STATE OF CONNECTICUT *v.* RUSSELL PEELER
(SC 18125)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

*Argued January 7—officially released May 26, 2016**

Mark Rademacher, assistant public defender, with whom was *Lisa J. Steele*, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Kevin T. Kane*, chief state's attorney, *John C. Smriga*, state's attorney, *Jonathan Benedict*, former state's attorney, *Susan C. Marks*,

supervisory assistant state's attorney, *Marjorie Allen Dauster* and *Joseph Corradino*, senior assistant state's attorneys, and *Matthew A. Weiner*, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. A jury found the defendant, Russell Peeler, guilty of, among other things, one count of capital felony in violation of General Statutes (Rev. to 1999) § 53a-54b (8) and one count of capital felony in violation of General Statutes (Rev. to 1999) § 53a-54b (9) in connection with the 1999 shooting deaths of a woman and her young son, and, following a capital sentencing hearing, the trial court, *Devlin*, *J.*, rendered judgment imposing two death sentences.[1] This appeal of the defendant's death sentences is controlled by *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), in which a majority of this court concluded that, following the enactment of No. 12-5 of the 2012 Public Acts (P.A. 12-5), executing offenders who committed capital crimes prior to the enactment of P.A. 12-5 would offend article first, §§ 8 and 9, of the Connecticut constitution. See, e.g., *Conway* v. *Wilton*, 238 Conn. 653, 658–62, 680 A.2d 242 (1996) (explaining scope of and rationale for rule of stare decisis). Our conclusion that the defendant's death sentences must be vacated as unconstitutional in light of *Santiago* renders moot the defendant's other appellate claims.

The judgment is reversed with respect to the imposition of two sentences of death and the case is remanded with direction to impose a sentence of life imprisonment without the possibility of release on each capital felony count; the judgment is affirmed in all other respects.

In this opinion ROGERS, C. J., and PALMER, EVELEIGH, McDONALD and ROBINSON, Js., concurred.

* May 26, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

This case originally was argued before the same panel of justices on July 10, 2014. This court granted the state's request for supplemental argument on November 30, 2015, which was heard on January 7, 2016.

[1] The facts and procedural history of the case are presented more fully in *State* v. *Peeler*, 271 Conn. 338, 343–57, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

ROGERS, C. J., concurring. Just as my personal beliefs cannot drive my decision-making, I feel bound by the doctrine of stare decisis in this case for one simple reason—my respect for the rule of law. To reverse an important constitutional issue within a period of less than one year solely because of a change in justices on the panel that is charged with deciding the issue, in my opinion, would raise legitimate concerns by the people we serve about the court's integrity and the rule of law in the state of Connecticut.

Having carefully considered the arguments presented by the parties, I am not persuaded by the state's contention that principles of stare decisis should not control the outcome of this case. Although I agree that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, *Boys Markets, Inc.* v. [*Retail Clerks Union, Local 770*], 398 U.S. 235, 241 [90 S. Ct. 1583, 26 L. Ed. 2d 199] (1970), it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion. The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). See also *Vasquez* v. *Hillery*, 474 U.S. 254, 265 [106 S. Ct. 617, 88 L. Ed. 2d 598] (1986) (stare decisis ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals)." (Internal quotation marks omitted.) *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). "[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law underlying our own [c]onstitution requires such continuity over time that a respect for precedent is, by definition, indispensable." (Citation omitted.) *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); see also *George* v. *Ericson*, 250 Conn. 312, 318, 736 A.3d 889 (1999) ("Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of [decision-making] consistency in our legal culture and it is an obvious manifestation of the notion that [decision-making] consistency itself has normative value." [Citation omitted; internal quotation marks omitted.]).

"While stare decisis is not an inexorable command . . . particularly when we are interpreting the [c]onsti-

tution . . . even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." (Citations omitted; internal quotation marks omitted.) *Dickerson* v. *United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). "Such justifications include the advent of subsequent changes or development in the law that undermine a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Citations omitted; internal quotation marks omitted.) *Payne* v. *Tennessee*, 501 U.S. 808, 849, 111 S. Ct. 2579, 115 L. Ed. 2d 720 (1991) (Marshall, J., dissenting).

When neither the factual underpinnings of the prior decision nor the law has changed, "the [c]ourt could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from [the prior decision]. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 864.

I cannot identify any change or development in the law since the decision in *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), was issued or any new experiences or facts that have come to light. Because there also has been no showing that the substance of the opinion has or will become a detriment to coherence and consistency in the law, applying the doctrine of stare decisis is appropriate. Moreover, although the state has now had an opportunity to present new arguments in the present case that it had no reason to present in *Santiago* because it was not on notice that this court would consider them, the three members of the current court who were in the majority in that case have rejected those arguments on the merits and the fourth member of the majority in *Santiago*, Justice Norcott, had for many years before that decision expressed his view that the death penalty is unconstitutional per se. See, e.g., *State* v. *Rizzo*, 303 Conn. 71, 203, 31 A.3d 1094 (2011) (*Norcott, J.*, dissenting) ("the death penalty per se is wrong, violates the state constitution's prohibition against cruel and unusual punishment [and] . . . our statutory scheme for the imposition of the death penalty cannot withstand constitutional scrutiny because it allows for arbitrariness and racial discrimination in the determination of who shall live or die at the hands of the state" [internal quotation marks omitted]), cert. denied, U.S. , 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012). Accordingly, it is clear that, if these issues had been raised and briefed in *Santiago*, the result would have

been no different. In fact, the only change that has occurred is a change in the makeup of this court, which occurred after oral argument in *Santiago* but before the decision was released. I strongly believe that, in and of itself, a change in the membership of this court within a relatively short period of time cannot justify a departure from the basic principle of stare decisis, especially on an issue of such great public importance.[1] See *Payne* v. *Tennessee*, supra, 501 U.S. 850 (Marshall, J., dissenting) (change in court's personnel "has been almost universally understood *not* to be sufficient to warrant overruling a precedent" [emphasis in original]); *Taylor* v. *Robinson*, 196 Conn. 572, 578, 494 A.2d 1195 (1985) (*Peters*, *C. J.*, concurring) ("[a] change in the constituency of this court is not a sufficiently compelling reason to warrant departure from a [recent decision]"), appeal dismissed, 475 U.S. 1002, 106 S. Ct. 1172, 89 L. Ed. 2d 291 (1986); *Tileston* v. *Ullman*, 129 Conn. 84, 86, 26 A.2d 582 (1942) ("a change in the personnel of the court affords no ground for reopening a question which has been authoritatively settled"), appeal dismissed, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943). Any other conclusion would send the message that, whenever there is a hotly contested issue in this court that results in a closely divided decision, anyone who disagrees with the decision and has standing to challenge it need only wait until a member of the original majority leaves the court to mount another assault. In my view, that would be a very dangerous message to send. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 854 ("no judicial system could do society's work if it eyed each issue afresh in every case that raised it"); *Wheatfall* v. *State*, 882 S.W.2d 829, 843 (Tex. Crim. App. 1994) (If new personnel were the reason to overrule precedent, "this [c]ourt would be forced to reconsider every decision of . . . our [c]ourt upon changes in membership. Such an endeavor would defeat one of the essential purposes of stare decisis."), cert. denied, 513 U.S. 1086, 115 S. Ct. 742, 130 L. Ed. 2d 644 (1995).

Regardless of any reliance on the majority decision in *Santiago*, or lack thereof, stability in the law and respect for the decisions of the court *as an institution*, rather than a collection of individuals, in and of themselves, are of critically important value, especially on an issue of such great public significance as the constitutionality of the death penalty.[2] See *Vasquez* v. *Hillery*, supra, 474 U.S. 265 (stare decisis "ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion"); *George* v. *Ericson*, supra, 250 Conn. 318 ("[decision-making] consistency itself has normative value" [internal quotation marks omitted]); *People* v. *Hobson*, 39 N.Y.2d 479, 491, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (It would be "scandalous for a court to shift within less than two years because of the replacement of one of the majority

in the old court by one who now intellectually would have preferred to have voted with the old minority and the new one. The ultimate principle is that *a court is an institution and not merely a collection of individuals* . . . . This is what is meant, in part, as the rule of law and not of men." [Emphasis added.]). Indeed, I believe that overruling the flawed majority decision in *Santiago* under these circumstances would inflict far greater damage on the public perception of the rule of law and the stability and predictability of this court's decisions than would abiding by the decision. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 864 ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the [g]overnment. No misconception could do more lasting injury to this [c]ourt and to the system of law which it is our abiding mission to serve . . . ." [Citation omitted; internal quotation marks omitted.]), quoting *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 636, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974) (Stewart, J., dissenting).[3]

Accordingly, I concur with the majority opinion.

[1] In their dissenting opinions, Justice Zarella and Justice Espinosa cite numerous decisions in which this court has overruled one of its decisions. Anyone who has had an opportunity to read those decisions will discover that there is no inconsistency between the position that I took in the decisions in which I joined and the position that I take in the present case. Of particular significance, I would emphasize that, in many of the cases relied upon by the dissenting justices in which this court has overruled a recent decision, at least one member of the majority on the original decision that was being overruled reconsidered and joined with the majority in the subsequent overruling decision. In contrast, in the present case, it is perfectly clear that all of the members of the majority in *Santiago* continue to believe in the correctness of their decision, and the *only* change is the replacement of Justice Norcott by Justice Robinson.

With respect to Justice Espinosa's account of the panel changes that occurred prior to our decision in *Santiago*, suffice it to say that this court followed its standard procedures in determining which justices would sit on all phases of that case.

[2] I agree with much of Justice Zarella's analysis in his dissent in the present case, which, distilled to its essence, argues that, if a past decision was manifestly incorrect and there has been no reliance on it, principles of stare decisis may not require the court to stand by that decision. In *Santiago*, however, Justice Zarella, Justice Espinosa and I explained at great length why we believed that the majority decision was incorrect; see *State* v. *Santiago*, supra, 318 Conn. 231–341 (*Rogers, C. J.*, dissenting); id., 341–88 (*Zarella, J.*, dissenting); id., 388–412 (*Espinosa, J.*, dissenting); and we were unable to persuade the majority. The three members of that majority who are also in the majority in the present case continue to believe that *Santiago* was *not* manifestly incorrect, and there is every reason to believe that the fourth member, Justice Norcott, would agree with them because of his unwavering belief that the death penalty is per se unconstitutional. See *State* v. *Rizzo*, supra, 303 Conn. 202 n.1, 203 (*Norcott, J.*, dissenting). When it is clear that the same majority in a prior recent decision that this court is considering overruling continues to believe that the case was correctly decided, I cannot conclude that a mere change in membership of the court justifies overruling that decision. When that has been the *only* intervening change, stability is the overriding consideration. "For it is an established rule to abide by former precedents, where the same points come again in litigation; as well [as] to keep the scale of justice even and steady, *and not liable to waver with every new judge's opinion* . . . ." (Emphasis added.) 1 W. Blackstone, Commentaries on the Laws of England (1775) p. 69.

[3] I emphasize that I express no view on the question of whether the legislature could constitutionally reinstitute the death penalty by repealing No. 12-5 of the 2012 Public Acts and its prospective abolition of the death penalty and reenacting a death penalty statute that applied to all defendants, regardless of the date of their offense. The majority in *Santiago* also recognized that this is an open question. See *State* v. *Santiago*, supra, 318 Conn. 86 n.88 ("[w]e express no opinion as to the circumstances under which a reviewing court might conclude, on the basis of a revision to our state's capital felony statutes or other change in [the five objective indicia of society's evolving standards of decency], that capital punishment again comports with Connecticut's standards of decency and, therefore, passes constitutional muster"); see id., 52–86 (discussing indicia). In any event, the policy issue of whether to attempt to reinstate a constitutional death penalty is now in the hands of the legislature.

PALMER, J., with whom EVELEIGH and McDONALD, Js., join, concurring. In *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), a majority of this court concluded that, following the legislature's April, 2012 decision to abolish the death penalty for all future offenses; see Public Acts 2012, No. 12-5 (P.A. 12-5); capital punishment no longer comports with the state constitutional prohibition against cruel and unusual punishment. See *State* v. *Santiago*, supra, 10, 86, 118–19, 140; see also Conn. Const., art. I, §§ 8 and 9. Specifically, we determined that to execute individuals convicted of committing capital felonies prior to April, 2012, now that the legislature has determined that the death penalty is neither necessary nor appropriate for any crimes committed after that date, no matter how atrocious or depraved, would be out of step with contemporary standards of decency and devoid of any legitimate penological justification. See *State* v. *Santiago*, supra, 9, 14–15. Accordingly, we vacated the death sentence of the defendant in that case, Eduardo Santiago, and we ordered that he be resentenced to life in prison without the possibility of release. Id., 140.

The present appeal is brought by another defendant, Russell Peeler, who, like Santiago, committed a capital felony and was sentenced to death prior to the enactment of P.A. 12-5. Ordinarily, our determination in *Santiago* that the death penalty is no longer constitutional would control the outcome of the present case as well, and the defendant and others similarly situated would be entitled to resentencing consistent with our decision in *Santiago*. The state, however, has argued that *Santiago* was decided without the benefit of adequate briefing by the parties and that, as a result, the majority in *Santiago* made a series of legal and historical errors that led to an incorrect decision. Indeed, the state goes so far as to contend that our decision in *Santiago* was so unjust, and so completely devoid of legitimacy, that it should be afforded no precedential value and now may be overturned, only nine months later, merely because the composition of this court has changed.

I agree with and join the per curiam opinion in this case, in which the majority concludes that *Santiago* remains binding and valid authority, and that other convicted capital felons who have been sentenced to death are, therefore, entitled to be resentenced forthwith consistent with that decision. I write separately because I categorically reject any suggestion that the parties did not have the opportunity to brief these issues in *Santiago*, or that the court in that case overlooked key authorities, arguments, or historical developments that, if properly considered, would have resulted in a different outcome. We already have explained at some length

why the parties, and particularly the state, had a full and fair opportunity to address the issues on which our decision in *Santiago* was based. See id., 120–26; see also *State* v. *Santiago*, 319 Conn. 935, 936–40, 125 A.3d 520 (2015) (denying state's motion for stay of execution of judgment in *Santiago* pending resolution of appeal in present case). In this concurring opinion, I briefly address the state's principal historical and legal arguments and explain why they are unpersuasive.

I

HISTORICAL ANALYSIS

The state first argues that, in *Santiago*, we "relied on flawed historical analysis to justify [our] departure from well established principles of law . . . ." Specifically, the state contends that we incorrectly concluded that, prior to the adoption of the 1818 constitution, Connecticut courts were authorized to review the constitutionality of allegedly cruel and unusual punishments. In reality, the state contends, the authority to review and determine the propriety of a punishment always has rested solely with the legislature. In so arguing, the state fundamentally misunderstands the relevant Connecticut history, this court's precedents, and the basis of our decision in *Santiago*. Although a full review of the relevant history and the scope of the state's confusion in this regard lies beyond the ambit of this opinion, I briefly address three of the most significant flaws in the state's analysis.

First, the state misperceives the purpose of the discussion in part I of our decision in *State* v. *Santiago*, supra, 318 Conn. 15–46, and the role that that discussion played in the outcome of the case. Our goal in part I of *Santiago* was not to establish that this court has the constitutional authority to strike down legislatively enacted punishments as impermissibly cruel and unusual. There was no need to establish that principle because, as the defendant explains, and as the state ultimately concedes, the state lost that argument decades—if not centuries—ago. Just four years after the adoption of the 1818 constitution, Chief Justice Stephen Titus Hosmer, writing for the Connecticut Supreme Court of Errors, rejected the asserted "omnipotence of the legislature" with respect to punitive sanctions such as imprisonment and clarified that the review of such laws was properly within the purview of the judiciary. *Goshen* v. *Stonington*, 4 Conn. 209, 225 (1822); see also C. Collier, "The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition," 15 Conn. L. Rev. 87, 97 (1982) ("the delegates to the Connecticut [c]onstitutional [c]onvention of 1818 overrode the protestations of the Federalist old republicans who still clung to a faith in legislative supremacy and the common law to uphold all of the natural rights of individuals"). More recently, in *State* v. *Lamme*, 216 Conn. 172, 179–80, 579

A.2d 484 (1990), and again in *State* v. *Ross*, 230 Conn. 183, 249, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), we rejected the state's argument that our state constitution confers the authority to determine what constitutes cruel and unusual punishment solely on the legislature.[1] Our purpose in part I of *Santiago*, then, was merely to trace in greater detail than we previously had the origins and contours of our state constitutional freedoms from cruel and unusual punishment. In other words, the question we considered in *Santiago* was the *scope* of the rights at issue, and not which branch of government is charged with securing their enforcement.[2]

The second fundamental flaw in the state's historical analysis is its suggestion that, prior to 1818, Connecticut courts played no role in securing our common-law and statutory freedoms from cruel and unusual punishment. In *Santiago*, we reviewed numerous instances and contexts in which *each* of the three branches of government at times sought to temper what were perceived as cruel or unusual punishments. With respect to the judiciary, for example, we noted agreement among scholars of early Connecticut history that (1) magistrates enforced the criminal law during the colonial period so as to avoid needless cruelty, especially with regard to capital crimes; *State* v. *Santiago*, supra, 318 Conn. 29–31; (2) Connecticut courts began to nullify dubious capital sentences as early as the 1660s; id., 31–32 n.27; and (3) in the years leading up to the adoption of the 1818 constitution, "courts were adopting a milder practice in applying the capital law." (Internal quotation marks omitted.) Id., 36. Indeed, the very source on which the state relies explains at the outset how this preconstitutional history sowed the seeds that ultimately blossomed into this court's judicial review authority: "When we speak of law in early Connecticut—legislation, adjudication, and executive administration—we speak of the law of the magistrates." E. Goodwin, The Magistracy Rediscovered: Connecticut, 1636–1818 (1981) p. 11. "The Puritan's peculiar concept of the magistracy was . . . a unique contribution to the development of later concepts of independent judiciaries, distinct functions for courts of law, and even, perhaps, the distinctively American notion of judicial review." Id. In *Lamme*, having reviewed this history, we concluded that "the most significant aspect of the pre-1818 declaration of rights is that it had constitutional overtones even though it was statutory in form. The [d]eclaration and supplementary statutes relating to individual rights were grounded in the Connecticut common law and viewed as inviolate. Abridgements perpetrated by the government were considered void on their face *and courts were to refuse to enforce them*." (Emphasis added; internal quotation marks omitted.) *State* v. *Lamme*, supra, 216 Conn. 179, quoting C. Collier, supra, 15 Conn. L. Rev. 94; see also *Binette* v. *Sabo*, 244 Conn. 23, 79, 710 A.2d 688 (1998)

(*Katz*, *J.*, concurring in part and dissenting in part). Accordingly, although the state is certainly correct that the legislature played a central role in establishing and enforcing our traditional freedoms from cruel and unusual punishment during Connecticut's preconstitutional era, the state has offered no reason to conclude, counter to well established authority, that the legislature has been the exclusive guardian of those freedoms.[3]

Of course, any discussion of the relationship between the judicial and legislative authorities during the preconstitutional era, and especially prior to the creation of this court in 1784, must be qualified by the recognition that the General Court, which, at the end of the seventeenth century, was renamed the General Assembly, blended and simultaneously exercised both judicial and lawmaking functions during that period. See, e.g., H. Cohn & W. Horton, Connecticut's Four Constitutions (1988) p. 21; E. Goodwin, supra, pp. 33–35, 52–54. In some sense, then, any discussion of whether the legislature or the judiciary was responsible for securing the people's freedom from cruel and unusual punishment is academic. In any event, it is clear that the adoption of the state's first formal constitution in 1818 was motivated in no small part by a desire to create an independent judiciary tasked with securing those basic constitutional liberties, and that these changes embodied a rejection of the belief "that republican government with legislative supremacy was the best safeguard of personal liberties." (Internal quotation marks omitted.) *State* v. *Lamme*, supra, 216 Conn. 180; see also *Starr* v. *Pease*, 8 Conn. 541, 546–48 (1831) (declaration of rights contained in 1818 constitution imposed limitations on excessive powers previously wielded by legislature); H. Cohn & W. Horton, supra, p. 23 (call for independent judiciary was primary reason for constitutional convention).

The third fundamental flaw in the state's historical analysis is the state's failure to adequately and accurately document its theory that the freedoms from cruel and unusual punishment enshrined in the state constitution arose from and were limited to legislative efforts to circumscribe the harsh and arbitrary punishments imposed by colonial magistrates. Although the state weaves a lengthy and intriguing narrative in support of this theory, the state's account is sparse on citation, and, it must be said, one searches the cited authorities in vain for the propositions that the state attributes to them. Nowhere in the cited text, for example, does Professor Lawrence B. Goodheart state that the Ludlow Code of 1650—from which article first, § 9, of the state constitution derives its origins—was drafted to address public concerns that magistrates were wielding excessive power or imposing arbitrary penal sanctions. See L. Goodheart, The Solemn Sentence of Death: Capital Punishment in Connecticut (2011) pp. 11–12. Quite the contrary. In the section of his book on which the state

relies, Goodheart explains that the colonists generally deferred to magistrates' interpretation of Biblical authority; see id., p. 9; and he discusses at some length the key role that the magistrates played in securing fundamental liberties and tempering the colonies' draconian capital statutes: "The statutes are deceptive as to what occurred in practice. The laws represented a religious ideal, a public declaration, as the 1672 [colonial] code put it, of what was 'suitable for the people of Israel.' The judicial system was much more lenient. The courts aspired to be scrupulous and fair. There was concern to balance individual protection with the greater good. Drawing on centuries of English tradition, the Puritans upheld civil rights, including . . . no torture [and] no cruel or barbarous punishments . . . . Attorneys did not usually function in either colony; the wise and impartial rule of the magistrates was deemed sufficient." (Footnotes omitted.) Id., p. 14.

The state's reliance on Everett Goodwin's book, The Magistracy Rediscovered: Connecticut, 1636–1818, is similarly misplaced. The state cites page 103 of Goodwin's book for the proposition that, in the state's words, "Connecticut's history is unique in selecting the legislature as the body 'safeguarding' citizens from abusive, unlegislated, court-imposed punishments, and not the other way around." The cited passage, however, contains no mention whatsoever of abusive, court-imposed punishments. Rather, Goodwin merely discusses the fact that, as a general matter, Connecticut's early legal system relied less on English common law than did the other American colonies. E. Goodwin, supra, p. 103. He also references the evolution in Chief Justice Zephaniah Swift's thinking with respect to the separation of powers; although Swift initially believed in the primacy of the legislature; see id., pp. 99–100, 103; he ultimately came to conclude that, because the legislature is vulnerable to " 'undue and improper influence' "; id., p. 114; the courts must play an important role with respect to the constitutional review of statutes. See id., pp. 99, 101, 103, 109–10, 114, 160 n.34. In other parts of his book, Goodwin explains that the colonists codified an extreme version of the criminal law but "[left] the mitigation to the discretion of the [m]agistrate"; (internal quotation marks omitted) id., p. 27; and that the discretion invested in the magistrates reflected the Puritans' confidence in their wisdom and godliness. Id., p. 30. Like Goodheart, then, Goodwin provides little support for the state's account.

The other sources on which the state relies likewise fail to support—and in some cases flatly belie—the state's theory that Connecticut's traditional freedoms from cruel and unusual punishment originated from and were limited to a commitment to statutory law as a bulwark against abusive judicial sentencing practices. William Holdsworth, for example, explains that magistrates in both the Connecticut and New Haven colonies

"repeatedly avoided imposing the full penalties prescribed by . . . [law]"; W. Holdsworth, Law and Society in Colonial Connecticut, 1636–1672 (1974) p. 124 (unpublished doctoral dissertation, Claremont Graduate School); and that, although Connecticut's first criminal statutes were more severe than those of Massachusetts, Connecticut's colonial code actually "placed fewer restrictions on the discretionary powers of the magistrates, and increased the penalties they could impose for certain crimes . . . ." Id., p. 132. Holdsworth explains that "these differences reflect a greater consensus in Connecticut between rulers and ruled and a greater degree of trust of the one for the other, but they also reflect the *growth* in magisterial power . . . ." (Emphasis added.) Id.[4] The state's heavy reliance on the language of Ludlow's Code also misses the point. Ludlow's Code authorized not only those punishments established by express legislative enactment, but also, in the absence of a controlling statute, penal sanctions imposed on the basis of the magistrates' own understanding of "the word of God." (Internal quotation marks omitted.) L. Goodheart, supra, p. 12.

Even more troubling is the state's representation that this court's decision in *Pratt* v. *Allen*, 13 Conn. 119, 125 (1839), stands for the proposition that, "[w]ith the exception of moving the judiciary to an independent body, the 1818 constitution *'left the legislative department as it found it.'* " (Emphasis added.) The state uses the quoted passage from *Pratt* in an attempt to demonstrate that the judiciary, which, the state alleges, had no authority to review the appropriateness of legislatively imposed punishments under the colonial common law, obtained no greater authority in this respect under the 1818 constitution. The state, however, neglects to account for the sentence in *Pratt* immediately preceding the one that it quotes. The full passage reads as follows: "The [constitution of Connecticut], so far as it respects the legislature, is conversant principally with its organization, the authority of its separate branches, and the privileges of its members. But we look in vain for the character of its legislative acts *any further than as they are*, *in some measure*, *restrained*, *by the bill of rights*. In short, *with few limitations*, it left the legislative department as it found it." (Emphasis added.) *Pratt* v. *Allen*, supra, 125. The only fair reading of *Pratt*, then, is that the creation of an independent judiciary was *not* the only change effected by the state constitution, as the state suggests. Rather, the highlighted portions of the foregoing passage, which the state omits, clearly indicate that the constitution, in tandem with the creation of an independent judiciary, constrained the authority of the legislature to enact laws that infringe our basic liberties.

