. Ironically, the dissenters apparently discovered a newfound respect for the doctrine of stare decisis and argued vociferously that *Scott-Pontzer* should not be overruled. See *id.* at ¶¶ 75-101. But it has likely always been thus. Sixty-five years ago, Justice William O. Douglas observed: “Today’s new and startling decision quickly becomes a coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new status quo.” Douglas, *supra* note 44, at 737.

75. See *State ex rel. Int’l Paper v. Trucinski*, 106 Ohio St. 3d 203, 2005-Ohio-4557, 833

*CompManagement, Inc.*,<sup>76</sup> the *Galatis* tripartite test was applied to uphold existing precedent and reject calls for a new law.

In 2008, in *Groch v. General Motors Corp.*,<sup>77</sup> Justice O'Connor authored another majority opinion that presented the opportunity to juxtapose the *Galatis* tripartite test against the manner in which the Ohio Supreme Court formerly addressed stare decisis. *Groch* involved questions certified from a federal district court involving the constitutionality of several statutes.<sup>78</sup> One was a statute of repose.<sup>79</sup> Ohio's high court had recently issued two conflicting decisions related to the question: *Sedar v. Knowlton Construction Co.* (which found a similar provision constitutional)<sup>80</sup> and *Brennaman v. R.M.I. Co.* (overruling *Sedar* and finding a similar provision unconstitutional).<sup>81</sup> Justice O'Connor explained the history and rationale of *Sedar*, the analysis of *Brennaman*'s overruling of *Sedar* just four years later, and the *Galatis* tripartite test<sup>82</sup>:

The explicit purpose of the *Galatis* test, which was developed after *Brennaman* was decided, is to provide a "well-structured method of ensuring a disciplined approach to deciding whether to abandon a precedent." . . . *Brennaman* illustrates the pitfalls of a court's application of an unstructured approach to overruling a precedent.

Although *Sedar* was a thorough and concise opinion that fully sustained each of its specific conclusions with extensive reasoning, *Brennaman* is the classic example of the "arbitrary administration of justice" that *Galatis* cautions against.

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N.E.2d 728, at ¶¶ 5-15. International Paper was attempting to challenge the claimant's permanent total disability (PTD) award and asked the Court to overrule *State ex rel. Thomas v. Indus. Comm.* and to vacate the claimant's PTD award. The Court found that the *Galatis* tripartite test was not satisfied and therefore declined to overrule *Thomas*. *Id.* at ¶ 3.

76. See *Cleveland Bar Ass'n v. CompManagement, Inc.*, 111 Ohio St. 3d 444, 2006-Ohio-6108, 857 N.E.2d 95, at ¶ 16. Cleveland Bar Association argued that *CompManagement* was wrongly decided. However, Cleveland Bar Association failed to satisfy the *Galatis* tripartite test, and the Court refused to overturn precedent. *Id.* at ¶ 21.

77. *Groch v. General Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶¶ 132-38 (2008).

78. See *id.* at ¶¶ 11-20.

79. See *id.* at ¶ 94.

80. See *Sedar v. Knowlton Constr. Co.*, 551 N.E.2d 938, 949 (Ohio 1990). The issue before the Court was whether a ten-year statute of repose that applied to architects, construction contractors, and others who supply similar services was constitutional. *Id.* at 940. The Court found the provision was constitutional. *Id.* at 949.

81. See *Brennaman v. R.M.I. Co.*, 639 N.E.2d 425, 430 (Ohio 1994). The Court addressed the same issue of the ten-year statute of repose that was ruled on in *Sedar*. *Id.* at 430. However, this time the Court found that the provision was unconstitutional. *Id.* at 430-31.

82. See *Groch*, 2008-Ohio-546 at ¶¶ 108-54.



*Brennaman* cavalierly overruled *Sedar* with virtually no analysis. In the process *Brennaman* failed to accord proper respect to the principle of stare decisis . . . . *Brennaman* illustrates why it is imperative that the *Galatis* factors be applied. Otherwise, the principles of predictability and stability are sacrificed for the sake of personal judicial whims.<sup>83</sup>

Nevertheless, Justice O'Connor's majority opinion in *Groch* did not overrule *Brennaman* but simply limited it to its facts—application to a different statute of repose.<sup>84</sup>

In a signal that perhaps *Galatis* strikes the right balancing test between predictability and flexibility, Justice O'Connor's majority opinion in *Groch* drew concurring and dissenting opinions. Justice Lanzinger, who joined the high court in 2005, authored a concurring opinion to *Groch*, in which she questioned “the continued vitality” of *Galatis* if it was going to be used to leave *Brennaman* intact “instead of forthrightly overruling a bad precedent.”<sup>85</sup>

On the other hand, Justice Pfeifer, who had written the majority opinion in *Brennaman*, queried how *Brennaman* could have “morphed from a case worthy of citation . . . to an object of derision” in such a short time.<sup>86</sup> He then criticized the breadth of stare decisis as set forth in *Galatis*, suggesting that the *Galatis* standard is too restrictive to allow precedent to be simply overruled: “Or is the majority simply forced to insult this court’s work in *Brennaman* because it has no basis to overrule it given the ‘judicial straitjacket’ the majority zipped itself into in *Galatis*?”<sup>87</sup>

Thus, those Justices who desire to expressly overrule precedent and also those who desire to affirm it claim to find fault in *Galatis*. Perhaps that is as it should be.