A thorough review of the cited historical sources and our related cases thus leaves one with the discomforting impression that the state, in its apparent zeal to retain

the death penalty, has mischaracterized not only this court's precedents but history itself. For all of these reasons, I reject the state's contention that this court, in *Santiago*, relied on a flawed historical analysis or exercised its powers of judicial review in a manner precluded by either tradition or precedent.

II

DELAYS AND INFREQUENCY OF IMPLEMENTATION

The state's next argument is that, in *Santiago*, we improperly considered the infrequency with which the death penalty is imposed in Connecticut, as well as the lengthy delays in carrying out capital sentences, in determining that capital punishment no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose. Specifically, the state contends that (1) this court rejected these arguments in *State* v. *Rizzo*, 303 Conn. 71, 191–94, 31 A.3d 1094 (2011), cert. denied, U.S. , 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012), (2) nothing has changed since our decision in *Rizzo* to justify a different outcome, and (3) in any event, our conclusion that delays in carrying out capital sentences render the punishment unconstitutional is precluded by this court's decision in *State* v. *Smith*, 5 Day (Conn.) 175 (1811). I consider each argument in turn.

Nothing in our decision in *Rizzo* precluded the result we reached in *Santiago*. In *Rizzo*, we looked at the growing infrequency of capital sentencing and executions throughout the country. See *State* v. *Rizzo*, supra, 303 Conn. 192–94 and nn. 89–94. At that time, we did not reject out of hand the argument of the defendant, Todd Rizzo, that the death penalty had come to be so rarely used in the United States as to constitute cruel and unusual punishment. Nor did we specifically consider recent developments in this state. Rather, we recognized that both capital sentences and executions were declining in number nationwide, and we acknowledged that several of the likely causes of those declines suggested diminishing public support for capital punishment. See id., 192–94. At the same time, however, we noted that the decline also might reflect other, short-term factors, such as the economic recession, supply shortages of one of the lethal injection drugs, and temporary uncertainty about the legal status of capital punishment pending the United States Supreme Court's decision in *Baze* v. *Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). *State* v. *Rizzo*, supra, 192–94. We also noted that the number of executions carried out nationally in 2007 and 2008, although a recent low, remained substantially higher than during the early 1990s, just prior to our decision in *State* v. *Ross*, supra, 230 Conn. 183. See *State* v. *Rizzo*, supra, 192. Accordingly, and in light of the fact that capital punishment remained legal in most states; see id., 190; we could

not conclude at that time that infrequency of imposition alone was sufficient evidence that the death penalty had become impermissibly cruel and unusual. See id., 194. Because capital punishment remained legal, and so presumably retained some deterrent value, we also did not have cause at that time to consider whether lengthy delays in carrying out capital sentences deprived capital punishment of its retributive value.

Much has changed since *Rizzo*. Two additional states—Maryland and Nebraska—have abolished capital punishment.[5] The number of executions carried out nationally has continued to decline, falling by more than one third from 2011 to 2015, and is now lower than at any time since 1991.[6] The number of new capital sentences imposed likewise continues to fall; the total fell by nearly 40 percent between 2011 and 2015, and is now by far the lowest of the post-*Furman*[7] era.[8] It has been more than one decade since the last execution was carried out in New England (Michael Ross, who essentially volunteered to die, in 2005), and more than five decades since the one before that (Joseph Taborsky in 1960). That this is all true even though many of the short-term factors we considered in *Rizzo* no longer apply strongly suggests that the persistent, long-term declines in capital punishment are just what they appear to be—evidence that contemporary standards of decency have evolved away from execution as a necessary and acceptable form of punishment. Significantly, the Death Penalty Information Center has published its 2015 year-end summary, and the statistics for 2015 continue to reflect a substantial decline in the imposition and implementation of the death penalty nationwide.[9] If anything, the pace of decline is accelerating.

Since our decision in *Rizzo*, a number of respected jurists also have concluded that the infrequent imposition and delayed execution of the death penalty call its constitutionality into question. See, e.g., *Glossip* v. *Gross*, U.S. , 135 S. Ct. 2726, 2764–76, 192 L. Ed. 2d 761 (2015) (Breyer, J., with whom Ginsburg, J., joins, dissenting); *Jones* v. *Chappell*, 31 F. Supp. 3d 1050, 1065–67 (C.D. Cal. 2014) (Carney, J.), rev'd sub nom. *Jones* v. *Davis*, 806 F.3d 538 (9th Cir. 2015). At the same time, new legal scholarship has emerged that powerfully debunks the state's argument that the rarity with which the death penalty is imposed in Connecticut merely indicates that our capital felony statutes are working as intended, and that the ultimate punishment is being reserved for the very worst offenders.[10]

Most significant, however, is the fact that, in 2012, the year after we decided *Rizzo*, the legislature enacted P.A. 12-5, which prospectively abolished the death penalty in Connecticut. Legislative abolition fundamentally altered the constitutional calculation we conducted in *Rizzo*. It cast in a new light all of the various factors pointing to reduced societal acceptance of capital pun-

ishment. It swept away the most compelling arguments that capital punishment serves legitimate penological functions. And it reflected the awareness of the legislature that the infrequency with which the death penalty is imposed and the slowness with which it is carried out dramatically undermine its ability to serve a valid retributive function and to secure justice and peace for the families of murder victims. See *State* v. *Santiago*, supra, 318 Conn. 103 and n.99. In light of these dramatic, recent changes in the constitutional landscape, it is difficult to comprehend how the state can argue with a straight face that "[t]here is nothing new under the sun . . . ." (Footnote omitted.)

Lastly, I am not persuaded by the state's assertion that *State* v. *Smith*, supra, 5 Day (Conn.) 175, a case decided two decades before the invention of the typewriter, somehow precludes the result this court reached in *Santiago*. *Smith* was the first published case in which this court considered whether two sentences of imprisonment may be imposed to run consecutively without offending the state's common-law prohibition against cruel and unusual punishment. See id., 178. Because "such ha[d] been the usage of our courts, for many years past," we concluded that postponing the commencement of the second term of imprisonment until the first had been completed was neither unprecedented nor cruel. Id., 179. Nowhere in the court's brief discussion of that issue, however, did it consider or decide any of the novel questions raised in *Santiago* and in the present appeal: (1) whether a method of punishment that is only imposed a few times per decade and only carried out a few times per century may be deemed to violate contemporary standards of decency; (2) whether the retributive value of a punishment—both to the offender and to the victims—dissipates when decades pass before it is carried out; and (3) whether the various procedural safeguards established by the federal and state legislatures and courts, which permit individuals on death row to pursue nearly endless appellate and postconviction remedies, reflect society's reluctance to impose the ultimate punishment and unwillingness to see it imposed erroneously. For these reasons, there is no doubt that, in *Santiago*, we properly considered the actual practices of this state with respect to the imposition and carrying out of capital sentences in concluding that capital punishment constitutes what has come to be seen as cruel and unusual.

III

RACIAL DISPARITIES AND PROSECUTORIAL DISCRETION

The state next contends that, in *Santiago*, when we observed that "the selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias"; *State* v. *Santiago*, supra, 318 Conn. 106–107; we improperly relied on statistical

evidence suggesting that people of color who offend against white victims are more likely than other offenders to be capitally charged and sentenced to death. The state argues that (1) a court in a habeas case currently pending on appeal before this court rejected these statistical claims; see *In re Death Penalty Disparity Claims*, Docket No. TSR-CV-05-4000632-S, 2013 WL 5879422 (Conn. Super. October 11, 2013); (2) studies that have documented racial disparities in other jurisdictions are not relevant to this state because, in the 1970s, Connecticut enacted the narrowest capital sentencing scheme in the country, and (3) in any event, such claims were not properly before us in *Santiago*.

The short answer to the state's arguments is simply to reiterate what we stated in *Santiago*: the question whether there are presently statistically significant racial disparities in the imposition of the death penalty in Connecticut was not before us in that case, as it is not before us in the present case, and we did not reach or rely on any such conclusion in holding the death penalty unconstitutional. See *State* v. *Santiago*, supra, 318 Conn. 109 n.104. What we did consider in *Santiago*—on the basis of an abundance of legal scholarship, persuasive federal and state authority, a thorough review of the relevant history, and our knowledge of human nature—was the proposition that any sentencing scheme that allows prosecutors not to seek and jurors not to impose the death penalty for any reason "*necessarily opens the door*" to caprice and bias of various sorts, racial or otherwise. (Emphasis added.) Id., 108. In other words, we agreed, as a matter of law, with those judges and scholars who have concluded that such a system cannot, in principle, ensure that the ultimate punishment will be imposed fairly and objectively, as it must be. The factual question of the extent to which the undisputed facial disparities in Connecticut's capital charging and sentencing system do in fact result from subconscious racial biases never entered into our analysis.[11]

The state's argument to the contrary—that Connecticut law does not afford jurors unlimited discretion to find mitigating factors—is unavailing. "It is well established that federal constitutional . . . law establishes a minimum national standard for the exercise of individual rights . . . ." (Internal quotation marks omitted.) *State* v. *Miller*, 227 Conn. 363, 379, 630 A.2d 1315 (1993); see also *State* v. *Santiago*, supra, 318 Conn. 18–19 (rule applies to eighth amendment protections). The United States Supreme Court repeatedly has instructed that juries must retain the discretion to consider any potentially mitigating factors when deciding whether to impose a capital sentence,[12] and the supremacy clause of the federal constitution bars both our legislature and this court from abridging that discretion. It is true that the United States Supreme Court has explained, and we have recognized, that the states remain free to chan-

nel the *manner* in which jurors exercise their broad discretion, such as by instructing that mitigating factors should be considered in light of "all the facts and circumstances of the case." (Internal quotation marks omitted.) *State* v. *Ross*, supra, 230 Conn. 284; see also id. (ultimately concluding that "[t]he instructions as given did not preclude the jury from giving mitigating force to *any* fact, taken alone or taken in conjunction with any other facts presented" [emphasis added]). Ultimately, however, there is nothing in the law of Connecticut or in this court's precedents that prevents a capital jury from considering racial, ethnic, or other such factors when deciding whether to impose the ultimate punishment. None of the cases cited by the state are to the contrary.

Because we did not rely on any factual finding of recent racial disparities in *Santiago*, and we do not do so now, it is not necessary to address fully the state's first and second arguments. I would, however, briefly note my disagreement with each.

With respect to *In re Death Penalty Disparity Claims*, I do not understand the court in that case to have rejected the petitioners' claim that there is statistically significant evidence that people of color who kill white victims are capitally charged, and thus placed at risk of death, at a much higher rate than are other offenders, and that those disparities cannot reasonably be accounted for by innocuous, nonracial factors. Rather, I understand the court to have acknowledged that there are significant racial disparities in capital charging (but not sentencing) in Connecticut; see *In re Death Penalty Disparity Claims*, supra, 2013 WL 5879422 *19, *24–*25; but to have concluded that, as a matter of federal constitutional and discrimination law, such disparities do not impair the validity of capital sentences imposed in this state. See id., *7, *10, *16–*18, *22–*25. The court further concluded, as a matter of law, that the constitution of Connecticut affords no greater protections than does federal law in this regard. Id., *3, *8. Whether the court in *In re Death Penalty Disparity Claims* was correct with respect to the latter conclusion is a question that this court has yet to answer.

Turning to the state's second argument, I am troubled by its repeated contention that the abundant evidence of racial disparities in other jurisdictions is irrelevant to the Connecticut experience because, "[i]n response to *Furman* [v. *Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)], Connecticut enacted the narrowest capital sentencing scheme in the country." The state relies on the following footnote in a 1980 law review article to support its proposition: "Connecticut's capital punishment law is unique in one regard. It enumerates five mitigating circumstances. But it states that the sentence shall not be death, if any mitigating factor exists,

whether statutorily defined or not. In other words, unlike the practice in every other state (except to some extent Colorado), a Connecticut jury, once it finds a mitigating fact, whether enumerated or not, does not have the power to balance or weigh the mitigating fact against any aggravating fact that may be present. The very existence of a mitigating fact precludes a death sentence." S. Gillers, "Deciding Who Dies," 129 U. Pa. L. Rev. 1, 104 n.10 (1980). Setting aside the question of whether the quoted passage even stands for the proposition for which the state cites it, the state is well aware that Connecticut's capital punishment law has *not* been as Gillers describes it for more than two decades. In 1995, the legislature amended General Statutes (Rev. to 1995) § 53a-46a to eliminate the provision on which the state relies. See Public Acts 1995, No. 95-19, § 1. Since then, juries in capital cases in Connecticut have balanced aggravating and mitigating factors in deciding whether to impose the ultimate punishment, just as they do in our sister states. In addition, any past idiosyncrasies in Connecticut's capital *sentencing* scheme are simply irrelevant to the central question of whether minority defendants accused of offending against white victims are capitally *charged* at a disproportionately high rate.

IV

EXECUTION OF THE INNOCENT

The state next contends that, in *Santiago*, we improperly considered the possibility that an innocent person may be erroneously executed as one reason why the death penalty fails to serve a legitimate retributive purpose. Although the state does not dispute the growing body of research that recently persuaded two justices of the United States Supreme Court that capital punishment is likely unconstitutional for this reason; see *Glossip* v. *Gross*, supra, 135 S. Ct. 2756–59 (Breyer, J., with whom Ginsburg, J., joins, dissenting); the state contends that the possibility of error is no longer a concern in this state because none of the eleven men currently subject to a sentence of death in Connecticut has professed his innocence.

Even if this were true, and even if it were properly subject to judicial notice, the state simply ignores the fact that, under P.A. 12-5, new prosecutions can still be brought at any time for capital felonies committed prior to April, 2012. Of the thousands of murders committed in Connecticut over the past several decades, some of which would be death eligible, many remain unsolved.[13] Accordingly, it is not at all unlikely that, if the death penalty were to remain available, the state would continue to seek it for some who have been accused of committing those crimes, with the possibility that an innocent person could wrongly be sentenced to die. Indeed, in the four years since the legislature prospectively abolished capital punishment, one additional

offender has been sentenced to death,[14] and at least one other likely would have been capitally charged if not for our decision in *Santiago*.[15] The state is fully aware of this possibility, as both the majority and a dissenting justice discussed it in *Santiago*. See *State* v. *Santiago*, supra, 318 Conn. 106 and n.102; id., 397 (*Espinosa*, *J.*, dissenting). I am, therefore, perplexed as to why the state continues to press this argument.

V

STATUTORY INTERPRETATION

The state next contends that, in *Santiago*, we improperly departed from our ordinary approach to questions of statutory interpretation. The basis of the state's objection is not entirely clear. For example, the state contends that, in *Santiago*, we failed to make what it considers to be "the required predicate finding that the language of [P.A. 12-5] itself is ambiguous," but, in the very next paragraph of its brief, the state quotes our conclusion in *Santiago* that "the policy judgments embodied in the relevant legislation are ambiguous." *State* v. *Santiago*, supra, 318 Conn. 89; see also id., 89 n. 91 (discussing textual ambiguity); id., 59–73 (considering competing interpretations of statutory text). More fundamentally, the state appears to assume that *Santiago* presented a conventional question of statutory interpretation, for which we are constrained to follow the dictates of General Statutes § 1-2z, which embodies the plain meaning rule. At the same time, the state also appears to recognize that claims that a penal sanction constitutes cruel and unusual punishment are reviewed according to a unique standard of review that requires us to assess "what a penal statute *actually indicates* about contemporary social mores." (Emphasis in original.) Id., 72 n.62.

In any event, to the extent that it was not transparent from our decision in *Santiago*, I take this opportunity to clarify that a claim that a penal sanction impermissibly offends contemporary standards of decency is not a question of statutory interpretation subject to § 1-2z and the attendant rules of construction.[16] When a reviewing court considers whether a challenged punishment is excessive and disproportionate according to current social standards, legislative enactments are just one—albeit the most important—factor to be considered. Moreover, our goal in evaluating those enactments is not merely to determine what the legislature intended to accomplish through the enabling legislation (the touchstone of statutory interpretation), but also to understand what the legislation *says and signifies* about our society's evolving perspectives on crime and punishment. In that respect, we look not only to the words of the statute, but also to its legislative history, the aspirations and concerns that were before the legislature as it deliberated, and, to the extent we can perceive them, the political motivations and calculations

that affected or effected the outcome of those deliberations. The latter, as much as anything else, offer a portal into what the final legislative product indicates about our contemporary standards of decency.

VI

RETRIBUTION AND VENGEANCE

The state next argues that, in *Santiago*, we incorrectly concluded that the death penalty now lacks any legitimate penological purpose because, among other things, the legislature's decision to retain it on a retroactive only basis was intended primarily to satisfy a public thirst for vengeance toward two especially notorious inmates, rather than to accomplish permissible retributive purposes. The state counters that (1) the legislature regularly and properly crafts penal statutes in response to public reactions to specific notorious and vicious crimes, and (2) P.A. 12-5 was crafted to make good on a promise to the families of murder victims that death would be repaid with death, and making good on such a promise is a legitimate manifestation of retributive justice.

Although it is undoubtedly true that the legislature is naturally responsive to powerful public sentiments, in the arena of criminal law as in other areas, that alone does not insulate a penal statute from constitutional scrutiny. As we explained in *Santiago*, if the mere fact that a punishment arose out of the democratic process established that it served a legitimate penological purpose, then the eighth amendment and its state constitutional counterparts would be largely superfluous. See id., 134–35. Rather, as the United States Supreme Court explained in *United States* v. *Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965), "in a representative republic . . . [in which] the legislative power is exercised by an assembly . . . [that] is sufficiently numerous to feel all the passions [that] actuate a multitude . . . yet not so numerous as to be incapable of pursuing the objects of its passions . . . barriers [must] be erected to ensure that the legislature [does] not overstep the bounds of its authority . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 443–44. "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents [that afterward] prove fatal to themselves." (Internal quotation marks omitted.) Id., 444. The court further emphasized that, in a government of divided powers in which each checks the others, the judiciary must play a central role in tempering the legislature's "[peculiar] susceptib[ility] to popular clamor," especially with respect to the levying of punishments against particular infamous persons. (Internal quotation marks omitted.) Id., 445. It is that task that we undertook in *Santiago*.

With respect to promises made to families and friends of the victims, we all have deep compassion for those who have been made to suffer the curse of crime. See, e.g., *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 772, 12 A.3d 817 (2011). As we explained in *Santiago*, however, whatever vows the state has made that it will seek and impose the ultimate penalty have proved to be unkeepable. Of the thousands of heinous murders that have been committed in Connecticut in the last six decades, only two have resulted in executions, and those only after the offenders renounced their appellate and habeas remedies and, in essence, volunteered to die. For the countless other families and secondary victims, the promise that they will find "restoration and closure"[17] in the hangman's noose, or an infusion of sodium thiopental, has proved to be a false hope. The vast majority of even the worst of the worst offenders are never sentenced to die, and, for the minuscule number who are, the delays are endless. Accordingly, although I am sensitive to the state's plea, I remain convinced that the death penalty, as it has been implemented in Connecticut over the past one-half century, serves no useful retributive purpose.[18]

VII

CONSTITUTIONAL TEXT

The state next argues that the death penalty can never be held unconstitutional because "it is expressly permitted by the Connecticut constitution." The state further argues that our reliance in *Santiago* on *People* v. *Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958, 92 S. Ct. 2060, 32 L. Ed. 2d 344 (1972);[19] see *State* v. *Santiago*, supra, 318 Conn. 131; was misplaced because that decision has been the subject of some judicial and scholarly criticism. Instead, the state recommends for our consideration a concurring opinion authored by Justice Antonin Scalia, who opines that "[i]t is impossible to hold unconstitutional that which the [c]onstitution explicitly contemplates." (Emphasis omitted.) *Glossip* v. *Gross*, supra, 135 S. Ct. 2747 (Scalia, J., concurring).

The dissenting justices in *Santiago* raised similar objections. See, e.g., *State* v. *Santiago*, supra, 318 Conn. 246–47 (*Rogers, C. J.*, dissenting); id., 353–54 (*Zarella, J.*, dissenting). The majority responded to them at some length in that decision; see id., 129–32; and no useful purpose would be served by rehashing those arguments here. I would, however, make a few additional points.

Regardless of whether one considers *Anderson* itself to be persuasive authority, recent scholarship both vindicates the reasoning of that case and sheds light on the defects in Justice Scalia's position. As Professor Joseph Blocher explains, "some supporters of the death penalty continue to argue . . . that the death penalty must be constitutional because the [f]ifth [a]mendment

explicitly contemplates it. The appeal of this argument is obvious, but its strength is largely superficial, and is also mostly irrelevant to the claims being made against the constitutionality of capital punishment. At most, the references to the death penalty in the [constitution] may reflect a founding era assumption that it was constitutionally permissible at that time. But they do not amount to a constitutional authorization; if capital punishment violates another constitutional provision, it is unconstitutional." J. Blocher, "The Death Penalty and the Fifth Amendment" (December 16, 2015) p. 1 (unpublished manuscript), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6227&context=faculty_scholarship; see also B. Ledewitz, "Judicial Conscience and Natural Rights: A Reply to Professor Jaffa," 10 U. Puget Sound L. Rev. 449, 459 (1987) ("The fifth amendment represents a limitation on capital punishment, that it was not to be carried out in the future as it had been in the past. One could hardly call the due process clause an endorsement of capital punishment.").

The state's argument appears to be that, with respect to the Connecticut constitution in particular, the due process clause of article first, § 8, cannot form the basis for holding capital punishment unconstitutional when that same clause authorizes the state to impose the death penalty, as long as it affords adequate due process of law. As the aforementioned authorities explain, however, this argument rests on two conceptual errors. First, a declaration of rights such as that contained in article first of the Connecticut constitution, or the federal Bill of Rights, is not a grant of governmental authority; rather, it delineates the rights and freedoms of the people *as against the government*. See *State* v. *Conlon*, 65 Conn. 478, 488–89, 33 A. 519 (1895); see also J. Blocher, supra, pp. 3, 8–9. For the state to suggest that one right (to be free from cruel and unusual punishment) bars the exercise of another *right* (presumably, to execute capital felons) is to fundamentally misunderstand the nature of the freedoms enshrined in article first. States have powers, and the people have rights vis-à-vis the exercise of those powers; there is no governmental *right* to kill.

A second, related conceptual error is the state's apparent failure to distinguish necessary from sufficient conditions. See J. Blocher, supra, p. 9. Article first, § 8, of the Connecticut constitution, as amended by article seventeen and twenty-nine of the amendments, which provides in relevant part that "[n]o person shall be . . . deprived of life . . . without due process of law . . . [or] held to answer for any crime, punishable by death . . . unless upon probable cause," indicates that, to the extent that the death penalty is otherwise permissible and authorized by law, it may be imposed only after the defendant is afforded adequate due process. In other words, due process is a *necessary* condition for the

imposition of the death penalty, and article first, § 8, as amended, thereby restricts the circumstances under which that penalty may be imposed. There is no textual support, however, for the state's apparent belief that article first, § 8, as amended, makes the provision of due process a *sufficient* condition for the imposition of capital punishment, so that the state is authorized to carry out executions as long as it has complied with the requirements of due process. Of course, as we explained in *State* v. *Ross*, supra, 230 Conn. 249–50, the fact that the founders expressly referenced capital punishment in the state constitution, and the fact that such references were retained when article first, § 8, was amended at the most recent constitutional convention in 1965, provides strong evidence that, at those times, capital punishment was seen to be a legal and permissible penalty that comported with standards of decency of the day. But that implies at most that the death penalty is not unconstitutional per se, at all times and under all circumstances. As Blocher explains, "one could grant Justice Scalia's argument that the death penalty is not 'categorically impermissible' while maintaining that the conditions for its constitutional use are not currently satisfied and perhaps never will be." J. Blocher, supra, p. 5.

VIII

STARE DECISIS

Lastly, the state argues that, to the extent that *Santiago* was wrongly decided and resulted in an unjust outcome, the principle of stare decisis, that is, the duty of a court to adhere to established precedent, does not require that we uphold the conclusion that capital punishment offends the state constitution. The state itself concedes, however, that "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Alvarez*, 257 Conn. 782, 793–94, 778 A.2d 938 (2001). The state has provided neither reasons nor logic to justify overruling our recent decision in *Santiago*.[20]

First, having fully reviewed the state's arguments and the authorities on which it relies, I find no reason to conclude that *Santiago* was wrongly decided, let alone unjust. The state has not pointed to any controlling cases that we overlooked, persuasive arguments that we failed to consider, or fatal defects in our reasoning. Most of the state's arguments are ones that we expressly considered and rejected in *Santiago*, and the others fail to hold up under scrutiny or simply miss the point. In a disturbing number of instances, the authorities on which the state relies do not even support the proposition for which the state cites them.

Second, the state has failed to identify any case, and I am not aware of any, in which a court of last resort

has reversed its own landmark constitutional ruling after a matter of just months. For this court to entomb the death penalty in *Santiago*, and then to exhume and revivify it nine months later, would be unprecedented and would make a mockery of the freedoms enshrined in article first of the state constitution. If the people of Connecticut believe that we have misperceived the scope of that constitution, it now falls on them to amend it.[21]

Finally, I question whether a decision in this case to overrule *Santiago*, and to revive the death penalty for the defendant in the present case, could survive federal constitutional scrutiny. The defendant in *Santiago* has received the benefit of our decision therein, namely, that capital punishment is an excessive and disproportionate punishment, and that he no longer may be executed. The state now proposes that we reauthorize the death penalty[22] and proceed to execute the defendant, Peeler, solely on the basis of the fact that a different panel of this court, having considered essentially the same arguments only months later, might reach a different result. Nothing could be more arbitrary than to execute one convicted capital felon who committed his offense prior to the enactment of P.A. 12-5 but to spare another, solely on the basis of the timing of their appeals. For this reason as well, I reject the state's request that we overrule *Santiago* and revive the death penalty in Connecticut.

[1] The state, while ultimately acknowledging that the court in *Ross* "employed an independent analysis of the facial validity of a [capital] sentence," suggests that we did so principally to review the procedural safeguards that must be followed before the death penalty may be imposed, and not to review the constitutionality of the punishment itself. This argument ignores the fact that, in both *State* v. *Ross*, supra, 230 Conn. 245–52, and *State* v. *Rizzo*, 303 Conn. 71, 184–201, 31 A.3d 1094 (2011), cert. denied, U.S. , 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012), we purported to conduct a comprehensive analysis of precisely the question presented in *Santiago* and the present case, namely, whether, as a general matter, the death penalty had come to offend the state constitutional prohibition against cruel and unusual punishment, either because it fails to comport with contemporary standards of decency or because it no longer serves any legitimate penological purpose. The fact that capital punishment survived constitutional scrutiny in *Ross* and *Rizzo* but failed to do so in *Santiago* does not indicate that we applied a less deferential standard of review in the latter case, as the state contends. Rather, it simply reflects the fact that the legislature's prospective abolition of the death penalty in 2012 fundamentally reshaped the penological landscape and thus altered our constitutional calculation.

[2] I further note that the state's argument that our reliance on *State* v. *Smith*, 5 Day (Conn.) 175 (1811), was misplaced because that decision failed to address the constitutionality of the sentence at issue proves little and less. I will return to the holdings and implications of *Smith*. For now, suffice it to say that one should not expect that a case decided in 1811, seven years before the adoption of this state's first formal constitution, would speak to the constitutionality of the sentence in question. Rather, to reiterate, in *Santiago*, we cited to pre-1818 authority such as *Smith* and *Lung's Case*, 1 Conn. 428 (1815), merely as evidence of the well established common-law freedoms from cruel and unusual punishment that were incorporated into the due process provisions of the 1818 constitution. This court's power of judicial review was never in question.

[3] The other cases on which the state relies are readily distinguishable or otherwise fail to support the propositions for which the state cites them. See, e.g., *State* v. *Lamme*, supra, 216 Conn. 183 (indicating that cases on which state relies in construing article first, § 9, are not binding precedent);

State v. *Davis*, 158 Conn. 341, 358–59, 260 A.2d 587 (1969) (relying on fact that five successive legislatures had declined to abolish death penalty in holding that penalty complied with *federal* constitution), vacated in part, 408 U.S. 935, 92 S. Ct. 2856, 33 L. Ed. 2d 750 (1972); *State* v. *Williams*, 157 Conn. 114, 120–21, 249 A.2d 245 (1968) (when sentence that ultimately was imposed was not illegal, failure of jail physician to provide certain medication prior to trial did not constitute cruel and unusual punishment), cert. denied, 395 U.S. 927, 89 S. Ct. 1783, 23 L. Ed. 2d 244 (1969); *Simborski* v. *Wheeler*, 121 Conn. 195, 197–98, 201, 183 A. 688 (1936) (challenge to form of execution was based on statutory rather than constitutional ground). Although the state suggests that the United States Supreme Court vacated *Davis* on other grounds, in truth, it was precisely this court's determination that legislative authorization insulated the death penalty from constitutional review that the Supreme Court rejected, in light of its decision in *Furman* v. *Georgia*, 408 U.S. 238, 239–40, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[4] The portions of Holdsworth's dissertation suggesting that early criminal statutes were enacted in response to concerns over the abuse of magisterial discretion primarily refer to the prevalence of such concerns in *Massachusetts*. See W. Holdsworth, supra, pp. 104, 109, 167–71. The state fails to acknowledge that Holdsworth repeatedly emphasizes that such concerns were less pronounced in the Connecticut and New Haven colonies and that, in fact, those colonies continued to *increase* the authority and discretion of the magistrates after the adoption of Ludlow's Code. See id., pp. 104, 132, 137, 152–53, 171–72. As Holdsworth concludes, "[Ludlow] omitted most of the Bay Colony's liberties and permitted the magistrates greater discretion in dealing with many crimes. At one time, Connecticut's leaders were distrustful of magisterial discretion, but they became less anxious about it once they assumed the mantle of authority themselves, trusting themselves to deal sternly but justly with the multitude of problems that beset their commonwealth." Id., pp. 171–72; but see J. Trumbull, Historical Notes on the Constitutions of Connecticut, 1639–1818 (1901) pp. 9, 42 (noting that prominent founders of Connecticut, such as Thomas Hooker, founded colony to escape magisterial tyranny that they perceived in Massachusetts).

[5] Death Penalty Information Center, "States With and Without the Death Penalty," available at http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited May 12, 2016) (Maryland abolished death penalty in 2013, and Nebraska abolished death penalty in 2015).

[6] See Death Penalty Information Center, "Executions by Year," available at http://www.deathpenaltyinfo.org/executions-year (last visited May 12, 2016) (detailing number of executions in United States since 1976).

[7] *Furman* v. *Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[8] See Death Penalty Information Center, "Death Sentences by Year: 1976–2014," available at http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009 (last visited May 12, 2016); Death Penalty Information Center, "2015 Sentencing," available at http://www.deathpenaltyinfo.org/2015-sentencing (last visited May 12, 2016).

[9] See generally Death Penalty Information Center, "The Death Penalty in 2015: Year End Report," available at http://www.deathpenaltyinfo.org/documents/2015YrEnd.pdf (last visited May 12, 2016).

[10] See J. Donohue, Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution (2011) pp. 131–46, available at http://www.deathpenaltyinfo.org/documents/DonohueCTStudy.pdf (last visited May 12, 2016) (finding little relationship between egregiousness and rate at which cases are charged as capital felonies, and noting that, of seventeen offenders potentially chargeable with capital felony murder for hire, only thirteen were charged capitally and only one—Santiago—was sentenced to death).

[11] Nor did we conclude in *Santiago* that Connecticut's prosecutors have exercised their discretion with anything less than complete professionalism. In *Santiago*, we opined only that, in light of the constraints imposed by federal law, it is virtually impossible to exercise such discretion so as to ensure that the imposition of the death penalty, writ large, will not be arbitrary and capricious.

[12] See, e.g., *Johnson* v. *Texas*, 509 U.S. 350, 361, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993); see also *Walton* v. *Arizona*, 497 U.S. 639, 663, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) (Scalia, J., concurring in part and concurring in the judgment) (opining that state cannot preclude consideration of defendant's racial beliefs as mitigating evidence), overruled in part on other grounds by *Ring* v. *Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[13] See, e.g., Division of Criminal Justice, State of Connecticut, "Cold Cases—Open," available at http://www.ct.gov/csao/cwp/view.asp?a=1798&q=291462 (last visited May 12, 2016).

[14] See *State* v. *Roszkowski*, Superior Court, judicial district of Fairfield, Docket No. FBT-CR-06-0218479-T.

[15] See *State* v. *Howell*, Superior Court, judicial district of New Britain, Docket No. HHB-CR-15-0279874-T.

[16] For the same reasons, the state's argument that our decision in *Santiago* was precluded by Connecticut's savings statutes, General Statutes §§ 1-1 (t) and 54-194, also misses the mark.

[17] The state notes in its brief that maintaining the death penalty could serve a retributive purpose by "providing a sense of restoration and closure to victims and their families . . . ."

[18] The state, which quotes from the Book of Ecclesiastes in its brief, would do well to consider the following passage therefrom: "Better not vow at all than vow and fail to pay." Ecclesiastes 5:5, in The New English Bible: Old Testament (Oxford University Press & Cambridge University Press 1970) p. 931.

[19] We relied on *Anderson* for the proposition that "incidental references to the death penalty in a state constitution merely acknowledge that the penalty was in use at the time of drafting; they do not forever enshrine the death penalty's constitutional status as standards of decency continue to evolve . . . ." *State* v. *Santiago*, supra, 318 Conn. 131.

[20] Justice Espinosa, in her dissenting opinion in the present case, repeatedly suggests that *Santiago* is not binding precedent because it was decided on the basis of the subjective moral beliefs of the majority, contrary to precedent and in violation of our sworn duty to follow the law. We already have said everything that needs to be said with respect to these baseless assertions. See *State* v. *Santiago*, supra, 318 Conn. 86 n.89. With respect to the issue of stare decisis, we merely reiterate that our decision in *Santiago* did not overturn controlling precedent but, rather, applied the well established evolving standards of decency test in the context of a fundamentally new and different legal landscape, in which capital punishment has been legislatively abolished—an issue of first impression never before addressed by this or any other court prior to the adoption of P.A. 12-5. Justice Espinosa's reliance on *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 234, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), therefore, is misplaced.

[21] Whether capital punishment might be reinstated in Connecticut by means other than a constitutional amendment is not before us in this case. See *State* v. *Santiago*, supra, 318 Conn. 86 n.88.

[22] I take no position on the question of whether, following our decision in *Santiago*, this court has the power to reauthorize the death penalty without new enabling legislation. Compare *Jawish* v. *Morlet*, 86 A.2d 96, 97 (D.C. 1952) (statute held to be unconstitutional is "not void in the sense that it is repealed or abolished" but remains dormant, and may be revived by subsequent judicial decision), with *Dascola* v. *Ann Arbor*, 22 F. Supp. 3d 736, 744–46 (E.D. Mich. 2014) (decision holding statute unconstitutional essentially nullifies statute, and if court should later determine that it does in fact pass constitutional muster, legislature must reenact it).

ROBINSON, J., concurring. I join the majority's decision not to disturb *State* v. *Santiago*, 318 Conn. 1, 9, 122 A.3d 1 (2015),[1] which held that, "in light of the governing constitutional principles and Connecticut's unique historical and legal landscape . . . following its prospective abolition, this state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose. For these reasons, execution of those offenders who committed capital felonies prior to April 25, 2012, would violate the state constitutional prohibition against cruel and unusual punishment." My decision to join the majority's decision to reverse the death sentence of the defendant, Russell Peeler, is significantly informed by the unique position that I hold as the only active member of this court who did not sit to decide *Santiago*, which was a four to three decision. In my view, stare decisis considerations of this court's institutional legitimacy and stability are at their zenith in this particular case, given that the *only* thing that has changed since this court decided *Santiago* is the composition of this court.[2] Having considered *Santiago* in light of the arguments raised by the parties in this appeal, I conclude that it is not so clearly wrong that we should risk damaging this court's institutional stability by overruling it. Put differently, because it would imperil our state's commitment to the rule of law for it to appear that a change in the composition of the court resulted in the immediate retraction of a landmark state constitutional pronouncement, I join in the court's decision to uphold *Santiago*.

The background legal principles governing the doctrine of stare decisis are well established. "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 519, 949 A.2d 1092 (2008). "This court has repeatedly acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law. . . . Stare decisis is a formidable obstacle to any court seeking to change its own law. . . . It is the most important application of a theory of [decision-making] consistency in our legal culture and it is an obvious manifestation of the notion that [decision-making] consistency itself has normative value. . . . Stare decisis does more than merely push courts in hard cases, where they are not convinced about what justice requires, toward decisions that conform with decisions made by previous courts. . . . The doctrine is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves

resources and it promotes judicial efficiency. . . .

"As this court has stated many times, [t]he true doctrine of stare decisis is compatible with the function of the courts. . . . [T]here is no question but that [a] decision of this court is a controlling precedent until overruled or qualified. . . . [S]tare decisis . . . serve[s] the cause of stability and certainty in the law—a condition indispensable to any well-ordered system of jurisprudence . . . .

"Whether stare decisis serves the interests of judicial efficiency, protection of expectations, maintenance of the rule of law, or preservation of judicial legitimacy, however, is not dispositive. The value of adhering to precedent is not an end in and of itself, however, if the precedent reflects substantive injustice. Consistency must also serve a justice related end. . . . When *a prior decision is seen so clearly as error* that its enforcement [is] for that very reason doomed . . . the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision. Stare decisis is not an inexorable command. . . . The court must weigh [the] benefits [of stare decisis] against its burdens in deciding whether to overturn a precedent it thinks is unjust. The rule of stare decisis may entail the sacrifice of justice to the parties in individual cases, but, far from being immune from considerations of justice, it must always be tested against the ends of justice more generally. . . .

"Indeed, this court has long believed that although [s]tare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, [it] is not an absolute impediment to change. . . . [S]tability should not be confused with perpetuity. If law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. . . . [I]t is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience. . . . The United States Supreme Court has said that when it has become convinced of former error, it has never felt constrained to follow precedent. . . .

"[One] well recognized exception to stare decisis under which a court will examine and overrule a prior decision . . . [is when that prior decision] is *clearly wrong*. . . . The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned. . . . Because stare decisis is not a rule of law but a matter of judicial policy . . . it does not have the same kind of force in each kind of case so that adherence to or deviation from that general policy *may depend upon the kind of case*

involved, especially the nature of the decision to be rendered that may follow from the overruling of a precedent." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 658–61, 680 A.2d 242 (1996). "In short, consistency must not be the only reason for deciding a case in a particular way, if to do so would be unjust. Consistency obtains its value best when it promotes a just decision." Id., 662.

Guided by these general principles, I first observe that the timing of our consideration of the present case renders stare decisis considerations particularly strong with respect to the public's perception of this court's legitimacy in its exercise of its core function of constitutional interpretation. See *State* v. *Ferguson*, 260 Conn. 339, 367, 796 A.2d 1118 (2002) ("[w]e will not revisit the same issues we so recently have decided"). In contrast to other cases, wherein the passage of time has yielded factual or legal developments that serve as a basis for a challenge to the decision under attack; see, e.g., *Campos* v. *Coleman*, 319 Conn. 36, 37–38, 123 A.3d 854 (2015) (overruling *Mendillo* v. *Board of Education*, 246 Conn. 456, 495–96, 717 A.2d 1177 [1998], and recognizing derivative cause of action for loss of parental consortium by minor child); *State* v. *Salamon*, supra, 287 Conn. 522–28 (interpretation of kidnapping statutes); all that has changed since *Santiago* was decided "is the composition of this [c]ourt, which is not a valid reason for ignoring stare decisis principles." *Haynes* v. *State*, 273 S.W.3d 183, 187 (Tex. Crim. App. 2008), overruled on other grounds by *Bowen* v. *State*, 374 S.W.3d 427 (Tex. Crim. App. 2012); see also *Wheatfall* v. *State*, 882 S.W.2d 829, 843 (Tex. Crim. App. 1994) (The court rejected the argument that it "should consider the changing membership of the [United States] Supreme Court in our review of their precedent" because "this [c]ourt would be forced to reconsider every decision of the [United States] Supreme Court or our [c]ourt upon changes in membership. Such an endeavor would defeat one of the essential purposes of stare decisis."), cert. denied, 513 U.S. 1086, 115 S. Ct. 742, 130 L. Ed. 2d 644 (1995). Indeed, as this court observed more than seventy years ago, "a change in the personnel of the court affords no ground for reopening a question which has been authoritatively settled." *Tileston* v. *Ullman*, 129 Conn. 84, 86, 26 A.2d 582 (1942), appeal dismissed, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943); accord *Herald Publishing Co.* v. *Bill*, 142 Conn. 53, 62, 111 A.2d 4 (1955) ("[a] change in the personnel of the court never furnishes reason to reopen a question of statutory interpretation").

The New York Court of Appeals has described the benefits of decisional stability in the face of the changing composition of the court, aptly stating that it "would have been scandalous for a court to shift within less than two years because of the replacement of one of the

majority in the old court by one who now intellectually would have preferred to have voted with the old minority and the new one. The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men." *People* v. *Hobson*, 39 N.Y.2d 479, 491, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); see also *People* v. *Taylor*, 9 N.Y.3d 129, 148, 878 N.E.2d 969, 848 N.Y.S.2d 554 (2007) ("Stare decisis is deeply rooted in the precept that we are bound by a rule of law—not the personalities that interpret the law. Thus, the closeness of a vote bears no weight as to a holding's precedential value as a controversy settled by a decision in which a majority concur should not be renewed without sound reasons . . . ." [Citation omitted; internal quotation marks omitted.]); S. Wachtler, "Stare Decisis and a Changing New York Court of Appeals," 59 St. John's L. Rev. 445, 455–56 (1985) (describing "necessary balance between stability and innovation," and stating that "[j]udiciously applied in a proper case, the doctrine of stare decisis will allay the fears of those who look with apprehension upon the ongoing personnel changes in the [New York] Court of Appeals").

Put differently, for me to join this court and near immediately disturb this court's so recently decided landmark decision in *Santiago* would require me, in the words of Justice Thurgood Marshall, to embrace the principle that "[p]ower, not reason, is the new currency of this [c]ourt's decisionmaking." *Payne* v. *Tennessee*, 501 U.S. 808, 844, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (Marshall, J., dissenting); see id. (Justice Marshall dissented from the court's decision to overrule *Booth* v. *Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 [1987], and *South Carolina* v. *Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 [1989], and to permit the admission of victim impact evidence during the penalty phases of capital trials because "[n]either the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this [c]ourt did."). I agree with Justice Marshall that "stare decisis is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of the judiciary as a source of impersonal and reasoned judgments. . . . Indeed, this function of stare decisis is in many respects even more critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements. Because enforcement of the [federal] [b]ill of [r]ights and the [f]ourteenth [a]mendment [to the United States constitution] frequently requires this [c]ourt to rein in the forces of democratic politics, this [c]ourt can legitimately lay

claim to compliance with its directives only if the public understands the [c]ourt to be implementing principles . . . founded in the law rather than in the proclivities of individuals." (Citation omitted; emphasis omitted internal quotation marks omitted.) *Payne* v. *Tennessee*, supra, 852–53 (Marshall, J., dissenting).[3]

My sensitivity to stare decisis in this case is heightened by the fact that we are called on to reconsider the court's conclusion in *Santiago* that the death penalty is now unconstitutional under our state's constitution. "[I]f the doctrine of stare decisis has any efficacy under our case law, death penalty jurisprudence cries out for its application. Destabilizing the law in these cases has overwhelming consequences . . . ." *Zakrzewski* v. *State*, 717 So. 2d 488, 496 n.5 (Fla. 1998) (Anstead, J., concurring), cert. denied, 525 U.S. 1126, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); accord *State* v. *Waine*, 444 Md. 692, 702, 122 A.3d 294 (2015) (observing that "[w]here the [c]ourt has previously recognized a new [s]tate constitutional standard as fundamental to due process, deference to that precedent ensures the constancy upon which due process endures"). Indeed, in *People* v. *Taylor*, supra, 9 N.Y.3d 129, Judge Robert S. Smith of the New York Court of Appeals explained in his concurring opinion his decision to join the majority in overturning a death sentence obtained under an unconstitutional death penalty procedure statute—despite dissenting three years before in *People* v. *LaValle*, 3 N.Y.3d 88, 99, 817 N.E.2d 341, 783 N.Y.S.2d 485 (2004), in which the court had invalidated that statute.[4] Judge Smith explained that the "policies underlying the doctrine of stare decisis, which include stability, predictability, respect for our predecessors and the preservation of public confidence in the courts, are at their strongest where, as here, a court is asked to change its mind although nothing else of significance has changed. No one suggests that any development in the last three years, either in the law or the law's effect on the community, has changed the context in which *LaValle* was decided. *Indeed, we are asked to revive the very same statute held invalid in LaValle—not a theoretically impossible step, but a radical one. So far as I can tell, we have never done such a thing, and the occasions on which other courts have done it are rare* . . . ." (Citation omitted; emphasis added.) *People* v. *Taylor*, supra, 156.

Guided by these authorities, I am not convinced that any analytical shortcomings in *Santiago* surpass the significant stare decisis concerns that would accompany overruling that landmark decision. See, e.g., *Dickerson* v. *United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) ("[w]hether or not we would agree with [the] reasoning [of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis

weigh heavily against overruling it now"). Specifically, I have reviewed the opinions and briefs filed in *Santiago*, and determined that the majority in that case did not unreasonably read the record and the authorities when it concluded that: (1) the issues decided therein were raised by the parties, thus affording the state notice and an opportunity to brief them, had it elected to do so; and (2) the death penalty now is cruel and unusual punishment under our state's constitution in the wake of the death penalty's prospective repeal in No. 12-5 of the 2012 Public Acts. Although reasonable jurists certainly could—and most emphatically did—disagree about the merits of *Santiago*, I do not view the majority's decision in that case as so fundamentally flawed that it warrants overruling so soon after it was decided.[5]

Thus, I emphasize my disagreement with the state's argument, in its supplemental brief and at oral argument before this court, that the recency of the court's decision in *Santiago* renders it an appropriate candidate for overruling, insofar as there has been minimal reliance on it to this point, and that the doctrine "carries less force when the court is asked to reconsider constitutional rulings because, unlike in statutory interpretation cases, the legislature lacks the ability to correct a judicial mistake." See, e.g., *State* v. *Salamon*, supra, 287 Conn. 523 ("[p]ersons who engage in criminal misconduct, like persons who engage in tortious conduct, rarely if at all will . . . give thought to the question of what law would be applied to govern their conduct if they were to be apprehended for their violations" [internal quotation marks omitted]); *Conway* v. *Wilton*, supra, 238 Conn. 661 (force of stare decisis is "least compelling [when the ruling revisited] may not be reasonably supposed to have determined conduct of the litigants" [internal quotation marks omitted]). I agree with Justice Palmer's observation in his opinion in the present case that the watershed nature of this court's decision in *Santiago* creates, in essence, a different kind of reliance concern beyond the arithmetically measurable reliance considered at oral argument before this court and emphasized by Justice Zarella in his dissenting opinion.[6] See L. Powe, "Intragenerational Constitutional Overruling," 89 Notre Dame L. Rev. 2093, 2104 (2014) (concluding that "reliance is rarely a factor in any decision about stare decisis in a case that does not involve economics" but observing that "[p]erhaps reliance in the noneconomic sphere internalizes . . . the [c]ourt's view of the likely public reaction to a formal overruling"). That reliance concern is particularly heightened in the death penalty context, insofar as I can imagine nothing that would appear more shockingly arbitrary than for this court to invalidate the death penalty in *Santiago* and render a final judgment sparing the defendant in that case,[7] and then—with the substitution of a newly appointed justice—immediately over-

rule *Santiago* and hold that the defendant and his counterparts on death row could potentially face execution.[8] Putting aside the obvious equal protection consequences highlighted by Justice Palmer, this result, as demonstrated by very recent experience in one of our sister states, would at the very least strongly *appear* to stem solely from when the filing and scheduling of the defendants' appeals and the composition of the panels that heard their cases.[9] See *State* v. *Petersen-Beard*, Docket No. 108061, 2016 WL 1612851, *1 (Kan. April 22, 2016) (four to three decision overruling three separate four to three decisions issued by differently constituted panel on same day). This would be the nadir of the rule of law in the state of Connecticut.[10] Put differently, I find no substantive or procedural errors in *Santiago* whose magnitude justifies incurring the massive risk to our court's credibility as an institution that the state asks us to undertake.

Accordingly, I join in the judgment of the court.

[1] Unless otherwise noted, all references to *Santiago* in this opinion refer to *State* v. *Santiago*, supra, 318 Conn. 1.

[2] I wish to explain my position that this court properly considered this constitutional issue, namely, the constitutionality of the death penalty in the wake of No. 12-5 of the 2012 Public Acts, in the first instance in *Santiago*, notwithstanding the fact that it was published well after I joined the court and its panel ultimately included a recently retired justice. In particular, I emphasize that I do not view the court's actions in *Santiago* as in any way precluding me from exercising my duty to decide this significant issue as a matter of first impression.