While the individual Justices grapple with the application of *Galatis* to specific cases, the Ohio Supreme Court seems to have carved out at least three broad topical exceptions to strict application of the *Galatis* tripartite test.

First, in *State v. Silverman*, a majority of the court, including Justice O'Connor, held that the *Galatis* tripartite test was inapplicable to

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83. *Id.* at ¶¶ 135-37.

84. *See id.* at ¶ 147.

85. *Id.* at ¶ 219 (Lanzinger, J., concurring). Justice Lanzinger has expressed similar concerns elsewhere. *See, e.g.,* *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, at ¶¶ 106-08 (Lanzinger, J., concurring in part).

86. *Groch*, 2008-Ohio-546 at ¶ 235 (Pfeifer, J., dissenting).

87. *Id.* at ¶ 237. Justice Pfeifer has expressed similar concerns elsewhere. *See, e.g., State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'n'rs*, 115 Ohio St. 3d 337, 2007-Ohio-5022, 875 N.E.2d 59, at ¶59 (Pfeifer, J., dissenting).

interpretation of evidentiary rules.<sup>88</sup> The Court concluded this because “a procedural or evidentiary rule ‘does not serve as a guide to lawful behavior.’”<sup>89</sup> Moreover, “as to such rules, stare decisis has relatively little vigor.”<sup>90</sup> In so holding, the majority found “*Galatis* must be applied in matters of substantive law” where reliance issues may be involved.<sup>91</sup>

Second, in *State v. Bodyke*, a plurality of the court, including Justice O’Connor, held that the *Galatis* tripartite test was “inapplicab[le] to constitutional claims.”<sup>92</sup> The Court in *Rocky River* found that the insurance and contract law context that arose in *Galatis* was different than constitutional law.<sup>93</sup> The Court reasoned in *Rocky River* that “reconsideration of past decisions in the constitutional realm ‘is not some forbidden aberration. It is, in fact, the fulfillment of our constitutional responsibilities.’”<sup>94</sup>

Finally, in *Arbino v. Johnson & Johnson*, a majority of the court, including Justice O’Connor, held that “while stare decisis applies to the rulings rendered in regard to specific statutes, it is limited to circumstances ‘where the facts of a subsequent case are substantially the same as a former case.’”<sup>95</sup> The majority held:

We will not apply stare decisis to strike down legislation . . . merely because it is similar to previous enactments that we have deemed unconstitutional. To be covered by the blanket of stare decisis, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated.<sup>96</sup>

After reviewing the statutes at issue in *Arbino*, the Court found they were “more than a rehashing of unconstitutional statutes” and, therefore, declined to apply stare decisis.<sup>97</sup>

## V. CONCLUSION

For now, *Galatis* continues to provide the Ohio Supreme Court

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88. See *State v. Silverman*, 121 Ohio St. 3d 581, 2009-Ohio-581, 906 N.E.2d 427, at ¶ 33.

89. *Id.* at ¶ 32 (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

90. *Id.* (quoting *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715, 719 (1955)).

91. See *id.* at ¶ 31.

92. *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶¶ 34-36.

93. See *id.* at ¶ 35.

94. *Id.* at ¶ 36.

95. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 23.

96. *Id.*

97. *Id.* at ¶ 24.

with a standard for determining when judicial precedent will be overruled or modified. But change within the law continues. In 2010, Chief Justice Moyer unexpectedly passed away, and Chief Justice O'Connor was soon elected to the post. Three years later, for only the second time since World War II, the high court saw three new Justices arrive: Judith French, Sharon Kennedy, and William O'Neill. Confronted with a similar situation 65 years ago, Justice William O. Douglas observed:

When only one new judge is appointed during a short period, the unsettling effect in constitutional law may not be great. But when a majority of a Court is suddenly reconstituted, there is likely to be substantial unsettlement. There will be unsettlement until the new judges have taken their positions on constitutional doctrine. During that time—which may extend a decade or more—constitutional law will be in flux. That is the necessary consequence of our system and to my mind a healthy one.<sup>98</sup>

It remains to be seen how these new Justices will impact the *Galatis* test. However, whatever criticisms its detractors may have, Chief Justice O'Connor's approach in *Galatis* has provided a fairly straight-forward analytical tool for considering the overruling of precedent where previously there was none. In doing so, it has provided both predictability and flexibility. If further change is considered, the “predictability” wing of stare decisis suggests that any new standard must retain sufficient definition to make overruling judicial precedent the exception and not the rule. To hold otherwise would be detrimental to the rule of law in Ohio.

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98. Douglas, *supra* note 44, at 736-37. With the United States Supreme Court, Justice Douglas did not have to deal with judicial elections potentially changing the composition of the court every few years.