I recognize that some concerns have been expressed about this court's decision to consider the constitutionality of the death penalty in the wake of Public Act 12-5 in the first instance in *Santiago*, rather than in this case, given this court's policy and practice of deciding important constitutional issues with a full and current panel of this court whenever possible. See W. Horton, "One Thought on *State* v. *Santiago*," Horton, Shields & Knox Appellate Blog (October 28, 2015), available at http://hortonshieldsknox.com/one-thought-on-state-v-santiago (last visited May 16, 2016) ("it looks bad for a court when, notwithstanding a constitutional provision that a justice must stop holding office at age [seventy], a newly appointed justice has to sit on the sidelines for months, and in this one case years, while a justice over age [seventy] decides very important cases with which the new justice may disagree"); see also D. Klau, "Supreme Court to Rehear Arguments in Death Penalty Case," Appealingly Brief (December 1, 2015), available at http://appealinglybrief.com/2015/12/01/supreme-court-to-rehear-arguments-in-death-penalty-case (last visited May 16, 2016) (describing court's position vis-à-vis *Santiago* and present case as "uncomfortable").

By way of background, I note that Governor Dannel P. Malloy appointed me to this court in December, 2013, to the seat on this court vacated by the mandated retirement of Justice Flemming L. Norcott, Jr. The constitutionality of the death penalty in the wake of Public Act 12-5 was argued in *Santiago* on April 23, 2013, approximately six months prior to Justice Norcott attaining the constitutionally mandated age of retirement. Justice Norcott then continued to participate in deliberations as a member of that panel, including consideration of the state's subsequent motions for reconsideration and to stay, in accordance with General Statutes § 51-198 (c). Justice Norcott's vote to join the slender majority in *Santiago* ended a career on this court in which he had been a leading voice against the constitutionality of the death penalty. See, e.g., *State* v. *Santiago*, 305 Conn. 101, 307 n.166, 49 A.3d 566 (2012); *State* v. *Breton*, 264 Conn. 327, 446–47, 824 A.2d 778 (2003) (*Norcott*, *J.*, dissenting).

I respectfully disagree with the concerns expressed about Justice Norcott's continued participation in *Santiago*, to my apparent exclusion from the opportunity to decide this issue tabula rasa. In my view, Justice Norcott's continued deliberation in *Santiago* pursuant to § 51-198 (c) was wholly proper and appropriate under the letter and purpose of that statute, despite

the fact that his participation lasted for nearly two years following my elevation to what had been his seat on this court. To allow prudential concerns about the exclusion of a newly appointed justice to disenfranchise Justice Norcott from his continued participation in *Santiago* nearly eight months into deliberations on that case—particularly given the magnitude of the issues considered therein—would have raised the constitutionally unsavory specter of running out a football game clock on the office of a member of this court in a case argued well before his retirement and the appointment of his successor. See *Honulik* v. *Greenwich*, 293 Conn. 641, 661–62, 980 A.2d 845 (2009) (This court upheld the constitutionality of § 51-198 [c] and noted that it relieved a retiring justice from the obligation to "arbitrarily . . . cease hearing new cases at some point prior to reaching seventy, effectively cutting his or her term of office short, and without the possibility of a replacement. If a justice must cease all Supreme Court case work on the date of his seventieth birthday, then, by necessity, he is divested of the full authority and responsibility of his office many months before that date."). This is particularly so, given that the circumstances leading to the lengthy deliberation may well have been completely out of Justice Norcott's control. See id., 662 (noting that some cases result "despite all good faith efforts," in "misjudgment as to the time required to dispose of an appeal or delay due to unforeseen difficulties").

Thus, the timing of my participation in deciding this issue reflects nothing more than the following facts: (1) the constitutionality of the death penalty following the enactment of Public Act 12-5 is an issue of law common to numerous cases on this court's docket; (2) accordingly, some case had to be the first to consider the issue, with *Santiago* being the first ready case in line; (3) the length of the court's deliberations in *Santiago* were consistent with the gravity of the issue before the court and the length of the numerous opinions published in that case; and (4) once this court decided *Santiago*, it became necessary to resolve other death penalty cases as they became ready for consideration, with the present case being the first direct appeal in line after the conclusion of proceedings in *Santiago*.

[3] In dissenting in *Payne*, Justice Marshall described the majority's decision to distinguish the importance of stare decisis in cases "involving property and contract rights, where reliance interests are involved" from those "involving procedural and evidentiary rules," particularly when "decided by the narrowest of margins, over spirited dissents" as creating a "radical new exception to the doctrine of stare decisis," applicable to prior decisions with single vote margins. (Internal quotation marks omitted.) *Payne* v. *Tennessee*, supra, 501 U.S. 845, 851. He observed that "the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who now comprise a majority of this [c]ourt." (Emphasis omitted.) Id., 851. Justice Marshall eloquently stated that "the majority's debilitated conception of stare decisis would destroy the [c]ourt's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this [c]ourt shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. . . . By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a [five to four] vote 'over spirited dissen[t]' . . . the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this [c]ourt may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question." (Citations omitted.) Id., 853–54. In sum, Justice Marshall stated: "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this [c]ourt as a protector of the powerless." Id., 856.

[4] In *LaValle*, the New York Court of Appeals considered the constitutionality of a statute requiring the trial judge to inform the jury that its deadlock with respect to a sentence of death or life without parole would require the judge to sentence the defendant to a lesser sentence of life imprisonment with parole eligibility after twenty to twenty-five years. *People* v. *LaValle*, supra, 3 N.Y.3d 116. The court held that this statutory instruction was unconstitutionally coercive and that the court had to strike the statute subject to legislative repair because, under the state constitution, "the absence of any instruction is no better than the current instruction under our constitutional analysis," and "[l]ike the flawed deadlock instruction, the absence of an instruction would lead to death sentences that are based on speculation, as the [l]egislature apparently feared when it decided to pre-

scribe the instruction." Id., 128.

[5] In his well researched and scholarly dissenting opinion, Justice Zarella crafts a test intended to mitigate the seemingly subjective nature of the existing stare decisis inquiry by requiring the court to engage in a multifactor balancing analysis after making a threshold determination that the precedent under attack is, for whatever reason, wrongly decided. Justice Zarella's test does not, however, accommodate for degrees of wrong, insofar as he observes that, "[i]n addition to placing too little value on precedent, the wrongness of a previous decision should not factor into the stare decisis calculus because it is difficult to quantify or measure the degree of a particular decision's wrongness," noting that "the merits determination is independent of, and has no impact on, the stare decisis analysis."

I respectfully disagree with Justice Zarella's refusal to consider the relative degree of "wrong" in engaging in his stare decisis analysis. First, with no qualitative control other than the balancing of costs of maintaining versus eliminating a prior decision, it appears to be receptive to overruling precedent in a way that undercuts the salutary features with respect to promoting stability in the law. Second, this approach ironically appears to overrule certain well established principles of stare decisis, namely that: (1) the prior decision must be shown to be "*clearly wrong*" with a "clear showing that an established rule is incorrect and harmful"; (emphasis added; internal quotation marks omitted) *Conway* v. *Wilton*, supra, 238 Conn. 660–61; and (2) "a court should not overrule its earlier decisions unless the *most cogent* reasons and *inescapable logic* require it." (Emphasis added; internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 519.

In my view, the precedential value of an older decision, unquestionably correct when decided, might well erode over time as the result of relevant changes in law and policy, thus rendering a decision to overrule it less of a shock to the stability of the court and the law. See S. Burton, "The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication," 35 Cardozo L. Rev. 1687, 1703–1704 (2014) (describing threshold factors to examine before deciding merits of whether to overrule precedent, including: "[1] notice and predictability; [2] legal developments that make the precedent anomalous; [3] the precedent's workability; [4] reliance on the precedent; [5] the quality of the precedent court's reasoning; and [6] changes in factual circumstances that erode the precedent's justification" [footnotes omitted]). Without the benefit of the lessons learned from watching a precedent's value evolve over time, I would require a far greater showing of error—near akin to that required to justify reconsideration of a decision under Practice Book § 71-5—to justify the overruling of a decision of extremely recent vintage, wherein nothing has changed other than the parties and the composition of the court. In my view, such an overruling would be appropriate only if the original decision evinced a complete misunderstanding of the governing legal principles, particularly if compounded by lack of meaningful adversarial input from the parties to the earlier case. See *State* v. *DeJesus*, 288 Conn. 418, 437 and n.14, 953 A.2d 45 (2008) (considering case law not addressed in *State* v. *Sanseverino*, 287 Conn. 608, 625, 949 A.2d 1156 [2008], and overruling *Sanseverino*, which held, without briefing from parties, that appellate remedy in case when jury was not instructed in accordance with *Salamon* was judgment of acquittal rather than new trial before properly instructed jury); see also *State* v. *Sanseverino*, 291 Conn. 574, 574–75, 969 A.2d 710 (2009) (following *DeJesus* in revised opinion issued after grant of state's motion for reconsideration); *State* v. *Sanseverino*, supra, 287 Conn. 663 (*Zarella*, *J.*, dissenting) (observing that majority decided remedy issue sua sponte with no argument or briefing from parties).

[6] At oral argument before this court, the state and members of the court discussed the concept of reliance by considering hypothetical questions about whether this court could ever overrule its constitutional pronouncement in *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008), namely, that the previous state statutory prohibition against same sex marriage violated the constitution of Connecticut. Notwithstanding the United States Supreme Court's recent decision in *Obergefell* v. *Hodges*, U.S. , 135 S. Ct. 2584, 2593, 192 L. Ed. 2d 609 (2015), I recognize that the reliance concerns attendant to *Kerrigan* were numerically greater than those present in this case, insofar as the legislature changed the statutory scheme and thousands of our state's citizens were married in the eight years since this court's decision in *Kerrigan*. Given the life interest at issue here, I suggest that the reliance interests on *Santiago* of the defendant and others presently exposed to the death penalty differ only in kind, and not degree, from those of the couples who were married as a result of *Kerrigan*.

[7] The defendant in *Santiago* has already been resentenced to life imprisonment in accordance with this court's decision in that case. See *State* v. *Santiago*, 319 Conn. 935, 125 A.3d 520 (2015) (denying state's motion for stay of judgment).

[8] Justice Zarella criticizes my position with respect to stare decisis as flawed by the logical fallacy of "post hoc ergo propter hoc, or after this, therefore resulting from it." See Black's Law Dictionary (10th Ed. 2014) (defining "post hoc ergo propter hoc" as "[t]he logical fallacy of assuming that a causal relationship exists when acts or events are merely sequential"). He understands my view to be that, "[b]ecause the present appeal has been decided after a change in the court's membership, the change in the membership caused or was the reason to overturn *Santiago*." I believe Justice Zarella misunderstands my position, which simply is one of correlation, *not* causation. As a theoretical matter, had the *Santiago* panel remained intact, it is theoretically possible that one member of the majority could have defected and voted in this case to overrule *Santiago*. Thus, I agree that, as a purely theoretical matter, the change in panel is merely correlative, rather than causational with respect to the potential overruling of *Santiago*. I, however, do not share Justice Zarella's optimism about the probable collective understanding on the part of those who are asked to accept our court's decisions as a consistent statement of what the law is, with respect to the potential overruling of *Santiago*. Hence, Justice Zarella and I irreconcilably, but respectfully, disagree about the public perception issues that would attend the overruling of *Santiago* so soon after it was decided. See also footnote 9 of this concurring opinion.

To this end, I firmly disagree with Justice Zarella's observation that my position with respect to stare decisis in the present case amounts to a "suggestion that this court is bound, now and forever, to follow any decision, right or wrong, unless the panel that decided the previous case is identical to the panel that wishes to overrule that case." I do not believe any such thing, and to take such a position, would, as Justice Zarella observes, stand in contrast to the historical record. Indeed, as a practical matter, such a position would immobilize our case law and render it completely unable to adapt to changes in law and society. My prudential concerns with respect to the panel change and public perception concern the posture of this particular case, which is unique with respect to the juxtaposition of the controversy of the issue and the timing of the argument and decision.

[9] A very recent series of decisions in one of our sister states tells a cautionary tale about the perception of instability created by the rapid overruling of decisions upon the change of a state Supreme Court's membership. In *Doe* v. *Thompson*, Docket No. 110318, 2016 WL 1612872, *23–26 (Kan. April 22, 2016), and two companion cases, *State* v. *Redmond*, Docket No. 110280, 2016 WL 1612917, *5 (Kan. April 22, 2016), and *State* v. *Buser*, Docket No. 105982, 2016 WL 1612846, *7 (Kan. April 22, 2016), the Kansas Supreme Court concluded, in four to three decisions, that certain 2011 amendments to that state's sex offender registration act—such as extension of registration periods, special notations on driver's licenses, and increased "active" availability of registrant information online—were punitive, rather than regulatory, in nature; this rendered their retroactive application to previously convicted sex offenders a violation of the ex post facto clause set forth in article one, § 10, of the United States constitution. One of the four jurists comprising the majority in those cases was a trial court judge who was temporarily assigned to hear cases because of a vacancy on the court created when one of the justices was appointed to a seat on the United States Court of Appeals for the Tenth Circuit. See *Doe* v. *Thompson*, supra, *26 n.1; *State* v. *Redmond*, supra, *5 n.1; *State* v. *Buser*, supra, *7 n.1.

A new justice, Caleb Stegall, was subsequently appointed to the vacancy on the Kansas Supreme Court. After hearing argument in *State* v. *Petersen-Beard*, Docket No. 108061, 2016 WL 1612851, *1 (Kan. April 22, 2016), Justice Stegall authored a four to three decision, which was released on the same day as *Doe*, *Redmond*, and *Buser*, and overruled those decisions. Id., *1. The majority opinion in *Petersen-Beard* adopted large portions of the dissenting opinion in *Doe*, and concluded that the 2011 amendments to the sex offender registration act were not punishment and, therefore, could not be held to constitute cruel and unusual punishment under the Kansas constitution or the eighth amendment to the United States constitution. Id., *4–16. As Justice Johnson, the author of the majority opinion in *Doe*, *Redmond*, and *Buser*, explained in his dissent, the court's conclusion in *Petersen-Beard* did not affect the judgments obtained in the prior three cases, notwithstanding a court-ordered delay in publication pending argument and a decision by a

"newly constituted court" in *Petersen-Beard*, the "apparent rationale [of which] was to make the holding in [*Doe*, *Redmond*, and *Buser*] applicable solely to the parties in those cases." Id., *18; see also id. ("Plainly stated, all of those litigants won on appeal, and the [2011] amendments cannot be applied to them. But they had to wait for many months—unnecessarily in my view—to reap the benefits of their respective wins. I find that to be a denial of justice.").

Interestingly, neither the majority nor the dissent in *Petersen-Beard* considered the doctrine of stare decisis, as it affected the Kansas court's obligation to follow its own recent precedents, with respect to that decision. Reaction to the rapid overruling was, however, widely noticed, and primarily attributed to the change in personnel of the Kansas Supreme Court. One scholarly commentator, Professor David Post, described the Kansas Supreme Court's action in *Petersen-Beard*, which required "all other . . . sex offenders in the state with convictions before 2011" to register, while sparing the defendants in *Doe*, *Redmond*, and *Buser*, as "seem[ing] to violate the very fundamental notion, embedded in our idea of 'due process of law,' that like cases are to be treated alike—someone in precisely the same situation . . . will have to register . . . while [the defendants in *Doe*, *Redmond*, and *Buser*] will not." D. Post, "In a Single Day, the Kansas Supreme Court Issues Important Constitutional Opinions—and Overrules Them," Washington Post (April 25, 2016), available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/25/in-a-single-day-the-kansas-supreme-court-issues-important-constitutional-opinions-and-overrules-them (last visited May 16, 2016). Discussing the change in the court's personnel, Professor Post describes as "a bit unseemly" the fact that "[t]his strange circumstance seems to have come about because the Kansas court was short-handed." Id.; see also D. Weiss, "Kansas Supreme Court Issues Three Opinions Then Overrules Them on the Same Day," ABA J. (April 25, 2016) ("[t]he reason for the change in stance was a new justice who joined the court, taking the place of a senior district judge who was filling a vacancy"), available at http://www.abajournal.com/news/article/kansas_supreme_court_issues_three_opinions_then_overrules_them_on_the_same (last visited May 16, 2016); S. Greenfield, "What a Difference a Day Makes, Kansas Edition," Simple Justice: A Criminal Defense Blog (April 26, 2016), available at http://blog.simplejustice.us/2016/04/26/what-a-difference-a-day-makes-kansas-edition (last visited May 16, 2016) (An article observing that *Petersen-Beard* was inconsistent with the doctrine of stare decisis, and stating that the "problem arose because one seat at the Kansas Supreme Court was filled by one [judge in *Doe*, *Redmond*, and *Buser*], and another [judge in *Petersen-Beard*]. The [c]ourt was split, three to three, on the issue, so that last [vote] was the tie breaker."); T. Rizzo, "Sex Offenders Win and Lose in 'Peculiar' Rulings by the Kansas Supreme Court," Kansas City Star (April 22, 2016), available at http://www.kansascity.com/news/local/crime/article73328242.html (last visited May 16, 2016) (quoting state attorney general's description of decisions as "peculiar" and stating that "[t]he highly unusual circumstance appear[s] to be the result of a one-justice change in the makeup of the court").

Although public reaction should not sway our decisionmaking, I cannot ignore the likelihood, vividly illustrated by the reaction to the Kansas Supreme Court's recent decision in *Petersen-Beard*, that such rapid overruling of a major constitutional precedent would be attributed solely to the change in the court's composition. This indicates to me that overruling *Santiago* would present the risk of shaking our citizens' confidence in our court as an institution, betraying it as a collection of individuals who make seemingly arbitrary decisions. As I stated previously, the majority's analysis in *Santiago* is not so unreasonable or fundamentally flawed as to justify taking that risk in the public's confidence in this court, and the judiciary as a whole.

[10] Thus, I find wholly unpersuasive the state's arguments that *Santiago* "is no obstacle to this court issuing a correct legal decision on the question of whether capital punishment violates the state constitution," and that "the only result in [this case] that could undermine the public faith in the integrity of this court . . . would be an affirmance of *Santiago* . . . based on the principle of stare decisis. If [this] court believes that *Santiago* . . . properly decided that capital punishment violates the Connecticut constitution, then it should so hold. But if a majority of this court believes that *Santiago* . . . is incorrect, justifying affirmation of that breach through a statement that the court believes it tied its own hands would have a deleterious effect . . . on the public's perception of the procedural fairness of the criminal justice

system and diminish public confidence in the rule of law." (Citation omitted; internal quotation marks omitted.) In my view, any concerns in the public's confidence about this court's technical fidelity to the adversarial appellate decision-making process in *Santiago*—a matter on which the majority and dissent in that case disagreed energetically—are drastically outweighed by the public perception of arbitrariness that would result from the defendant in that case, Eduardo Santiago, getting to live, and the defendant in the present case facing the prospect of lethal injection, for no reason beyond the fact that Santiago's case happened to come up first on this court's docket and was heard by a slightly different panel of this court. See footnote 2 of this concurring opinion.

ZARELLA, J., dissenting. "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion [on] the democratic process in order that the [c]ourt might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible . . . I agree with [United States Supreme Court] Justice [William O.] Douglas: 'A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the [c]onstitution [that] he swore to support and defend, not the gloss [that] his predecessors may have put on it.' . . . Or as the [United States Supreme] Court itself has said: '[W]hen convinced of former error, [the] [c]ourt has never felt constrained to follow precedent. In constitutional questions, where correction depends [on] amendment and not [on] legislative action [the] [c]ourt throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.' " (Citation omitted.) *South Carolina* v. *Gathers*, 490 U.S. 805, 825, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989) (Scalia, J., dissenting), overruled in part on other grounds by *Payne* v. *Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

I think my colleagues and I are well advised to carefully consider the words of Justice Antonin Scalia, particularly Chief Justice Rogers and Justice Robinson, who choose to uphold this court's decision in *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), not because they have decided that that decision is right, but because of the dictates of stare decisis and concerns over the legitimacy of this court. I cannot fathom how Chief Justice Rogers and Justice Robinson believe they respect the rule of law by supporting a decision that is completely devoid of any legal basis or believe it is more important to spare this court of the purported embarrassment than to correct demonstrable constitutional error. Of course, it is possible that Justice Robinson believes that *Santiago* is correct, although he has not told us so. As I shall explain subsequently in this opinion, this approach prevents Justice Robinson from conducting—or at the very least from demonstrating to the public and to this court that he has undertaken—a full, fair, and objective analysis of the benefit and costs of applying stare decisis to *Santiago*.

I need not further swell the Connecticut Reports with a lengthy exposition on why *Santiago* is wrong. It suffices to say that the majority in that case employed an improper legal standard and wrongfully usurped the legislature's power to define crime and fix punishment, and the six factors set forth in *State* v. *Geisler*, 222

Conn. 672, 685, 610 A.2d 1225 (1992), support the conclusion that capital punishment remains consistent with the social mores of this state and is not cruel and unusual punishment in light of the passage of No. 12-5 of the 2012 Public Acts (P.A. 12-5). See generally *State* v. *Santiago*, supra, 318 Conn. 341–88 (*Zarella*, *J.*, dissenting). Instead, the primary object of this dissent is to bring order to our inconsistent and irreconcilable stare decisis jurisprudence by articulating a defensible and objective stare decisis standard. Then, in applying that standard in the present case, I will show why affording stare decisis effect to *Santiago* creates more harm than it does good. Finally, I will explain why overruling *Santiago* will enhance, not diminish, the integrity and legitimacy of this court.

I

STARE DECISIS

The concurring justices in the present case contend that the dictates of stare decisis require that we stand by our decision in *Santiago*.[1] In her concurring opinion, Chief Justice Rogers, quoting from *Dickerson* v. *United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), states: "[T]he doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." (Internal quotation marks omitted.) Then, quoting Justice Thurgood Marshall's dissenting opinion in *Payne* v. *Tennessee*, supra, 501 U.S. 849 (Marshall, J., dissenting), she provides the following special justifications: "the advent of subsequent changes or development in the law that undermine[s] a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Internal quotation marks omitted.) The majority in *Payne*, however, noted that the "[c]ourt has never felt constrained to follow precedent" when the "governing decisions are unworkable or are *badly reasoned* . . . ." (Emphasis added; internal quotation marks omitted.) *Payne* v. *Tennessee*, supra, 827; see also *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) ("[The court has] always . . . treated stare decisis as a principle of policy . . . and not as an inexorable command . . . . [W]hen governing decisions are unworkable or are badly reasoned, [the] [c]ourt has never felt constrained to follow precedent. . . . [The court's] willingness to reconsider [its] earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." [Citations omitted; internal quotation marks omitted.]). In demanding some " 'special justification' " to overrule *Santiago*, Chief Justice Rogers overlooks contrary statements by both the United

States Supreme Court and this court. The United States Supreme Court has often stated that it is not bound to follow unworkable or *badly reasoned* precedents. See, e.g., *Vieth* v. *Jubelirer*, 541 U.S. 267, 306, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004); see also *Smith* v. *Allwright*, 321 U.S. 649, 665, 64 S. Ct. 757, 88 L. Ed. 987 (1944) ("when convinced of *former error*, [the] [c]ourt has never felt constrained to follow precedent" [emphasis added]). In addition, we have often stated that we are free to overrule decisions that are clearly wrong. See, e.g., *Conway* v. *Wilton*, 238 Conn. 653, 660, 680 A.2d 242 (1996) ("[one] well recognized exception to stare decisis under which a court will examine and overrule a prior decision . . . [is when that prior decision] is *clearly wrong*" [emphasis added; internal quotation marks omitted]); see also *State* v. *Salamon*, 287 Conn. 509, 514, 526–27, 542–44, 949 A.2d 1092 (2008) (ultimately rejecting more than thirty years of this court's jurisprudence on Connecticut's kidnapping laws because majority of court was convinced it was wrong).

There is little doubt that Chief Justice Rogers overlooks the clearly wrong exception in our and the United States Supreme Court's stare decisis jurisprudence because it would lead her to no other conclusion than that *Santiago* must be overruled. A cursory reading of Chief Justice Rogers' dissent in *Santiago* reveals beyond any doubt that she strongly feels that the majority's decision in *Santiago* is obviously wrong. In fact, her belief that *Santiago* was completely wrong was central to her dissent in that case and not merely an observation made in passing. She describes the majority's analysis in *Santiago* as "fundamentally flawed"; *State* v. *Santiago*, supra, 318 Conn. 231 (*Rogers*, *C. J.*, dissenting); and "a house of cards, falling under the slightest breath of scrutiny." Id., 233 (*Rogers*, *C. J.*, dissenting). She further stated that it was "riddled with non sequiturs . . . [a]lthough to enumerate all of them would greatly and unnecessarily increase the length of [her dissent]." Id., 242 (*Rogers*, *C. J.*, dissenting). In *Santiago*, Chief Justice Rogers could uncover "no legitimate legal basis for finding the death penalty unconstitutional under either the federal or the state constitution"; id., 276 (*Rogers*, *C. J.*, dissenting); leading her to conclude that the majority in *Santiago* "improperly decided that the death penalty must be struck down because it offends the majority's subjective sense of morality." Id., 277 (*Rogers*, *C. J.*, dissenting).[2] In her dissent to this court's denial of the state's motion for argument and reconsideration of *Santiago*, Chief Justice Rogers further demonstrated how flawed she thought the decision in *Santiago* is. She stated: "Indeed, if there was ever any doubt, it is now inescapably clear that the three main pillars of the majority's analysis have no foundation . . . ." *State* v. *Santiago*, 319 Conn. 912, 919, 124 A.3d 496 (2015) (*Rogers*, *C. J.*, dissenting). In addition, she wrote: "By denying the state's motion

for argument and reconsideration, the majority merely reconfirms my belief that it has not engaged in an objective assessment of the constitutionality of the death penalty under our state constitution. Instead, the majority's conclusion that the death penalty is unconstitutional constitutes a judicial invalidation, without constitutional basis, of the political will of the people." (Internal quotation marks omitted.) Id., 920 (*Rogers*, *C. J.*, dissenting). In light of Chief Justice Rogers' repeated expressions regarding the fallacy of the majority opinion in *Santiago*, it is no wonder she now overlooks the clearly wrong exception to our stare decisis jurisprudence. She could not reasonably rely on stare decisis if she acknowledged that exception.

Chief Justice Rogers' action highlights a deeper problem with our case law on stare decisis. Our jurisprudence on stare decisis is constructed on contradictory principles inconsistently applied.[3] The concurring opinions of Justices Palmer and Robinson in the present case suffer from similar shortcomings.[4] Both fail to recognize the presence of certain characteristics that generally result in our affording of less stare decisis effect to a previous decision. At the very least, Justices Palmer and Robinson should explain why these characteristics are not important for purposes of the present case. For example, *Santiago* announces a rule that applies in criminal cases. In such context, we have often stated that "[t]he arguments for adherence to precedent are least compelling . . . when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . ." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 523. This is especially true in the present case because the rule in *Santiago* was announced after the defendant in the present case, Russell Peeler, engaged in criminal conduct and was tried, convicted, and sentenced to death. In addition, neither Justice Palmer nor Justice Robinson explains why *Santiago* should not receive less deference in light of the fact that it is a constitutional holding. See, e.g., *Seminole Tribe* v. *Florida*, supra, 517 U.S. 63 ("[the court's] willingness to reconsider [its] earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible" [internal quotation marks omitted]); see also *State* v. *Lawrence*, 282 Conn. 141, 187, 920 A.2d 236 (2007) (*Katz*, *J.*, dissenting) ("[i]ndeed, it is well recognized that, in a case involv[ing] an interpretation of the [c]onstitution . . . claims of stare decisis are at their weakest . . . [when the court's] mistakes cannot be corrected by [the legislature]" [internal quotation marks omitted]).

The inconsistent application of stare decisis leaves this court open to criticism that it is employing that doctrine to reach ideologically driven or politically expedient results, a real threat to this court's integrity

and institutional legitimacy.[5] Due to the underdevelopment of our stare decisis case law, that doctrine can be easily manipulated to reach a desired result. Thus, I take this opportunity to articulate a principled framework for the application of stare decisis.[6] Then, I will demonstrate why, in the present case, stare decisis should not be applied to this court's decision in *Santiago*.

Before I delve into the stare decisis framework and application, it is important that I address two preliminary matters. First, stare decisis has both a vertical and horizontal component. See, e.g., W. Consovoy, "The Rehnquist Court and the End of Constitutional Stare Decisis: *Casey*, *Dickerson* and the Consequences of Pragmatic Adjudication," 2002 Utah L. Rev. 53, 55. Vertical stare decisis refers to the principle that the decisions of this court are binding on the lower courts of this state. Id.; see also Black's Law Dictionary (10th Ed. 2014) p. 1626 (defining vertical stare decisis as "[t]he doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction"). On the other hand, horizontal stare decisis addresses when this court should adhere to its own earlier decisions. See W. Consovoy, supra, 55; see also Black's Law Dictionary, supra, p. 1626 (defining horizontal stare decisis as "[t]he doctrine that court, esp[ecially] an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself"). The balance of this opinion concerns only horizontal stare decisis.

Second, in my view, stare decisis has two modes of operation. As a general matter, stare decisis, Latin for "to stand by things decided"; (internal quotation marks omitted) Black's Law Dictionary, supra, p. 1626; is a doctrine that directs a court to adhere to its earlier decisions or to the decisions of courts that are higher in a jurisdiction's judicial hierarchy. More specifically, however, the doctrine operates in two distinct manners. First, the doctrine functions automatically in most cases. I will call this mode of operation the rule of precedent. Under this aspect of stare decisis, the court assumes that its prior decisions are correct and relies on such decisions in deciding the case before the court. Under the rule of precedent, our previous decisions are the bricks of the foundation on which the pending case will be decided. Moreover, we rely on such decisions, in large part, simply because they were decided prior in time, that is, because they are precedent. Each time this court cites a previous case to support a proposition, the rule of precedent mode of operation of stare decisis is implicitly at work. Second, stare decisis operates more explicitly and directly when we reconsider a previous decision or line of decisions. In this context, the doctrine provides a framework for determining whether the court should continue to abide by a past decision, even though it may be wrong. It is this distinct mode

of operation—more particularly, the framework it provides—that I will address in this opinion. With these preliminary ideas in mind, I now turn to articulating a principled doctrine of stare decisis.

A

A Principled Doctrine of Stare Decisis

As I just explained, stare decisis guides this court's determination of whether it should adhere to a previous erroneous decision. Implicit in this framing of stare decisis is that the court must decide whether the decision being reconsidered is wrong before it applies the doctrine of stare decisis.[7] In fact, and as I explain later in this part of my opinion, the stare decisis analysis cannot be completely conducted unless the court has determined if, and more importantly, why, the previous decision is incorrect. Moreover, the court need not resort to the doctrine of stare decisis if it concludes that the previous decision is correct. See R. Fallon, "Stare Decisis and the Constitution: An Essay on Constitutional Methodology," 76 N.Y.U. L. Rev. 570, 570 (2001). In such circumstances, the court can simply affirm the case on the basis of its merits. Id.

I do not mean to suggest, however, that the wrongness of the previous decision is part of the stare decisis calculus. It is *not*. Indeed, it is fundamental that we avoid conflating the merits and stare decisis considerations. The reasons should be obvious. If a case could be overruled simply because a majority of justices believes it had reached the wrong conclusion, precedent would have no independent value, and stare decisis would be a hollow doctrine. See F. Schauer, "Precedent," 39 Stan. L. Rev. 571, 575–76 (1987) (argument based on precedent places value on past decision merely because it was decided in past, despite present belief that past decision was erroneous); see also *Hubbard* v. *United States*, 514 U.S. 695, 716, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (Scalia, J., concurring in part and concurring in the judgment) (explaining that court must give reasons for ignoring stare decisis, "reasons that go beyond mere demonstration that the overruled [decision] was wrong . . . otherwise the doctrine would be no doctrine at all"). Moreover, the oft-repeated adage that, "in most matters it is more important that the applicable rule of law be settled than that it be settled right"; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting); would be empty of any meaning. In addition to placing too little value on precedent, the wrongness of a previous decision should not factor into the stare decisis calculus because it is difficult to quantify or measure the degree of a particular decision's wrongness. See J. Fisch, "The Implications of Transition Theory for Stare Decisis," 13 J. Contemp. Legal Issues 93, 105 (2003). The ability to distinguish between the degrees of wrongness of previ-

ous cases becomes necessary, however, if wrongness is part of the stare decisis calculus. That is, if a lesser degree of error is tolerable but a higher degree of error is intolerable, some mechanism is needed to measure and distinguish degrees of error; but developing such a mechanism is prohibitively difficult. See id. Thus, when we reconsider a previous decision of this court, the stare decisis framework is applied only after we have determined that the previous decision is incorrect, irrespective of how wrong it is. Moreover, the merits determination is independent of, and has no impact on, the stare decisis analysis.[8]

Under this construction of stare decisis, the fact that Chief Justice Rogers and Justice Robinson rely on the doctrine of stare decisis to uphold *Santiago* suggests that they both believe that decision is wrong. Of course, there can be no question that Chief Justice Rogers believes the decision in *Santiago* is wrong. I am unsure whether Justice Robinson believes *Santiago* is wrong because he does not tell us, but, because he did not join Justice Palmer's concurrence and instead relies on stare decisis rather than the merits to uphold *Santiago*, I am left to conclude that he likely does believe that *Santiago* was incorrectly decided.[9]

The doctrine of stare decisis naturally raises the following question: what justifies a doctrine that counsels this court to adhere to certain erroneous decisions? We have repeatedly stated that "[t]he doctrine is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency." *Conway* v. *Wilton*, supra, 238 Conn. 658–59. Moreover, "it gives stability and continuity to our case law." Id., 658. Undoubtedly, this desire to achieve stability and consistency in our law is born from respect for the rule of law. See, e.g., *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) ("[i]ndeed, the very concept of the rule of law underlying [the United States] [c]onstitution requires such continuity over time that a respect for precedent is, by definition, indispensable"). If fidelity to or concern for the rule of law justifies the doctrine of stare decisis, at least in part, then it is important that we understand what is encompassed in that ideal. At its essence, the rule of law is the concept that governmental power is exercised under, and constrained by, a framework of laws, not individual preference or ideology. J. Waldron, "Stare Decisis and the Rule of Law: A Layered Approach," 111 Mich. L. Rev. 1, 3 (2012). As Professor Randy J. Kozel aptly observed, this idea can helpfully be understood by comparison to its converse, the rule of individuals; see R. Kozel, "Settled Versus Right: Constitutional Method and the Path of Precedent," 91 Tex. L. Rev. 1843, 1857 (2013); and Thomas Paine captured the concept when he proclaimed "that

so far as we approve of monarchy, that in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." T. Paine, Common Sense and Other Writings (2005) p. 44. Thus, adherence to the doctrine of stare decisis creates the appearance, and at times the reality, that this court is guided and constrained by the law—both written law, the constitution and statutes, and decisional law, the rules set forth in the decisions of this court—and not the whim of its individual members.

What should be obvious, however, is that application of stare decisis can come into tension with the rule of law as well. For example, if this court, upon later consideration, concludes that our earlier reading of a constitutional provision was incorrect but nonetheless decides, due to stare decisis, to follow that erroneous reading, we have entrenched the *rule of individuals*—those individuals who comprised this court at the time of the earlier decision—rather than the rule of law. See J. Waldron, supra, 111 Mich. L. Rev. 7. This tension is particularly problematic in the context of constitutional adjudication, in which the text of the constitution, and not the construction given to it by this court, is the binding and supreme law.[10] Id. After all, and in the words of Justice Douglas, a judge must remember, "above all else that it is the [c]onstitution [that] he swore to support and defend, not the gloss [that] his predecessors may have put on it." W. Douglas, "Stare Decisis," 49 Colum. L. Rev. 735, 736 (1949).

Perhaps because of this inherent and unavoidable tension, we have long held that stare decisis is not an absolute impediment to change in our case law. See, e.g., *White* v. *Burns*, 213 Conn. 307, 335, 567 A.2d 1195 (1990). Instead, we have called for a balancing of the benefits and burdens of stare decisis, noting we "should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 520; see also *State* v. *Miranda*, 274 Conn. 727, 733, 878 A.2d 1118 (2005) ("there are occasions when the goals of stare decisis are outweighed by the need to overturn a previous decision in the interest of reaching a just conclusion in a matter"). Unfortunately, we have never taken the opportunity to articulate the prudential and pragmatic considerations or to outline the benefits and burdens of stare decisis. It is this task to which I now turn.

The remainder of this part of the opinion articulates a principled balancing test this court should employ when determining whether to afford stare decisis effect to a previous decision that it is convinced is wrong or about which it has serious doubts. The balancing test

I advocate includes four factors, one benefit and three costs. On the benefit side of the scale is the protection of reliance interests. The countervailing weights, that is, the costs of adhering to an erroneous judicial decision, are the (a) cost of error correction, (b) cost to the constitutional order, and (c) cost of unworkability or uncertainty. Each of these four factors will be discussed in this opinion. The analysis of each factor and the weighing of the benefit factor against the cost factors occur only after the court has concluded that the precedent in question is wrong.

1

Benefit of Stare Decisis—Protection of Reliance Interests

At first glance, it would appear that the benefits of stare decisis are stability and constancy in the law. See, e.g., *Conway* v. *Wilton*, supra, 238 Conn. 658 ("[t]his court has repeatedly acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law"). We have acknowledged, however, that adherence to precedent, and thereby stability and constancy, "is not an end in and of itself"; (internal quotation marks omitted) *State* v. *Salamon*, supra, 287 Conn. 520; and, therefore, there must be some other interest protected or policy served by stability and consistency that is the benefit of stare decisis.

Upon reviewing our cases and the academic literature on stare decisis, I conclude that the benefit served by stare decisis is the protection of reliance interests.[11] In fact, two of the stare decisis justifications we have articulated in the past indirectly acknowledge the importance of protecting reliance interests. As I noted previously in this opinion, stare decisis is justified because "it allows for predictability in the ordering of conduct . . . [and] promotes the necessary perception that the law is relatively unchanging . . . ." *Conway* v. *Wilton*, supra, 238 Conn. 658–59. Thus, as long as the law is predictable and relatively constant, citizens can rely on it in planning their affairs.

We have also directly recognized the importance of reliance interests when deciding whether to apply the doctrine of stare decisis. For example, in cases involving tort or criminal law, we often remark that "[t]he arguments for adherence to precedent are least compelling . . . when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . ." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 523; accord *O'Connor* v. *O'Connor*, 201 Conn. 632, 644, 519 A.2d 13 (1986). In *Salamon*, this court was confronted with whether an accused could be convicted under a kidnapping statute, General Statutes § 53a-94, even though the restraint involved in the kidnapping of the victim was

incidental to the commission of another criminal offense; see *State* v. *Salamon*, supra, 513; a question we had answered in the affirmative more than thirty years earlier and reaffirmed on a number of occasions. See, e.g., *State* v. *Chetcuti*, 173 Conn. 165, 170, 377 A.2d 263 (1977), overruled by *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008). On that occasion, however, the court decided to reexamine, and ultimately to depart from, our settled construction of the kidnapping statute. See *State* v. *Salamon*, supra, 542. Justice Palmer, writing for a majority of the court in *Salamon*, reasoned that the court was justified in reexamining and abandoning *Chetcuti* and its progeny, in part, because there was no reason to believe that criminals had adjusted their conduct on the basis of the court's interpretation of criminal statutes. See id., 523 ("[p]ersons who engage in criminal misconduct . . . rarely if at all will . . . give thought to the question of what law would be applied to govern their conduct if they were to be apprehended for their violations" [internal quotation marks omitted]). The lack of reliance, Justice Palmer stated, weighed in favor of reconsidering the court's past cases. Id.

This court similarly cited reliance, or the lack thereof, in overruling prior precedent in *Conway* v. *Wilton*, supra, 238 Conn. 677. In *Conway*, we reconsidered whether municipalities and their employees were owners under the Connecticut Recreational Land Use Act (act), General Statutes (Rev. to 1995) § 52-557f et seq., and, therefore, entitled to immunity from liability for injuries occurring on land the municipality holds open to the public for recreational use. Id., 655, 657–58. Only four and one-half years earlier, we had determined that the statute's language was clear and unambiguous and held that municipalities were owners for purposes of the act. See *Manning* v. *Barenz*, 221 Conn. 256, 260, 603 A.2d 399 (1992), overruled by *Conway* v. *Wilton*, 238 Conn. 653, 655, 680 A.2d 242 (1996). Nevertheless, in *Conway*, we concluded that the act should not apply to municipal landowners and overruled *Manning*; *Conway* v. *Wilton*, supra, 655, 676; reasoning, in part, that it could not reasonably be supposed that the defendant municipality tailored its conduct due to our holding in *Manning*. Id., 677. Moreover, we noted that there was no evidence that municipalities across the state had decided to forgo liability insurance under the assumption that *Manning* shielded them from liability.[12] Id.

Fostering and protecting reliance interests are important because, as Professor Jeremy Waldron has commented, creating a sense that the law can be relied on allows people to better exercise their liberty. J. Waldron, supra, 111 Mich. L. Rev. 9. Although legal constraint is inescapable in the modern era, freedom is nonetheless possible, Professor Waldron states, "if people know in advance how the law will operate, and how they must act to avoid its having a detrimental impact

on their affairs." J. Waldron, "The Concept and the Rule of Law," 43 Ga. L. Rev. 1, 6 (2008). Stated differently, if the law is relatively unchanging and known, individuals can anticipate, when facing new situations, how they will be treated by the law and plan their conduct accordingly.[13]

Given the importance of reliance interests, such interests must be a central focus of our stare decisis calculus. Thus, we need to develop a framework in which to directly analyze what, if any, reliance interests a particular court precedent has engendered. The starting point, of course, is identifying the forms of reliance interests that may exist. One commentator has aptly organized these interests into four categories: specific reliance; governmental reliance; court reliance; and societal reliance. See R. Kozel, "*Stare Decisis* as Judicial Doctrine," 67 Wash. & Lee L. Rev. 411, 452 (2010).

Specific reliance arises when an individual or group conforms its behavior to rules announced by the court. For example, the United States Supreme Court has long held that stare decisis has special force in cases involving contract or property law. See, e.g., *Payne* v. *Tennessee*, supra, 501 U.S. 828 ("[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved"); see also T. Lee, "Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court," 52 Vand. L. Rev. 647, 691–98 (1999) (tracing property and contract distinction back to early nineteenth century United States Supreme Court cases). That court has explained that cases announcing property or contract rules are entitled to greater stare decisis weight because "[everyone] would suppose that after the decision of [the] court, in a matter of that kind, [they] might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed." *Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 458, 13 L. Ed. 1058 (1851). It has also been observed that upsetting cases that establish rules of property can be injurious to many titles because, in conveying property, individuals rely on existing property and contract rules. See, e.g., *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486–87, 44 S. Ct. 621, 68 L. Ed. 1110 (1924); see also, e.g., *Ozyck* v. *D'Atri*, 206 Conn. 473, 484, 538 A.2d 697 (1988) (*Healey*, *J.*, concurring) (noting reason "stare decisis applies with special force to decisions affecting titles to land is the special reliance that such decisions mandate"). Conversely, we have opined that cases establishing rules of tort or criminal law receive diminished stare decisis weight, reasoning that such cases, particularly unintentional tort cases, are unlikely to influence individual behavior. See, e.g., *State* v. *Salamon*, supra, 287 Conn. 523 ("[p]ersons who engage in criminal misconduct, like persons who engage in tortious conduct, rarely if at all will . . . give thought to the question of what law would be applied

to govern their conduct if they were to be apprehended for their violations" [internal quotation marks omitted]); *O'Connor* v. *O'Connor*, supra, 201 Conn. 645 (abandoning this court's categorical allegiance to place of injury test when determining what law should apply in tort cases, reasoning that departing from precedent would not upset any expectations of litigants because they will rarely "give thought to the question of what law would be applied to govern their conduct if it were to result in injury" [internal quotation marks omitted]).

The Executive and Legislative Branches, along with local governments, also rely on this court's decisions. In *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003), Chief Justice Sullivan invoked legislative reliance in his dissent, urging the court to adhere to the status quo. See id., 348–50 (*Sullivan*, *C. J.*, dissenting). In *Craig*, this court created a common-law negligence action against a purveyor of alcohol who negligently serves alcohol to an intoxicated person who subsequently causes injuries to another person. See id., 314, 339–40. Prior to our holding in *Craig*, however, the general rule provided by the common law was that no such action shall lie against a purveyor of alcohol. See id., 322. Moreover, in *Quinnett* v. *Newman*, 213 Conn. 343, 344, 568 A.2d 786 (1990), overruled in part by *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003), this court held that Connecticut's Dram Shop Act occupied the field and therefore provided the injured person's sole remedy against a purveyor of alcohol for injuries caused by an intoxicated person. Nonetheless, the court in *Craig* decided to overrule *Quinnett* and the common law's long-standing general rule. *Craig* v. *Driscoll*, supra, 329. Chief Justice Sullivan contended, however, that the court should continue to decline to recognize the common-law cause of action and abide by the holding in *Quinnett*, reasoning that the legislature had enacted the Dram Shop Act in reliance on this court's common-law jurisprudence. Id., 344, 349–50 (*Sullivan*, *C. J.*, dissenting). In crafting a recovery scheme, the legislature was aware that no common-law cause of action ever had existed for plaintiffs to recover for the negligent service of alcohol, and, therefore, the Dram Shop Act reflected the legislature's judgment as to when such recovery should be allowed. See id., 349 (*Sullivan*, *C. J.*, dissenting). This court undermined the legislative scheme, however, by recognizing a common-law cause of action. See id. In such cases, according to Chief Justice Sullivan, the legislature's reliance on this court's prior precedent counseled strongly in favor of applying stare decisis.[14] Id., 349–50 (*Sullivan*, *C. J.*, dissenting).

The judiciary, including this court, also relies on our precedent. Under this form of reliance, our cases, as well as those of the Appellate Court and the trial courts, build on one another, resulting in the development of a doctrinal structure. Cf. R. Kozel, supra, 67 Wash. & Lee L. Rev. 459. For example, this court has established

a state double jeopardy jurisprudence that is founded on our recognition in *Kohlfuss* v. *Warden*, 149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928, 83 S. Ct. 298, 9 L. Ed. 2d 235 (1962), that, despite the absence of a double jeopardy clause in the state constitution, the due process clause of article first, § 9, of the Connecticut constitution of 1818, which now appears in article first, § 8, of the Connecticut constitution of 1965, embraces a common-law rule against double jeopardy.

The final form of reliance is societal reliance. Unlike the three previous forms of reliance, societal reliance is concerned with perception, not behavior. A court's precedents, particularly its constitutional precedents, have the ability to shape a society's "perceptions about our country, our government, and our rights." R. Kozel, supra, 67 Wash. & Lee L. Rev. 460. The United States Supreme Court case of *Dickerson* v. *United States*, supra, 530 U.S. 428, is instructive. In *Dickerson*, the court considered, among other things, whether *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), should be overruled insofar as it requires the suppression of an arrestee's unwarned statements. See *Dickerson* v. *United States*, supra, 432, 443. Chief Justice William Rehnquist, writing for the court, declined to do so. Id., 443. Instead, he noted that the stare decisis principles weighed heavily against departing from *Miranda* because "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." Id. Undoubtedly, the focal point was not on individual arrestees and police officers and whether they order their behavior on the basis of *Miranda*. Instead, the court's attention was drawn to how *Miranda* warnings have pervaded American culture. See id. The court clarified this point in *Arizona* v. *Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), in referring to *Dickerson*: "In observing that *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture . . . the [c]ourt was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right." (Citation omitted; internal quotation marks omitted.) Id., 349–50. As *Dickerson* suggests, the rules, principles, and rights established by court precedent can become part of the citizenry's consciousness. See R. Kozel, supra, 67 Wash. & Lee L. Rev. 462. Disturbing such precedents may affect our understanding of government and the relationship between citizens and the government. See id.

After the court has assessed and articulated the reliance interests of each category just described, it should turn to an examination of the disruption that would be caused if the precedent relied on is overruled. An assessment of the disruptive effect of overruling precedent considers the adjustment costs that would arise

from the need to modify behavior tailored to conform with the precedent the court is contemplating overruling. See R. Kozel, "Precedent and Reliance," 62 Emory L.J. 1459, 1486 (2013). Questions the court might consider when evaluating disruption costs include whether the overruling would (1) create a need for significant restructuring of corporate organizations or commercial transactions, (2) call into question the enforceability of contracts or title to real property, (3) cause a significant reordering of individual conduct, including risk shifting arrangements such as insurance policies, (4) upset a duly enacted legislative scheme and require the development of a new regulatory regime, (5) undermine the foundational decisions of a robust judicial doctrine, and (6) affect the broader, societal understanding of our constitutional system. Assessing the reliance engendered by a previous case and the costs that would arise from overruling such a case is the first step this court should undertake in balancing the benefit and costs of applying stare decisis to that case.

2

Costs of Stare Decisis

Once the benefit of applying stare decisis and adhering to precedent has been uncovered and quantified, the court must consider the burdens of applying stare decisis. Generally speaking, the burdens of applying stare decisis are the costs that result from perpetuating judicial error. As I noted previously in this opinion, there are three costs for the court to consider, and I will consider each in turn.

When evaluating the costs that would result from preserving judicial error, we should begin by considering the nature of the judicial error. This involves a two part test. First, we must ask whether the error was constitutional or statutory, because the cost of error will vary depending on the nature of the error. This I will call the cost of error correction. Second, if the error is constitutional, we must consider if and how such error disrupts the constitutional order. This will be referred to as the cost to the constitutional order.

a

Cost of Error Correction

The United States Supreme Court has long recognized that stare decisis has diminished force when the precedent in question interprets or applies the constitution, as opposed to a statute. See, e.g., *Burnet* v. *Coronado Oil & Gas Co.*, supra, 285 U.S. 406–407 (Brandeis, J., dissenting) ("in cases involving the [f]ederal [c]onstitution . . . [the] [c]ourt has often overruled its earlier decisions"); see also *Agostini* v. *Felton*, 521 U.S. 203, 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (noting that stare decisis "is at its weakest" in constitutional adjudications). The court has justified this constitutional-statutory dichotomy by explaining the relative

difficulty of correcting constitutional error as compared to correcting statutory error. See, e.g., *Agostini* v. *Felton*, supra, 235. When a court reaches an erroneous conclusion about the meaning or application of the constitution, such an error can be corrected only by judicial decision or constitutional amendment. See id. Conversely, when a court improperly interprets a statute, the legislature, through a simple majority, can correct such error. See *Burnet* v. *Coronado Oil & Gas Co.*, supra, 406 (Brandeis, J., dissenting). At least one justice of this court has, in the past, approved of this reasoning. See *State* v. *Lawrence*, supra, 282 Conn. 187 (*Katz*, *J.*, dissenting) ("it is well recognized that, in a case involv[ing] an interpretation of the [c]onstitution . . . claims of stare decisis are at their weakest . . . where [the court's] mistakes cannot be corrected by [the legislature]" [internal quotation marks omitted]). Although the court does not discuss it in these terms, it can fairly be said that the preservation of judicial constitutional error imposes greater costs than the preservation of statutory error due to the limited recourse of the people to correct such error. See K. Lash, "The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory," 89 Notre Dame L. Rev. 2189, 2195–97 (2014). Professor Kurt T. Lash has explained that, "[b]ecause remedying judicial errors involving constitutional interpretation remains beyond the ordinary reach of the democratic process, this heightens the potential 'cost' of such errors." Id., 2196. The cost of correcting constitutional error in Connecticut is particularly significant due to our onerous constitutional amendment process, which allows Connecticut citizens to directly call for constitutional change only once every twenty years.[15]

b

Cost to the Constitutional Order

The preservation of judicial constitutional error may result in costs beyond those arising from the difficulty of correcting such an error. Such costs result when a judicial decision alters or disturbs the state polity. A brief digression into our constitutional history and theory is needed to better understand this harm.

A fundamental principle of American government and constitutions, including the constitutions of the many states, is popular sovereignty. See A. Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem," 65 U. Colo. L. Rev. 749, 749–51 (1994). In essence, popular sovereignty is the theory that, in a free society, the people hold the power, and the government has only that power the people delegate to it. Id., 762–66 (explaining founding era understanding of republican government). The delegation of power occurs through the adoption of a constitution, which establishes the government and delegates the power among the branches. See id., 764. Through this delegation, the peo-

ple may reserve certain rights to themselves, limiting the government's power to act in particular areas. Also central to popular sovereignty is the people's ability to alter or abolish the established government, a right they exclusively hold. See id., 749, 762–64. That is, only the people, and not the governmental institutions they have ordained, can alter the structure and powers of government. See id.

The colonial citizens of Connecticut were no strangers to the ideals embodied in popular sovereignty. In fact, evidence dating back to the 1630s demonstrates that the populace of the Connecticut colony adopted the popular sovereignty principles. See, e.g., W. Horton, "Law and Society in Far-Away Connecticut," 8 Conn. J. Intl. L. 547, 549–50 (1993). In a 1638 sermon, Puritan Reverend Thomas Hooker expounded on these principles. See H. Cohn, "Connecticut Constitutional History: 1636–1776," 64 Conn. B.J. 330, 332–33 (1990). Specifically, Reverend Hooker stressed that the civil power resided with the people, the people had the authority to elect their political leaders, and the people established the limits within which their political leaders could act. See id. This sermon, it is argued by many, was the catalyst of the Fundamental Orders of 1639.[16] See, e.g., id., 333–34; see also W. Horton, The Connecticut State Constitution: A Reference Guide (2d Ed. 2012) p. 5. The Fundamental Orders contained "the germs of a great principle—the principle of self-government based on a limited measure of popular control." (Internal quotation marks omitted.) H. Cohn, supra, 335. This form of government and the popular sovereignty principles on which it was founded continued under the Charter of 1662,[17] after Connecticut's signing of the Declaration of Independence in 1776,[18] and are embodied in the 1818 and 1965 state constitutions. Indeed, the principle is explicitly expressed in article first, § 2, of the Connecticut constitution: "All political power is inherent in the people, and all free governments are founded on their authority . . . ."

With this historical and theoretical background in mind, I return to discussing the costs inherent in following erroneous constitutional decisions. In constitutional adjudication, we must take special care to ensure that we are enforcing the will of the people as expressed in their constitution. Because the ultimate power rests in the people and has been allocated to the separate branches of government, it is our duty to ensure that each branch, including the judiciary, does not usurp the power of its coequal branches. It is especially important that we take pains to restrain *this branch*, because a usurpation of legislative or executive power is, in effect, a usurpation of the people's power. It is true that the constitution entrenches certain fundamental principles, such as the freedom of the press, to immunize them from majoritarian control; however, most political and policy questions have been left to democratic rule, that

is, majority control through the elected branches of government. In such cases, the people exercise their power and carry out or vindicate their will at the ballot box. Thus, it is essential that we not immunize from majoritarian control those questions that the people have left to the political process. To do so would be to misappropriate the power of the people.[19]

When we erroneously interpret or apply the constitution in ways that upset the governmental structure or intrude on the democratic process by frustrating the majoritarian government, we levy a cost on the constitutional order. See, e.g., K. Lash, "Originalism, Popular Sovereignty, and *Reverse* Stare Decisis," 93 Va. L. Rev. 1437, 1442 (2007). Professor Lash provides a taxonomy that is helpful in understanding and evaluating such errors and the costs they impose. See id., 1457–61. He organizes judicial error in constitutional cases into two broad parameters, namely, intervention versus nonintervention, and immunity versus allocation. Id., 1454. He explains his classifications as follows: "First, courts may wrongfully intervene in the political process or they may wrongfully fail to intervene. Second, judicial error may involve a question of immunity (whether the government has any power over a given subject) or a question of allocation (which governmental institution has power over a given subject)." (Emphasis omitted.) Id. The degree of harm imposed on popular sovereignty and the constitutional order, of course, varies with the type of error; see id., 1457–61; and, as Professor Lash explains, depends on how intrusive the error is on the political process. See id., 1456–57.

I will begin with errors of allocation that, generally speaking, impose the smallest amount of harm on our constitutional order. See id., 1457–58. Allocation cases are those involving questions of separation of powers. See id., 1455. When the court erroneously allocates power to the wrong branch of government, the harm is minimal because, in most cases, the political process can correct such error. See id., 1457. For example, if we incorrectly determine that the Executive Branch has a power the constitution does not grant that branch, the people can reject such error by electing a governor who will not exercise the wrongly allocated power. Id., 1457–58. Allocation errors that appropriate power to the judiciary from the political branches are more problematic due to the court's insulation from the political process. See id., 1455, 1458. In such cases, the costs inflicted on the constitutional system are dependent on the ability of the other branches to correct such error. See id., 1458. For example, if the judicial usurpation of authority can be corrected through the General Assembly's ability to define the jurisdiction of the court, the costs are minimal. See id.; see also Conn. Const., art. V, § 1 ("[t]he powers and jurisdiction of these courts shall be defined by law"). If, however, the political process cannot correct such error, the costs are significant

and of the same kind as discussed in erroneous cases of immunity intervention, which I discuss subsequently in this opinion. See K. Lash, supra, 93 Va. L. Rev. 1458.

Cases of immunity involve the question of whether a particular issue is subject to political resolution; see id.; that is, whether the constitution has entrenched a principle, such as the freedom of the press, or left a question to the democratic process, such as general economic legislation. Immunity errors come in two forms, nonintervention and intervention. See id., 1459. A nonintervention error imposes fewer costs on the constitutional order than does an intervention error. See id. Erroneous nonintervention occurs when the court fails to intervene, thereby overlooking a principle entrenched in the constitution and leaving it to the political process. See id., 1454, 1459. Such error does undermine the legitimacy of our constitutional system by allowing a simple majority in the General Assembly to trump the entrenched will of the people; nonetheless, the costs generated by erroneous nonintervention are limited because the issue remains subject to majority control. See id., 1459. Thus, if the court fails to protect a right entrenched in the constitution, the people can mobilize and, through the General Assembly, act to protect such right through legislation. See id.

On the other hand, intervention error occurs when the court entrenches a principle in the constitution that, under a proper reading of the document, has no constitutional status. See id., 1455. Such error inflicts the greatest costs on popular sovereignty and the constitutional order because it often removes from the political process an issue that the constitution left to that process. See id., 1460–61. Worse yet, the people have only one avenue to correct such error, namely, constitutional amendment, which requires either supermajoritarian action by the General Assembly or awaiting the electorate's next opportunity to call a constitutional convention.[20] See footnote 15 of this opinion.

In sum, judicial error in constitutional cases can frustrate the ideals of popular sovereignty and majority rule, thereby disturbing the constitutional order. The costs imposed by such a disruption should factor into this court's stare decisis calculus. Cases that involve the greatest costs are those of erroneous immunity intervention and erroneous usurpation of power by the court; in those cases, such usurpation cannot be corrected or mitigated by the political branches.[21]

c

Cost of Unworkability or Uncertainty

Perpetuating unworkable rules or uncertain judicial decisions also imposes costs. This principle naturally flows from the justifications for stare decisis. That is, if stare decisis is a defensible doctrine because it creates predictability and stability in the law; see, e.g., *Conway*

v. *Wilton*, supra, 238 Conn. 658; then decisions that create uncertainty "undermine, rather than promote, the goals that stare decisis is meant to serve." *Johnson* v. *United States*, U.S. , 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). It would be ironic to adhere to an uncertain precedent under the guise of stare decisis. Often, this principle arises when the court finds a previously announced rule to be unworkable or when it discovers that a particular precedent has come into conflict with another case or line of cases.[22] There is no reason, however, why the same principle should not apply when a case, despite not being unworkable or creating conflict in court jurisprudence, creates uncertainty. See, e.g., *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 379, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (Roberts, C. J., concurring) ("[I]f adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its stare decisis effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases . . . and when the precedent's underlying reasoning has become so discredited that the [c]ourt cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake."); *United States* v. *Dixon*, 509 U.S. 688, 711–12, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) (overruling earlier case in part because it created confusion).

In summary, under this framework, the court weighs the benefit and costs of adhering to prior cases. The court would employ a four step test in assessing whether to adhere to stare decisis. In step one, the court will consider the merits of the case under reconsideration. If it concludes that the previous case is correct, it will reaffirm that decision on the merits, and the inquiry will end. On the other hand, if the court should conclude that the previous decision is wrong, it should continue on to steps two through four. In step two, the court will analyze the benefit of adhering to the precedent case. This analysis involves the evaluation of one factor, namely, the reliance interests. In assessing whether the case being reconsidered has engendered any reliance, the court must methodically work through each category of reliance interests—specific, governmental, court, and societal—and catalog how each group has ordered its behavior on the basis of the erroneous decision. It must further assess what disruption would result if the case is overruled. Next, in step three, the court would evaluate the costs of adhering to the erroneous decision, which requires the evaluation of three factors. Those factors include the (a) costs of correcting the judicial error, (b) costs the error imposes on the constitutional order, and (c) costs of unworkability or uncertainty. After the costs have been identified and evaluated, the court will move to the fourth and

final step: the court would compare the benefit to the costs of adhering to the decision. If the reliance interests and the disruption costs that would arise from overruling the decision outweigh the costs of perpetuating judicial error, the previous decision will be afforded stare decisis effect, and the court will be bound to follow it. If, however, the costs of preserving judicial error outweigh any reliance interests, the decision under reconsideration will be afforded no stare decisis effect, and it should be overruled.

B

Application of Principled Doctrine of Stare Decisis to *Santiago*

The court's adoption of the four step test outlined in part I A of this opinion would result in a more consistent and principled application of the doctrine of stare decisis. In fact, applying this approach would shield this court from the appearance that the doctrine of stare decisis is used as a tool to reach a preferred result. I will now apply this framework in the present case to consider whether stare decisis should be applied to our decision in *Santiago*.

1

Step One: The Merits of *Santiago*

As I previously observed, it would serve no purpose to lengthen this dissent with further explanation as to why *Santiago* was wrongly decided. Instead, it suffices to say that, for the reasons Chief Justice Rogers, Justice Espinosa, and I provided in our dissenting opinions in *Santiago*, that decision was wrong then and continues to be wrong now.

2

Step Two: The Lack of Reliance *Santiago* Has Engendered

In part I A of this opinion, I explained that reliance interests can generally be placed into four categories: specific reliance; governmental reliance; court reliance; and societal reliance. I will consider each category in turn.

It cannot genuinely be argued that *Santiago* has garnered any specific reliance. The individuals currently on death row have not acted in reliance on our holding in *Santiago*. Indeed, the conduct that resulted in their convictions and death sentences occurred long before we issued our decision in *Santiago*. Moreover, we have often stated that stare decisis has less force in criminal cases precisely because those cases do not beget reliance interests. E.g., *State* v. *Salamon*, supra, 287 Conn. 523. For example, Justice Palmer wrote for the majority in *Salamon*: "Persons who engage in criminal misconduct . . . rarely if at all will . . . give thought to the question of what law would be applied to govern their

conduct if they were to be apprehended for their violations." (Internal quotation marks omitted.) Id. Some might suggest that there has been specific reliance on *Santiago* because certain death row inmates have filed motions to vacate their death sentences. That argument misses the mark. The relevant conduct, the commission of a capital crime, was committed before this court decided *Santiago*. That certain inmates are now trying to capitalize on this court's error is simply opportunistic.

There similarly has been no governmental or court reliance. Neither the Legislative Branch nor the Executive Branch has taken action in the wake of and in reliance on *Santiago*. The legislature has not enacted a new punishment scheme for capital crimes, and the governor has not taken steps to implement a new punishment scheme. Cf. *Craig* v. *Driscoll*, supra, 262 Conn. 349 (*Sullivan*, *C. J.*, dissenting) ("the doctrine of stare decisis has particular force in this case because of the long-standing nature of the common law [on] which our legislature has relied in crafting the remedies available to parties such as the plaintiffs"). Moreover, neither this court nor any other court in this state has relied on *Santiago* to decide cases. Significantly, a judicial doctrine has not been built on the foundation of *Santiago*. In fact, courts that have been asked to apply the central holding of *Santiago* have elected to stay the proceedings and to await our decision in the present case.

Finally, *Santiago* has not amassed any societal reliance. As I discussed previously, societal reliance refers to the people's perception of our constitutional system and the relationship between themselves and government. The people of Connecticut have hardly had time to absorb our decision in *Santiago*, and, thus, there has been little time for that decision to become part of Connecticut's consciousness. *Santiago* simply has not garnered, at least presently, the same level of social and historical significance as the United States Supreme Court's decisions in, for example, *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), or *Miranda* v. *Arizona*, supra, 384 U.S. 436, and it would be disingenuous to suggest otherwise. The principles expounded on in *Brown* have become part and parcel of who we are as a society, and *Miranda* is central to the people's understanding of their relationship with law enforcement. It cannot seriously be suggested that *Santiago* has reached the same, or even similar, status. Whether the people of this state and country believe that capital punishment is, in all cases and under all circumstances, unconstitutional is far from a foregone conclusion, and, therefore, *Santiago* does not represent a foundational legal norm.

Clearly, there is not a scintilla of reliance on *Santiago*. Neither society nor the government has changed its

behavior to comport with that decision. Moreover, *Santiago* is far from being part of our state consciousness. Even if it could be argued that there has been some reliance on *Santiago*, such reliance would surely be unreasonable. This court's decision in *Santiago* was released August 25, 2015, at a time when the present appeal was pending. On September 4, 2015, the state filed a motion for argument and reconsideration of our decision in *Santiago*, a motion we denied on October 7, 2015. See *State* v. *Santiago*, supra, 319 Conn. 912. *On that very day*, we also ordered supplemental briefing in this case, addressing, among other things, the effect of the judgment in *Santiago*. Thus, in an apparent moment of double speak, this court declined to reconsider *Santiago* and called its legitimacy into question. What's more, the judgment in *Santiago* was not even final when we ordered supplemental briefing in this case. See *State* v. *Santiago*, 319 Conn. 935, 125 A.3d 520 (2015) (denying state's motion for stay of judgment on October 30, 2015).

In light of the complete lack of reliance on *Santiago*, there is no need to consider the disruptive effect that overruling *Santiago* would have. Obviously, if there has been no reliance, there are no reliance interests to disrupt.

3

Step Three: Assessing the Costs of Perpetuating *Santiago*'s Error

Because there has not been even the slightest bit of reliance on *Santiago*, only the most trivial of costs will be necessary to tip the scale in favor of not affording stare decisis effect to *Santiago*. The costs of preserving *Santiago*, however, are stifling, not trivial. I will address each of the three costs outlined previously in this opinion. Those costs are the costs of error correction, costs to the constitutional order, and costs of unworkability or uncertainty.

a

The Uncertainty of *Santiago*

For the sake of brevity and clarity, I will first consider the creation of uncertainty. There is a great irony in arguing that the dictates of stare decisis would have this court stand by a previous case that creates uncertainty. *Santiago* is such a case. I do not suggest—nor could I—that *Santiago* announced an unclear rule of law or a test that will be unworkable in future cases. Nonetheless, the majority opinion in that case created an immense ambiguity, an ambiguity that has left a dark cloud of uncertainty over the powers of government.

The uncertainty arises from the majority's mode of analysis. In order to determine that the death penalty is now offensive to our state constitution, the majority employed a hybrid analysis of its own creation. As I noted in my dissent in *Santiago*, the majority's

approach in that case fell somewhere between a per se analysis and a statutory analysis; *State* v. *Santiago*, supra, 318 Conn. 342 (*Zarella, J.*, dissenting); and, under that approach, the majority reached the amorphous conclusion that, in light of the legislature's adoption of P.A. 12-5, the death penalty no longer comports with the state's contemporary standards of decency, no longer serves any legitimate penological purposes, and, therefore, is prohibited by the state constitution. See id., 9.

I admit that parsing the 140 page majority opinion in *Santiago* can be a difficult and, at times, perplexing task. After giving that decision careful, thorough, and thoughtful consideration, however, I concluded that the majority had not determined that the death penalty is per se unconstitutional, and the majority in *Santiago* had not disputed that conclusion. See id., 341–42 (*Zarella*, *J.*, dissenting). Although the majority in *Santiago* never explicitly states that its holding was not per se, it seemed to suggest as much. For example, in a footnote, the majority acknowledged that "society's standards of decency need not always evolve in the same direction. We express no opinion as to the circumstances under which a reviewing court might conclude, on the basis of a revision to our state's capital felony statutes or other change in these indicia, that capital punishment again comports with Connecticut's standards of decency and, therefore, passes constitutional muster." Id., 86 n.88. A logical reading of this passage suggests that some action short of a constitutional amendment, such as a repeal of P.A. 12-5, would suffice to render the death penalty constitutional in Connecticut. In addition, the majority concluded its decision by holding "that capital punishment, *as currently applied*, violates the constitution of Connecticut." (Emphasis added.) Id., 140. A plurality of justices in the present case, however, has caused me to query whether my reading of the majority opinion in *Santiago* was incorrect. Justice Palmer, the author of the majority opinion in *Santiago*, and two other members of the majority in *Santiago* now maintain that, "[i]f the people of Connecticut believe that we have misperceived the scope of [the state] constitution, it now falls on them to amend it." Text accompanying footnote 21 of Justice Palmer's concurring opinion. If, however, the holding in *Santiago* was not per se, why is a constitutional amendment necessary to reinstate capital punishment? The plurality notes that the issue of whether capital punishment may be reinstated in this state by means other than a constitutional amendment is not before us in this case; see footnote 21 of Justice Palmer's concurring opinion; and, therefore, the plurality expresses no opinion on that question. See id. The plurality simply creates further confusion regarding the ultimate holding in *Santiago*.

It is now obvious that *Santiago* has created a great degree of uncertainty, and continuing that uncertainty will impose costs. It is true that this court's decisions

will often generate some amount of uncertainty. That uncertainty, however, concerns whether the law announced in a case will apply under different factual circumstances. For example, in *Campos* v. *Coleman*, 319 Conn. 36, 57, 123 A.3d 854 (2015), this court recognized a cause of action for loss of parental consortium. The court did not decide, however, the outer limits of that claim. See, e.g., id., 46. We did not determine whether a stepchild, who has not been legally adopted by his or her stepparent, would be permitted to bring such a claim if the stepparent is injured. Id. In addition, we left open whether the cause of action extends to parental type relationships in which the parental figure is not a biological or legal parent of the child. Id. Thus, our decision in *Campos* created some degree of uncertainty as to the extent of liability in certain tort cases. This type of uncertainty, however, is to be expected, and is tolerable, particularly in common-law adjudication, where incremental development of the law is preferred. The uncertainty created by *Santiago*, and evinced by Justice Palmer's concurring opinion in the present case, however, is of a different kind and degree. Due to the meandering reasoning in *Santiago*, members of the legislature, as well as this court, are uncertain of what, if any, authority the legislature has to enact a capital felony statutory scheme in the future. This uncertainty is intolerable and imposes significant costs on our system of government.

b

Santiago's Tax on Our Constitutional Order

Closely related to the cost of this uncertainty are the costs *Santiago* places on our constitutional order. When a judicial decision erroneously immunizes an issue from majoritarian control and mistakenly allocates power to the judiciary, when such allocation cannot be corrected by majoritarian action, it taxes our constitutional order greatly. See K. Lash, supra, 93 Va. L. Rev. 1458, 1460–61.

I will first address *Santiago*'s specious immunization of capital punishment from majoritarian control. I will explain how the court has created a constitutional right when none existed. It will then be necessary, due to the contorted reasoning of the majority in *Santiago*, to consider whether the issue of capital punishment has been removed from majoritarian control.

In concluding that the death penalty is unconstitutionally cruel and unusual, the majority in *Santiago* created a right that is not grounded in Connecticut's constitution. As I explained in my dissent in *Santiago*, a cursory textual analysis of the constitution reveals numerous references to capital punishment and capital offenses.[23] *State* v. *Santiago*, supra, 318 Conn. 353–55 (*Zarella*, *J.*, dissenting). The entrenchment of these references in our state constitution suggests that the peo-

ple of Connecticut have conferred on their government the power to impose the ultimate punishment. More specifically, they bestowed that authority on the legislature. See, e.g., *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976) ("the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment . . . within the limits and according to the methods therein provided"). The majority in *Santiago* swept away those textual references by suggesting they were "incidental" and "merely acknowledge that the penalty was in use at the time of drafting . . . [and] do not forever enshrine the death penalty's constitutional status as standards of decency continue to evolve . . . ." *State* v. *Santiago*, supra, 131. In so doing, however, the majority ignored two important events. First, the delegates to the 1965 constitutional convention expressly rejected a proposed amendment that would have made capital punishment unconstitutional. Journal of the Constitutional Convention of Connecticut 1965, p. 111. Second, in 1972, article first, § 19, of the Connecticut constitution was amended to provide that "no person shall, *for a capital offense*, be tried by a jury of less than twelve jurors without his consent." (Emphasis added.) Conn. Const., amend. IV. In light of these events, it cannot be said that the constitutional references to capital punishment are merely incidental. Together, the textual references to capital punishment and capital crimes, and the rejection of the proposed abolition of the death penalty at the 1965 constitutional convention, entrench capital punishment in our state constitution, thereby requiring a constitutional amendment to make the death penalty unconstitutional under all circumstances.[24] Moreover, by embedding the death penalty in the state constitution, the people expressed their opinion that the punishment is not, and cannot be, per se unconstitutional.

Although it is clear that *Santiago* created a right not provided by the constitution, it is less clear whether it immunizes capital punishment from majoritarian control. As I discussed previously in this part of my opinion, the precise holding of *Santiago* is uncertain. In that case, the majority seemed to suggest that whether the death penalty could be imposed remained subject to majoritarian decision. See, e.g., *State* v. *Santiago*, supra, 318 Conn. 86 n.88 ("[w]e express no opinion as to the circumstances under which a reviewing court might conclude . . . that capital punishment again comports with Connecticut's standards of decency"). In the present case, however, Justice Palmer, along with two other justices, suggests that, under *Santiago*, the death penalty may be per se unconstitutional and that perhaps capital punishment may be reinstated through constitutional amendment only. See text accompanying footnote 21 of Justice Palmer's concurring opinion. If this latter reading is correct, preserving the error in *Santi-*

ago will impose significant costs on the constitutional order because it has removed from the political process a matter that the constitution has expressly left to that process. If, on the other hand, the former reading is correct, and capital punishment can be reinstated by the legislature—for example, by repealing P.A. 12-5—then the costs of this court's error, although still existent, are less significant. This uncertainty surely has a chilling effect on the legislature. Even if the legislature has the authority to reinstate the death penalty, it may be reluctant to do so for fear that such action is unconstitutional under the majority's reasoning in *Santiago*. This chilling effect increases the costs that arise from continued adherence to *Santiago*.

Regardless of whether *Santiago* immunizes capital punishment from majoritarian control, it does impose allocation costs on the constitutional order. Moreover, the allocation error cannot be corrected through majoritarian action and, therefore, levies substantial costs on the constitutional order. As I just explained, the people have enshrined capital punishment with constitutional status. Furthermore, defining crime and fixing punishment are part of the legislative, not judicial, power. See, e.g., *State* v. *Darden*, supra, 171 Conn. 679–80. Thus, by conferring the legislative power on the General Assembly, the people determined that it is that body who shall define capital crimes. See Conn. Const., art. III, § 1 ("[t]he legislative power of this state shall be vested in . . . the general assembly"). It is true that the General Assembly, when defining crime and fixing punishment, must act within the limits of the constitution; *State* v. *Darden*, supra, 679–80; and one limit the constitution places on the legislature's power to define crime and to fix punishment is the prohibition on cruel and unusual punishment. See, e.g., *State* v. *Ross*, 230 Conn. 183, 246, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995). In sum, the people have determined that capital punishment is, at least in certain circumstances, constitutional. They expressed such belief in our constitution. Moreover, the people granted the General Assembly the power to define capital crimes. At the same time, however, the people implicitly prohibited the imposition of cruel and unusual punishment, a prohibition enforced by the Judicial Branch. Even if it is assumed, for the sake of argument, that the constitutional provision generally prohibiting cruel and unusual punishment is inconsistent with the enshrining of capital punishment with constitutional status, it is rudimentary that we read conflicting provisions of statutes and of the constitution, so far as is possible, to be consistent and to give effect to every word and provision thereof. Thus, the most probable reading of these seemingly conflicting commands is that the people determined that capital punishment is a constitutional punishment for the most heinous of crimes. In so doing, they deter-

mined that there are particular situations in which the death penalty is a constitutional punishment. Thus, under our current constitution, the death penalty cannot be held unconstitutional in all cases and under all circumstances. In addition, the people left for the legislature the decision of which crimes shall be capital crimes. Of course, in the exercise of that power, the legislature could determine that it will not impose the death penalty as a punishment for any crime. Moreover, the legislature's power is checked by our duty to enforce the prohibition against cruel and unusual punishment. In this context, our duty is limited to determinations of whether the death penalty is unconstitutional as applied to certain crimes or certain persons, or as carried out, and not whether the death penalty, in and of itself, is cruel and unusual. In *Santiago*, we exceeded the outer bounds of this duty by determining that the death penalty no longer comports with the state's contemporary standards of decency and by concluding that it thus can never be imposed. Our decision was not limited to an as applied determination. Thus, we have usurped the power of the legislature to define capital crimes and to fix the appropriate punishment.

To compound our affront to the legislature's power, this court's power grab cannot be corrected through majoritarian action. Even if it is assumed that the legislature could reinstate the death penalty by, for example, repealing P.A. 12-5, it appears that the ultimate decision regarding whether the constitution permits the imposition of capital punishment rests with this court. The majority in *Santiago* stated: "We express no opinion as to the circumstances under which *a reviewing court* might conclude . . . that capital punishment again comports with Connecticut's standards of decency and, therefore, passes constitutional muster." (Emphasis added.) *State* v. *Santiago*, supra, 318 Conn. 86 n.88. And, in the present case, a plurality of justices suggests that reinstating the death penalty may require a constitutional amendment, but it reserves that question for another day. See footnote 21 and accompanying text of Justice Palmer's concurring opinion. The majority in *Santiago* contorted our constitutional order by concluding that this court will decide when the death penalty, in and of itself, is again constitutional. See *State* v. *Santiago*, supra, 86 n.88. As I have explained, our constitution enshrined capital punishment with constitutional status and left to the legislature decisions regarding if and when it should be imposed, subject to limited, as applied, review by this court. Now, however, the legislature cannot reinstate a capital punishment scheme *at all* without the approval of this court or perhaps, as the plurality states, only through a constitutional amendment. This is an intolerable seizure of legislative power by this court, an error that apparently can be corrected through constitutional amendment only. Thus, the only reasonable conclusion I can reach is that

continuing to follow the erroneous decision in *Santiago* will levy great costs on the constitutional order of Connecticut because, in that decision, this court altered the balance of power created by the people.

c

The Costs of Correcting *Santiago* Are Likely Significant

Finally, I turn to the difficulty of error correction and the costs it imposes. Erroneous constitutional decisions create greater costs than erroneous statutory or common-law decisions because of the difficulty in correcting such error. See, e.g., *Agostini* v. *Felton*, supra, 521 U.S. 235 (stare decisis "is at its weakest when [a court] interpret[s] the [c]onstitution because [its] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions"). When we improperly interpret the constitution, that error can be corrected only by constitutional amendment or by decision of this court. E.g., id. When, on the other hand, we improperly interpret or apply a statute or common-law rule, the legislature can correct our mistake through simple, majoritarian action. Thus, because *Santiago* is a constitutional decision, perpetuation of its error will impose a significant cost. Even if the legislature could reinstate the death penalty notwithstanding our decision in *Santiago*, the damage caused by the decision would remain. Without a constitutional amendment or the overruling of *Santiago*, the reasoning of that case will remain intact. If the reasoning remains, so does the usurpation of legislative power, because, in *Santiago*, the majority indicated that *a reviewing court* would serve as the arbiter of whether and when capital punishment will again comport with contemporary standards of decency in Connecticut. The difficulty of correcting our error, therefore, is significant, particularly given the restrictive method of constitutional amendment in Connecticut. See footnote 15 of this opinion.

4

Step Four: Weighing the Benefit and Costs of Affording *Santiago* Stare Decisis Effect

The imbalance between the reliance interests that would be protected and the costs that would result from adhering to *Santiago* is so clear that I almost need not express it. The weighing in the present case is akin to using an elephant (costs of giving stare decisis effect to *Santiago*) as a counterweight for a mouse (reliance interests). In all actuality, using a mouse to represent the reliance interests at stake is far too generous. Not a single individual or institution, including this state's government, has acted in reliance of our decision in *Santiago*. In fact, that decision's legitimacy was placed on shaky ground from the beginning because we ques-

tioned its precedential effect before the judgment in that case was final; see *State* v. *Santiago*, supra, 319 Conn. 935 (denying state's motion for stay of judgment); and, therefore, even if there had been any reliance on *Santiago*, it would have been unreasonable. The costs of adhering to that decision, however, are astronomical. First, and most significant, *Santiago* has upset the balance of governmental power created by our constitution. In that case, this court took for itself a power that always has resided in the legislature. Moreover, the only way to restore the equilibrium of governmental power is by amending the state constitution, which is no easy task. Second, the ultimate holding of *Santiago* is unclear. Third, that decision may or may not have immunized capital punishment from majoritarian control, despite the people's intention, expressed through the constitution, to allow the democratic and political processes to determine if and when the ultimate punishment might be imposed. Finally, if this court does not now overrule *Santiago*, a constitutional amendment is the only certain way to correct this court's overreaching. On balance, it is clear that the costs far outweigh the benefit of applying stare decisis to *Santiago*, and therefore, that decision should be overruled.[25]

II

THE COURT'S INSTITUTIONAL LEGITIMACY

In their concurring opinions, Chief Justice Rogers and Justice Robinson focus primarily on concerns over this court's legitimacy. Chief Justice Rogers argues that overruling *Santiago* within one year of deciding that case simply because there has been a change in court membership would call into question the integrity of this court and our commitment to the rule of law. Similarly, Justice Robinson concludes that the present case turns on the "stare decisis considerations of this court's institutional legitimacy and stability . . . ." Text accompanying footnote 2 of Justice Robinson's concurring opinion. He continues by stating that, if this court were to now overrule *Santiago*, it would appear that an important constitutional case was retracted simply due to a change in court personnel. I am not unsympathetic to my colleagues' concerns over the legitimacy of the court. Indeed, I agree that it would be a travesty if we were to overrule our previous cases simply because they no longer comport with the personal and ideological beliefs of a majority of the justices of this court. That, however, is not this case. Moreover, the idea that we may subordinate our oath to uphold the constitution to concerns about this court's public appearance is incomprehensible. See Conn. Const., art. XI, § 1.

The arguments in the concurring opinions of Chief Justice Rogers and Justice Robinson rest on faulty premises. First, they both seem to suggest that overturning court precedent is inconsistent with the rule of law. For example, Chief Justice Rogers apparently feels

bound by *Santiago* because of her "respect for the rule of law," and Justice Robinson concludes that we should follow *Santiago* because to do otherwise "would imperil our state's commitment to the rule of law . . . ." Second, and far more bizarre, Chief Justice Rogers and Justice Robinson contend that the change in court membership is an insufficient reason to overturn *Santiago* in the present case. Of course, I agree that a change in court personnel cannot justify overruling an earlier decision; that fact, however, would not serve as the basis for overruling *Santiago*. Instead, we would overrule *Santiago* because, one, the reasoning of the majority opinion in that case was inherently flawed and led to an erroneous conclusion, and, two, a weighing of the benefit and costs of applying the doctrine of stare decisis dictates that it should not be applied to our decision in *Santiago*.

I will further expound on the flaws in both of these premises, but, before I do, I will briefly explain from what source the court derives its legitimacy. This court's legitimacy arises from the willingness of the people of Connecticut to accept and obey the court's decisions and is "a product of substance and perception . . . ." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 865. That acceptance is a product of our fidelity to the rule of law, that is, our "legitimacy depends on making *legally principled decisions* under circumstances in which their principled character is sufficiently plausible to be accepted by the [people of this state]." (Emphasis added.) Id., 866; see also T. Tyler & G. Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," 43 Duke L.J. 703, 796–99 (1994) (concluding, after literature review and empirical study, that United States Supreme Court's contention in *Casey* that judicial legitimacy comes from objective and neutral decision-making finds strong support). Stated differently, the court receives and maintains its legitimacy by deciding cases through the objective and dispassionate application of the law and by ignoring how such cases will be perceived by the public. Cf. *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 958 (Rehnquist, C. J., concurring in the judgment in part and dissenting in part).

It appears that Chief Justice Rogers and Justice Robinson understand that this institution's legitimacy comes from a fidelity to the rule of law. They take the argument one step further, however, and conflate stare decisis with the rule of law. To be sure, at times, adherence to precedent serves the ideals of the rule of law, but, as I discussed in part I A of this opinion, blindly following precedent can also result in a great cost on the rule of law. I can think of no case in which this reality has been more readily apparent than in the present case. In her dissenting opinion in *Santiago*, Chief Justice

Rogers stated: "[B]ecause there is no legitimate legal basis for finding the death penalty unconstitutional under either the federal or the state constitution, I can only conclude that the majority has improperly decided that the death penalty must be struck down because it *offends the majority's subjective sense of morality*." (Emphasis added.) *State* v. *Santiago*, supra, 318 Conn. 276–77 (*Rogers*, *C. J.*, dissenting). Then, in dissent to this court's denial of the state's motion for argument, which the state had filed after we issued our decision in *Santiago*, she wrote: "By denying the state's motion for argument and reconsideration, the majority merely reconfirms my belief that it has *not* engaged in an objective assessment of the constitutionality of the death penalty under our state constitution." (Emphasis added.) *State* v. *Santiago*, supra, 319 Conn. 920 (*Rogers*, *C. J.*, dissenting). In light of Chief Justice Rogers' belief that the majority opinion in *Santiago* was driven by the individual predilections of the justices who had joined that opinion, her contention in the present case that the rule of law binds her to that decision, as Justice Scalia might say, "taxes the credulity of the credulous." *Maryland* v. *King*, U.S. , 133 S. Ct. 1958, 1980, 186 L. Ed. 2d 1 (2013) (Scalia, J., dissenting). Out of a so called "respect for the rule of law," Chief Justice Rogers shows that ideal the greatest disrespect by entrenching, *into our constitutional jurisprudence no less*, what she perceives to be the rule of individuals.

In addition, if this court's legitimacy is truly a matter of "*substance and* perception"; (emphasis added) *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 865; then, certainly, we must acknowledge and correct plain error. Id., 983 (Scalia, J., concurring in the judgment in part and dissenting in part). Insofar as it is perception that Chief Justice Rogers and Justice Robinson are worried about, the answer is simple. To prevent the appearance that we are a court driven by the whim of a majority of the justices, we must carefully obey the rule of law. We do so by applying an objective and transparent standard to weigh the benefit and costs of giving *Santiago* stare decisis effect. Applying objective standards in a neutral way, and then articulating the reasons for our holding, will placate any appearance that this court is governed by people rather than by laws. After all, the rule of law, at its essence, is governmental decision-making within a framework of *laws*. As Professor Daniel A. Farber so aptly put it in a slightly different context, it is understandable for justices to be troubled by the perception that they are acting, not on the basis of their interpretation of the law but, rather, on the basis of the personal proclivities of a majority of the justices. See D. Farber, "The Rule of Law and the Law of Precedents," 90 Minn. L. Rev. 1173, 1197 (2006). "The proper response, however, is for those [j]ustices to consider the merits of the case with particular care, to guard against any

unconscious influences from political pressures [or personal belief] one way or the other, and then to explain their reasoning with clarity to the public." Id. As I have already discussed, the careful application of an objective stare decisis standard clearly dictates that this court should not uphold *Santiago* on the basis of stare decisis. To do otherwise would disserve, and not enhance, the integrity of this court.

I now turn to the second premise of Chief Justice Rogers' and Justice Robinson's contentions, namely, that the change in this court's membership between *Santiago* and the present case *is the reason* we would overturn *Santiago*.[26] Their reasoning suffers from the logical fallacy of post hoc ergo propter hoc, or "after this, therefore resulting from it." Black's Law Dictionary, supra, p. 1355; see also id. (defining "post hoc ergo propter hoc" as "[t]he logical fallacy of assuming that a causal relationship exists when acts or events are merely sequential"). Their reasoning is simple. Because the present appeal has been decided after a change in the court's membership, the change in the membership is the reason to overturn *Santiago*. The flaw in this argument should be evident. If this court now were to overturn *Santiago*, it would not be because Justice Robinson replaced Justice Norcott. Certainly, the change in court membership may be a circumstance under which the overruling occurs, but it is nothing more than pure happenstance. Instead, the actual reasons for overruling *Santiago*, as I have already stated, would be, one, a majority of the justices believes that decision is not supported by the law and, two, after weighing the benefit and costs of stare decisis, a majority of the justices concludes that *Santiago* is not deserving of stare decisis effect.[27]

Even more troubling than the fallaciousness of this argument is its suggestion that this court is bound, now and forever, to follow any decision, right or wrong, unless the panel that decided the previous case is identical to the panel that wishes to overrule that case. Such a rule would completely ignore the past practice of this court. In fact, I have yet to uncover, despite considerable research, a case in which a panel overruling a previous decision of this court was identical to the panel that decided the case being overruled. This has held true even when we have overruled a decision only shortly after it was released. For example, in *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), we overruled a conclusion we reached seven weeks earlier in *State* v. *Sanseverino*, 287 Conn. 608, 625–26, 641, 949 A.2d 1156 (2008), superseded in part, 291 Conn. 574, 969 A.2d 710 (2009). Despite the passage of such little time, the panels in both cases were not identical. *Sanseverino* was decided by Chief Justice Rogers and Justices Norcott, Katz, Palmer, and me. See *State* v. *Sanseverino*, supra, 287 Conn. 608. Justices Vertefeuille and Sullivan, however, were also members of the panel

in *DeJesus*. See *State* v. *DeJesus*, supra, 418. Perhaps some might argue that the panel change did not impact our decision to overrule *Sanseverino*, but that fact is of no legal significance. It has likewise been observed that many overruling decisions in the United States Supreme Court were issued after a change in court membership.[28]

In response, I imagine that Chief Justice Rogers and Justice Robinson would echo the arguments made by one of our colleagues at oral argument in the present case. At oral argument, it was suggested that some change in circumstances or law, other than a change in court personnel, is necessary to justify overruling a prior decision. Perhaps they would justify this court's previous departures from precedent, despite the changes in court composition, by explaining that "[e]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better." (Internal quotation marks omitted.) *George* v. *Ericson*, 250 Conn. 312, 318, 736 A.2d 889 (1999). And, of course, this justification would undoubtedly explain some of our past overruling decisions. It does not, however, explain why we should be restrained from overruling a case that was demonstrably wrong when decided, has not engendered any reliance, and imposes significant costs on society simply because a justice who decided it has been replaced. In fact, the United States Supreme Court required nothing more when it overruled *Bowers* v. *Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), in *Lawrence* v. *Texas*, 539 U.S. 558, 577–78, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). See *Lawrence* v. *Texas*, supra, 577, 578 (noting that "*Bowers* was not correct when it was decided," that it was not correct when court overruled it, and that "[t]he holding in *Bowers* . . . ha[d] not induced detrimental reliance"). It is worth noting that the court that decided *Lawrence* was almost entirely different from the court that decided *Bowers*. Only Chief Justice Rehnquist and Justices O'Connor and Stevens sat on both cases. Compare id., 561, with *Bowers* v. *Hardwick*, supra, 187. Moreover, in *DeJesus*, this court did not rely on any arguments or experience that was not presented by the dissenting justice in *Sanseverino*. See *State* v. *DeJesus*, supra, 288 Conn. 529 (*Katz*, *J.*, dissenting); see also *State* v. *Sanseverino*, supra, 287 Conn. 641–42 (*Zarella*, *J.*, dissenting). Instead, the majority in *DeJesus* merely concluded that *Sanseverino* was wrong. See *State* v. *DeJesus*, supra, 437. If a change in court membership could prevent a subsequent court from considering a previous court's decision, "segregation would be legal, minimum wage laws would be unconstitutional, and the [g]overnment could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United* v. *Federal Election Commission*, supra, 558 U.S. 377 (Roberts, C. J., concurring). Surely, such a rule is not sound policy.

Perhaps realizing the illogicality of a rule that would prohibit this court from overruling an erroneous decision simply because a member of the majority that reached such decision has left the court, Chief Justice Rogers suggests that we employ an even more unreasonable test. See footnote 2 of Chief Justice Rogers' concurring opinion. She acknowledges that a manifestly incorrect decision that has engendered no reliance may be overturned. See id. In determining whether a prior decision is manifestly incorrect, however, she is guided not by what a majority of the current justices thinks but by what the majority of the justices in the prior decision thinks, or might think if they still occupied a seat on our bench.[29] See id. Thus, the salient question in the present appeal becomes: "What would Justice Norcott do?" And the current court is required to divine an answer. Surely, the reader does not need me to call his or her attention to the theoretical flaw in this idea. Under such a test, our decisions will turn on pure speculation regarding how a former justice, or justices, would decide a current case if they were still on the court. In addition, justices who have reached the constitutionally required retirement age, and in some cases, who have passed away, will continue to rule supreme in this institution, not because of the decisions they wrote, and the reasoning therein, but simply because they happened to vote with the majority in a case that is subsequently under reconsideration.

Normally, I accept what my colleagues have written and do not attempt to uncover a delitescent meaning or ulterior motive, and I will not do so in the present case. I have trouble accepting, however, that it is the institutional integrity of this court that truly concerns Chief Justice Rogers. First, she largely agrees with the stare decisis analysis I have presented in this opinion. See footnote 2 of Chief Justice Rogers' concurring opinion. Second, she does not refute my argument that this court's legitimacy comes from a fidelity to the rule of law; overruling prior cases is, in many instances, consistent with the rule of law, and any appearance that we are driven by the rule of individuals can be placated by the application of an objective stare decisis test. Third, in the recent past, neither this court nor Chief Justice Rogers has expressed concern about overruling a prior decision after a change in court membership.[30]

Chief Justice Rogers also expresses concern that overruling *Santiago* would send the message that a challenge to any four to three decision may be mounted when a member of the original majority leaves the court. My response is concise and simple: So what. This has been, and will always be, the case, unless we make stare decisis an inexorable command. A challenge may, at any time, be mounted against any of our previous decisions, whether they are four to three, five to two, six to one, or unanimous. That is part of our constitutional

system. For a period of more than thirty years, criminal defendants repeatedly and consistently attacked this court's interpretation of the state's kidnapping statutes. See, e.g., *State* v. *Luurtsema*, 262 Conn. 179, 200, 202, 811 A.2d 223 (2002); *State* v. *Amarillo*, 198 Conn. 285, 304–306, 503 A.2d 146 (1986); *State* v. *Chetcuti*, supra, 173 Conn. 170–71. In *State* v. *Salamon*, supra, 287 Conn. 513–14, this court decided to adopt the interpretation the criminal defendants had been advocating for years. Moreover, the majority in *Salamon* did not seem troubled at all by the fact that various earlier compositions of this court had repeatedly rejected such an interpretation. This court need not stand blindly by an earlier decision simply because it was reached on the narrowest of votes.[31] Instead, what is important is that the court objectively apply the legal rules that govern each case and decide, on the basis of a neutral application of a principled stare decisis doctrine, whether the dictates of stare decisis require us to continue to adhere to an earlier, erroneous decision.

In sum, the argument that the integrity and legitimacy of this court would be undermined by overruling *Santiago* is faulty. First, the rule of law does not bind us to erroneous precedent. Instead, it requires us to neutrally apply an objective stare decisis framework and to decide whether the benefit of affording *Santiago* stare decisis effect is outweighed by the costs. Second, if the entire court were to reexamine our holding in *Santiago*, and, after such examination, a majority of the justices were to conclude that *Santiago* is wrong, it would *not* be because there has been a change in the court's membership.

III

CONCLUSION

In closing, I want to note an astute observation once made by Chief Justice Charles Evan Hughes, when he was an Associate Justice of the United States Supreme Court. In response to the argument that dissent weakens the court's institutional prestige, Justice Hughes wrote: "When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity [that] is merely formal, [that] is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect [on] public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice." C. Hughes, The Supreme Court of the United States: Its Foundation, Methods and Achievements—An Interpre-

ation (1928) pp. 67–68. The observation of Justice Hughes is equally applicable in the present case. What will ultimately sustain this court's legitimacy is a prudent and independent exercise of the judgment of each individual justice, guided, of course, by our constitution and our laws. Just as it may be regrettable when the justices do not all agree, it may also be regrettable that our public appearance may temporarily be tarnished when we overrule a previous decision in short order. Far greater, and more important, than such regret, however, is our oath to uphold the constitution and our duty to objectively interpret that law. I am troubled by the suggestion that we must adhere to a decision, despite our belief that such a decision is unconstitutional, for no reason other than the appearance that we have changed our mind due to a change in court personnel. I cannot, in good conscience, join the court in such action. I believe the oath we take requires more of us.

[1] It would be careless of me if I failed to mention that stare decisis has never been prominent in our capital punishment jurisprudence. Indeed, past justices convinced of the death penalty's unconstitutional status were unmoved by the doctrine of stare decisis and continually declined to join the court's decisions upholding capital punishment. For example, dissenting in part from the majority opinion in *State* v. *Ross*, 230 Conn. 183, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), Justice Berdon concluded that capital punishment was facially unconstitutional under our state constitution because it did not comport with the contemporary standards of decency. Id., 286–87, 319, 334 (*Berdon*, *J.*, dissenting in part). Despite this court's contrary holding in that case; id., 256; Justice Berdon continued to dissent in capital cases, arguing that the death penalty was per se unconstitutional. See, e.g., *State* v. *Cobb*, 251 Conn. 285, 523, 743 A.2d 1 (1999) (*Berdon*, *J.*, dissenting), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000); *State* v. *Webb*, 238 Conn. 389, 551, 680 A.2d 147 (1996) (*Berdon*, *J.*, dissenting); *State* v. *Breton*, 235 Conn. 206, 260, 663 A.2d 1026 (1995) (*Berdon*, *J.*, dissenting). Similarly, the first time Justices Norcott and Katz decided a capital punishment case, they, too, felt unconstrained by precedent, such as *Ross*. In *Webb*, Justice Katz joined Justice Berdon's dissent, concluding that the death penalty was facially unconstitutional; *State* v. *Webb*, supra, 551; and Justice Norcott concluded, in dissent, that the Connecticut capital penalty scheme violated the state constitution's prohibition against cruel and unusual punishment, although he would not say that the death penalty was unconstitutional in all cases. See id., 566–67 (*Norcott*, *J.*, dissenting). Subsequently, in *Cobb*, Justice Norcott joined Justices Berdon and Katz in their belief that the death penalty was unconstitutional in all cases. See *State* v. *Cobb*, supra, 543 (*Norcott*, *J.*, dissenting); see also id., 522–23 n.1 (*Berdon*, *J.*, dissenting). Both Justices Norcott and Katz maintained their position throughout their tenure on this court; see, e.g., *State* v. *Santiago*, 305 Conn. 101, 307 n.166, 49 A.3d 566 (2012) (Justice Norcott, writing for the majority, declined to examine constitutional challenge to capital punishment because it had been recently rejected by majority of this court in *State* v. *Rizzo*, 303 Conn. 71, 184, 201, 31 A.3d 1094 [2011], cert. denied, U.S. , 133 S. Ct. 133, 184 L. Ed. 2d 64 [2012], but he maintained that he remained steadfast in his own conclusion that death penalty does not comport with Connecticut constitution), superseded in part by *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015); *State* v. *Rizzo*, supra, 202 (*Norcott*, *J.*, dissenting) ("I continue to maintain my position that the death penalty has no place in the jurisprudence of the state of Connecticut" [internal quotation marks omitted]); *State* v. *Colon*, 272 Conn. 106, 395, 864 A.2d 666 (2004) (*Norcott*, *J.*, concurring) (Justice Norcott indicated that he continued to adhere to his " 'ongoing position' " that death penalty is unconstitutional but joined majority because judgment of court did not result directly in imposition of death, as court reversed defendant's death sentence), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Colon*, supra, 395 (*Katz*, *J.*, concurring and dissenting) ("I maintain my belief that the death penalty fails to comport

with contemporary standards of decency and thereby violates our state constitution's prohibition against cruel and unusual punishment" but "concur . . . because . . . I have an obligation to decide the issue before the court" [internal quotation marks omitted]); *State* v. *Peeler*, 271 Conn. 338, 464, 857 A.2d 808 (2004) (*Katz*, *J.*, with whom *Norcott*, *J.*, joins, dissenting) ("[a]dhering to . . . view that the death penalty is, in all circumstances, cruel and unusual punishment prohibited by the constitution"), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); *State* v. *Rizzo*, 266 Conn. 171, 313–14, 833 A.2d 363 (2003) (*Norcott*, *J.*, concurring) (noting continued belief that death penalty cannot " 'be administered in accordance with the principles of fundamental fairness set forth in our state's constitution' " but joining majority because decision related to procedural safeguards in imposing ultimate punishment and did not directly result in imposition of death sentence); *State* v. *Rizzo*, supra, 266 Conn. 314 (*Katz*, *J.*, concurring and dissenting) ("I maintain my belief that the death penalty . . . violates our state constitution's prohibition against cruel and unusual punishment. . . . Nevertheless, I address the issue pertaining to the burden of persuasion for the imposition of the death penalty because . . . I have an obligation . . . to decide the issue before the court . . . ." [Citation omitted; internal quotation marks omitted.]); *State* v. *Reynolds*, 264 Conn. 1, 254, 836 A.2d 224 (2003) (*Katz*, *J.*, dissenting) (maintaining belief that death penalty violates state constitution's prohibition against cruel and unusual punishment), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Courchesne*, 262 Conn. 537, 583–84, 816 A.2d 562 (2003) (*Norcott*, *J.*, concurring) (maintaining opposition to constitutionality of death penalty but joining majority because it addressed narrow procedural question and because imposition of death penalty would not necessarily follow as direct consequence of majority's decision); *State* v. *Courchesne*, supra, 584–85 (*Katz*, *J.*, concurring and dissenting) (same); *State* v. *Webb*, 252 Conn. 128, 147, 750 A.2d 448 (*Norcott*, *J.*, dissenting) (expressing continued opposition to death penalty), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000); *State* v. *Webb*, supra, 252 Conn. 147 (*Katz*, *J.*, dissenting) ("I continue to believe that the death penalty . . . violates our state constitution's prohibition against cruel and unusual punishment"); despite this court's numerous decisions to the contrary. See, e.g., *State* v. *Rizzo*, supra, 303 Conn. 201 ("[w]e conclude that the death penalty, as a general matter, does not violate the state constitution"); *State* v. *Colon*, supra, 383 (rejecting invitation to reconsider decisions holding death penalty constitutional because court was not convinced that previous decisions were wrong); *State* v. *Reynolds*, supra, 236–37 (same); *State* v. *Webb*, supra, 238 Conn. 401 (disagreeing with defendant's claim that "the death penalty statutes facially violate . . . article first, §§ 8 and 9, of the Connecticut constitution"); *State* v. *Ross*, supra, 251 (rejecting claim that death penalty is cruel and unusual in all circumstances).

In my view, it is appropriate for our capital punishment jurisprudence to take little notice of stare decisis. The stakes in capital cases are high—life or death—and it is unlikely that any justice of this court will be unsure of the constitutional status of the ultimate punishment, whether he or she believes that it is constitutional or unconstitutional. It seems that the best decision-making policy in this arena, in which our holdings are of great constitutional, moral, and practical magnitude, is to allow each justice to reach an independent judgment regarding the death penalty's constitutionality, while giving little weight to stare decisis. In the present case, however, the concurring justices heavily weigh stare decisis and thereby prevent each justice from reaching an independent judgment regarding the constitutionality of the death penalty.

[2] See also *State* v. *Santiago*, supra, 318 Conn. 277–78 (*Rogers*, *C. J.*, dissenting) ("The majority's decision to strike down the death penalty in its entirety is a judicial invalidation, without constitutional basis, of the political will of the people. It is this usurpation of the legislative power—not the death penalty—that violates the societal mores of this state as expressed in its fundamental law."); id., 341 (*Rogers*, *C. J.*, dissenting) ("the majority has addressed issues that the defendant did not raise, has relied on extra-record materials that the parties have not had an opportunity to review or to rebut, has failed to provide the state with an opportunity to respond to its arguments and conclusions and, finally, in reaching the decision that it has today, has unconstitutionally usurped the role of the legislature").

[3] This inconsistent application is best illustrated by a juxtaposition of cases in which this court overruled precedent with cases in which this court has upheld precedent. In many instances in which this court decides to overrule a previous case, it is not due to the clarity of the error in the

previous case or because the most cogent reasons and inescapable logic required it. Instead, it is simply because a majority of the members of the panel reaches a different conclusion than the majority of the previous panel. See, e.g., *Campos* v. *Coleman*, 319 Conn. 36, 43, 123 A.3d 854 (2015) (overruling *Mendillo* v. *Board of Education*, 246 Conn. 456, 717 A.2d 1177 [1998], in recognizing new cause of action after reconsidering five policy factors court addressed in *Mendillo* and simply reaching different conclusion regarding weight and balance of those factors, and stating that it "now agree[s] with the concurring and dissenting opinion in *Mendillo* that the public policy factors favoring recognition of [the] cause of action . . . outweigh those factors disfavoring recognition"); *State* v. *Salamon*, 287 Conn. 509, 542, 949 A.2d 1092 (2008) (overruling more than thirty years of precedent interpreting Connecticut's kidnapping statutes, which had not required proof that defendant had restrained victim for longer period or to greater degree than necessary to commit other charged crimes without explaining why, or even if, that prior precedent was clearly wrong); *Craig* v. *Driscoll*, 262 Conn. 312, 328–30, 340, 813 A.2d 1003 (2003) (implicitly overruling more than one century of case law denying common-law negligence action against purveyor of alcoholic beverages for injuries caused by intoxicated patron without so much as stating that case law was wrong, justifying new cause of action on basis that it would further objectives of state's Dram Shop Act, which was enacted with knowledge that no common-law negligence action would lie for such injuries, and overruling *Quinnett* v. *Newman*, 213 Conn. 343, 568 A.2d 786 [1990], which concluded that legislature had occupied field when it enacted Dram Shop Act, but noting that such conclusion was inconsistent with court's holding to contrary in *Kowal* v. *Hofher*, 181 Conn. 355, 436 A.2d 1 [1980]). Contrarily, in instances in which we uphold precedent, we trumpet the clearly wrong and most cogent reasons and inescapable logic standards. See, e.g., *State* v. *Ray*, 290 Conn. 602, 614–16, 966 A.2d 148 (2009) (denying defendant's invitation to overrule prior cases concluding that, under General Statutes § 21a-278 [b], defendant must prove that he or she is drug dependent, noting that, "[i]f [it had been] writing on a blank slate, [it] might [have found] persuasive the defendant's argument[s]," and noting that defendant's arguments were supported by statute's text, chronology of statutes, and legislative history but were raised and rejected in *State* v. *Hart*, 221 Conn. 595, 605 A.2d 1366 [1992], and defendant had presented "no developments in the law, no potential for unconscionable results, no irreconcilable conflicts and no difficulties in applying [the court's] construction of § 21a-278 [b]" and therefore had not demonstrated that previous cases were clearly wrong or that most cogent reasons and inescapable logic required overruling of them). To further illustrate our inconsistent application of this doctrine, I point the reader to the countless cases in which we overrule precedent without even a mere mention of stare decisis. In fact, my research has uncovered at least twenty-six such cases since I have joined this court. See, e.g., *Grey* v. *Stamford Health System, Inc.*, 282 Conn. 745, 757, 924 A.2d 831 (2007); *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 289, 914 A.2d 996 (2007); *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 455, 904 A.2d 137 (2006); *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 691, 899 A.2d 586 (2006); *Right* v. *Breen*, 277 Conn. 364, 377, 890 A.2d 1287 (2006); *Alexson* v. *Foss*, 276 Conn. 599, 608 n.8, 887 A.2d 872 (2006); *State* v. *Singleton*, 274 Conn. 426, 438, 876 A.2d 1 (2005); *State* v. *Cruz*, 269 Conn. 97, 106, 848 A.2d 445 (2004); *State* v. *Crawford*, 257 Conn. 769, 779–80, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002); see also footnote 30 of this opinion (citing cases spanning from 2007 to 2016). In highlighting the cases cited in this footnote and footnote 30 of this opinion, I do not mean to suggest that any of the overrulings were improper. I express no opinion in that regard. Instead, I use these cases simply to illustrate the point that our jurisprudence in this area is weak and inconsistent.

[4] I note that a plurality of justices, Justices Palmer, Eveleigh, and McDonald, need not resort to stare decisis because they continue to believe that *Santiago* is correct. Thus, any discussion of stare decisis as a rationale for affirming *Santiago* is unnecessary. Nonetheless, those justices do address stare decisis.

[5] The United States Supreme Court has suffered such criticism at the hands of numerous academic writers precisely because it has inconsistently applied its stare decisis doctrine. See, e.g., C. Cooper, "Stare Decisis: Precedent and Principle in Constitutional Adjudication," 73 Cornell L. Rev. 401, 402 (1988) (characterizing stare decisis as "a doctrine of convenience, to

both conservatives and liberals" and stating that "[i]ts friends, for the most part, are determined by the needs of the moment"); M. Paulsen, "Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?," 86 N.C. L. Rev. 1165, 1209 (2008) ("Notions of 'judicial integrity' would seem to require acknowledgment that stare decisis is a doctrine of convenience, endlessly pliable, followed only when desired, and almost always invoked as a make-weight. . . . [I]t [is] a 'Grand Hoax.' ").

[6] In the process of articulating an objective stare decisis framework, it will be necessary to overrule, at least in part, our current stare decisis jurisprudence. That irony is not lost on me. This overruling, however, is justified under the analysis I set forth subsequently in this opinion. Briefly, there is no doubt that our stare decisis doctrine has been relied on by individuals and the branches of government. See part I A 1 of this opinion (addressing reliance interests in stare decisis). In fact, each time an individual or government agency, including a court, relies on a decision of this court, it is implicitly relying on stare decisis and the belief that we will not overrule such a decision. Those interests, however, are outweighed by the costs of adhering to our current jurisprudence on this point. First, and most important, our current doctrine is unworkable and unpredictable. See footnotes 3 and 30 of this opinion; see also part I A 2 c of this opinion (explaining cost of unworkability and uncertainty). Second, it is likely that only this court can bring order to the chaos in our stare decisis jurisprudence. See part I A 2 a of this opinion (discussing cost of error correction). Because the doctrine is, in essence, a principle of judicial decision-making, it seems unlikely that the General Assembly could legislate on the matter.

[7] I acknowledge that this court's past practice may not have required that we first decide whether the previous decision was correct. As I will explain in this part of my opinion, however, deciding the merits question as a threshold matter, and keeping such determination independent of the stare decisis analysis, provides a more objective, and therefore principled, approach to stare decisis.

[8] I recognize that, previously in this opinion, I criticized Chief Justice Rogers for overlooking the clearly wrong exception to our stare decisis jurisprudence. I did so, however, to point out this court's inconsistent application of stare decisis, not to suggest that a previous decision's wrongness should continue to be part of this court's stare decisis calculus.

[9] I acknowledge that Justice Robinson does not agree that the merits and stare decisis analyses are distinct and separate. Instead, he considers the degree of a precedent's wrongness to be a component in deciding whether a prior decision should be given stare decisis effect. He gives two reasons why he cannot agree with a stare decisis framework, such as the one presented in this opinion, that does not consider a precedent's relative degrees of wrongness. I will address each of these concerns in turn but first note that this court's decisions are either right or wrong. To what degree a decision is wrong does not, in the end, change the fact that it is wrong. This point is particularly important in constitutional adjudication, such as in the present case. Our constitution is the supreme law of this state, and all judges have sworn an oath to uphold it. If a case purporting to expound on the constitution is wrong as to its meaning or application, that case is in conflict with the constitution, and the mere fact that the case might be only slightly wrong, whatever that might mean, does not save it. This is why the degree to which a precedent is wrong is irrelevant to the stare decisis calculus.

With respect to Justice Robinson's concerns, he first states that the stare decisis analysis set forth in this opinion "appears to be receptive to overruling precedent in a way that undercuts the salutary features with respect to promoting stability in the law." Footnote 5 of Justice Robinson's concurring opinion. This point highlights a theoretical difference in our views. Justice Robinson, it appears, believes that stability in the law, in and of itself, has some normative value worthy of protection. Thus, if a prior decision of this court is only slightly wrong, he might sustain it for the sake of preserving stability. In my view, however, stability has no normative value independent of the protection of actual reliance interests, as I explain in part I A 1 of this opinion, and, therefore, it is the degree of reliance, not wrongness, that I consider to be important in a stare decisis analysis. See, e.g., *State* v. *Salamon*, supra, 287 Conn. 520 (noting that adherence to precedent and, thereby, in my view, stability, "is not an end in and of itself" [internal quotation marks omitted]). Insofar as Justice Robinson might be suggesting that stability in our case law is important because it engenders public reliance

on our decisions, I submit that such an interest is equally protected by a stare decisis analysis focused on assessing the reliance a decision has garnered.

Second, Justice Robinson argues that my approach "overrule[s] certain well established principles of stare decisis, namely, that: (1) the prior decision must be shown to be '*clearly wrong*' with a 'clear showing that an established rule is incorrect and harmful' . . . and (2) 'a court should not overrule its earlier decisions unless the *most cogent* reasons and *inescapable logic* require it.' " (Citation omitted; emphasis in original.) Footnote 5 of Justice Robinson's concurring opinion. I have acknowledged this irony and have explained why our stare decisis jurisprudence should be overruled. See footnote 6 of this opinion.

[10] This natural tension is less apparent and problematic when this court considers stare decisis in the context of the common law, because the source of the common law is precedent, and not a written constitution or code. Moreover, the common law has developed incrementally and over time.

[11] Chief Justice Rogers and Justice Robinson both claim that maintenance of the court's legitimacy is also a benefit of stare decisis. Perhaps at a superficial level they are correct, but, upon deeper reflection, it becomes clear that the court's legitimacy comes from fidelity to the rule of law. See part II of this opinion. At times, the rule of law will counsel us to follow precedent, and, in such cases, adherence to the dictates of stare decisis does contribute to the court's institutional legitimacy. Other times, however, fidelity to the rule of law will require us to depart from erroneous judicial decisions. In such cases, after fair and careful consideration and impartial application of the applicable law, this court's legitimacy is not harmed simply because it has decided to depart from a previous erroneous ruling. Thus, for these reasons, I do not believe that this court's legitimacy is an appropriate factor to be considered in the stare decisis calculus. Moreover, if Chief Justice Rogers and Justice Robinson were right, we could rarely, if ever, overrule precedent. See part II of this opinion.

In the past, we have also cited the conservation of resources and judicial efficiency as justifications for stare decisis. See, e.g., *Conway* v. *Wilton*, supra, 238 Conn. 659. It seems to me that these benefits, however, are reasons to adhere to precedent in general and not justifications for the continued adherence to wrong decisions specifically. In the words of then Judge, later Justice, Benjamin N. Cardozo, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process (1921) p. 149. Thus, following precedent conserves resources and fosters efficiency because it prevents the court from having to consider every possible issue, in every case. For example, if a criminal defendant claims that he has been tried and convicted in violation of the state constitution's prohibition against double jeopardy, he need not first argue that the due process clause of article first, § 8, of the state constitution prohibits double jeopardy. Instead, he may rely on our cases holding to that effect. See, e.g., *State* v. *Gonzalez*, 302 Conn. 287, 314–15, 25 A.3d 648 (2011). Thus, adherence to precedent creates efficiency and conserves resources by allowing litigants to rely and build on our past decisions in order to frame their arguments and focus our attention on the unique issues that arise in their case, rather than having to start from ground zero. When we decide to reexamine a previous decision, however, as we have in the present case, little efficiency results from adherence to stare decisis after briefs are filed and arguments are heard.

[12] *Salamon* and *Conway* are but two examples in which this court has decided to revisit and overrule its prior decisions because the discarded cases had not conjured any meaningful reliance. Other examples abound. See, e.g., *Mueller* v. *Tepler*, 312 Conn. 631, 647, 655, 95 A.3d 1011 (2014) (in limiting rule in *Gurliacci* v. *Mayer*, 218 Conn. 531, 590 A.2d 914 [1991], Chief Justice Rogers reasoned "that allowing a plaintiff to maintain a loss of consortium claim under . . . circumstances [in which she was not married to the injured person because such marriage was prohibited by law would] not impair preexisting expectations or reliance interests in any serious way"); *State* v. *DeJesus*, 288 Conn. 418, 479 n.2, 953 A.2d 45 (2008) (*Palmer*, *J.*, concurring) (reasoning that lack of "any material reliance" on previous decision gives stare decisis little force); *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 681, 855 A.2d 212 (2004) (overruling *Morel* v. *Commissioner of Public Health*, 262 Conn. 222, 811 A.2d 1256 [2002], and *Lisee* v. *Commission on Human Rights & Opportunities*, 258 Conn. 529, 782 A.2d 670 [2001], in part because

neither case is type that engenders significant reliance interest); *Craig* v. *Driscoll*, 262 Conn. 312, 349–50, 813 A.2d 1003 (2003) (*Sullivan*, *C. J.*, dissenting) (stare decisis dictated that court not create common-law negligence action against purveyor of alcohol because legislature, in enacting Dram Shop Act, relied on long established common law rejecting such claim); *Ozyck* v. *D'Atri*, 206 Conn. 473, 484, 538 A.2d 697 (1988) (*Healey*, *J.*, concurring) (noting reason "stare decisis applies with special force to decisions affecting titles to land is the special reliance that such decisions mandate"); *O'Connor* v. *O'Connor*, supra, 201 Conn. 645 ("[o]ur refusal to adhere to . . . [prior precedent] . . . does not defeat any legitimate prelitigation expectations of the parties founded in reliance on our prior decisions").

[13] Commercial actors provide an informative example. Such actors routinely rely on judicial decisions when forming contracts or structuring corporate organizations. See, e.g., *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 365, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (reliance interests are important considerations in contract cases because parties act in conformance with existing legal rules when structuring transactions); *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (declining to overrule previous rule because it "has engendered substantial reliance and has become part of the basic framework of a sizable industry"). If the law was in constant flux, however, commercial actors would be unable to rely on it, resulting in either a chilling of commercial activities or frequent upsetting of expectations, thereby causing a waste of resources.

[14] Chief Justice Sullivan's legislative reliance argument was vindicated approximately four months after our decision in *Craig* when the legislature passed No. 03-91 of the 2003 Public Acts (P.A. 03-91), abrogating our holding in *Craig*, at least with respect to intoxicated patrons who are twenty-one years of age or older. See P.A. 03-91, § 1, codified at General Statutes (Rev. to 2005) § 30-102.

[15] The Connecticut constitution may be amended in one of two ways. First, any legislator may propose an amendment. See Conn. Const., amend. VI. The proposed amendment must be approved either by three fourths of the members of each house of the General Assembly or by at least a majority of the members of each house in two successive sessions of the General Assembly. Conn. Const., amend. VI. Once so adopted, the amendment is presented to the people for their approval at the next general election. Conn. Const., amend. VI. To become effective, it must receive the support of a majority of the electors voting on the amendment. Conn. Const., amend. VI.

Second, the constitution may be amended at a convention called for such purpose. See Conn. Const., art. XIII, § 1. A constitutional convention can be called by either the General Assembly or the people. See Conn. Const., art. XIII, §§ 1 and 2. The General Assembly may convene a constitutional convention by a two-thirds vote of the members of each house. Conn. Const., art. XIII, § 1. A convention can be convened in this way at any time not earlier than ten years since the convening of a prior convention. Conn. Const., art. XIII, § 1. Alternatively, every twenty years, the people are presented, at a general election, with the question of whether a constitutional convention shall be convened. See Conn. Const., art. XIII, § 2. If a majority of the electors voting on such question call for a convention, a convention will be convened. See Conn. Const., art. XIII, § 2. Any proposals from a constitutional convention to amend the constitution will become effective when approved by a majority of the people voting thereon. See Conn. Const., art. XIII, § 4.

As is evident from the foregoing discussion, amending the Connecticut constitution is no easy task. It requires supermajoritarian or successive majoritarian action by the General Assembly, accompanied by approval of a majority of the state's citizens. If the General Assembly does not propose constitutional amendments or call a constitutional convention for that purpose, the citizens have the opportunity to call such a convention and to propose amendments only once every twenty years.

[16] I acknowledge that not all scholars and historians believe that Reverend Hooker's sermon was political in nature or that it inspired the Fundamental Orders of 1639. See M. Besso, "Thomas Hooker and His May 1638 Sermon," 10 Early Am. Stud. 194, 197, 207 (2012). There have been many interpretations of Reverend Hooker's sermon. Some historians have suggested it pronounced and advocated new principles for government, which later appeared in the Fundamental Orders. See id., 202–206. Others have argued that Reverend Hooker's ideas were not original but representative of local practices, and that the sermon's ultimate goal was to advocate for a form of civil government. See id., 206–207. Still other historians suggest that Reverend

Hooker's sermon was not politically motivated at all but espoused a religious message. See id., 207. Whether Reverend Hooker's sermon was the catalyst for the Fundamental Orders, simply reflected popular understanding of government at the time, or was a religious message is unimportant for present purposes. What is important is that it embodied the spirit and beliefs of the time, and those beliefs embraced the principles of popular sovereignty.

[17] In 1662, the Fundamental Orders were supplanted by the Charter of 1662 granted by King Charles II, although the structure of government was left largely unchanged. See H. Cohn, supra, 64 Conn. B.J. 337–39. The Charter of 1662 remained in effect at least until the signing of the Declaration of Independence in 1776, except for a short, eighteen month period in the 1680s when Connecticut was annexed as part of the Dominion of New England. See id., 340–42; see also W. Horton, "Connecticut Constitutional History: 1776–1988," 64 Conn. B.J. 355, 357 (1990).

[18] In 1776, Connecticut, along with the other colonies, declared its independence from England. W. Horton, "Connecticut Constitutional History: 1776–1988," 64 Conn. B.J. 355, 357 (1990). Rather than abandoning the Charter of 1662 for a new constitution, however, the General Assembly simply removed any reference to the English monarch and declared that the government established by the Charter would remain the "civil constitution of this state . . . ." (Internal quotation marks omitted.) Id.

In the years after declaring independence from England and leading up to the constitutional convention of 1818, whether Connecticut had a constitution became a contentious issue. See R. Purcell, Connecticut in Transition: 1775–1818 (1918) pp. 177–80, 243–46, 249–50, 259–61. The arguments that the state had no constitution sounded in theories of popular sovereignty. See id., pp. 177–80, 243–46. For example, if the people were the fountain of power, which was the belief in Connecticut, the Charter of 1662, it was argued, could not be the state's constitution because it was adopted by the General Assembly, not the people. See id., 177–80. John Leland stated in 1802: "The people of Connecticut have never been asked, by those in authority, what form of government they would choose; nor in fact, whether they would have any form at all. For want of a specific constitution, the rulers run without bridle or bit, or anything to draw them up to the ring-bolt." (Internal quotation marks omitted.) Id., p. 245. Moreover, the General Assembly could amend or revoke any law it wanted, including those set forth in the Charter. Id., pp. 255–56.

Likewise, those who argued that there was a constitution in Connecticut also relied on popular sovereignty. Judge Zephaniah Swift wrote: "Indeed no form of government could have been valid, unless approved, and adopted by the people in convention, or in some other way." 1 Z. Swift, A System of the Laws of the State of Connecticut (1795) p. 57. In fact, Judge Swift acknowledged that once Connecticut ratified the Declaration of Independence, thereby severing its ties with England, the people had the right to establish a new form of government, if they had seen fit. Id. Nonetheless, Judge Swift believed that the Charter of 1662 continued as the constitution of Connecticut. See id., pp. 56–57. He theorized that the real legitimacy of state government arose, not so much from the Charter, but from the people's assent to be governed as described by the Charter. See id., pp. 57–58. Even if the Charter was the sole basis of the government's power, Judge Swift argued, it still remained valid. See id., p. 58. Although the Charter, and the government it established, would have become invalid after Connecticut declared its independence from England, "the subsequent conduct of the people, in assenting to, approving of, and acquiescing in the acts of the legislature," established the validity of the Charter's continuation. Id.

Whether a constitution existed in Connecticut between 1776 and 1818 is unimportant for present purposes. What is important is that the debate on that issue illustrated the prominence of popular sovereignty in Connecticut in the years leading up to the 1818 constitutional convention. Moreover, this debate was the impetus, at least in part, for that convention.

[19] Examples of what I view as this court's overreach abound. See, e.g., *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 244–45, 990 A.2d 206 (2010); *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 544–45, 858 A.2d 709 (2004); *Sheff* v. *O'Neill*, 238 Conn. 1, 3–4, 678 A.2d 1267 (1996).

[20] *Lochner* v. *New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), provides an instructive example of intervention error. In that case, the United States Supreme Court struck down a state labor law; see id., 57–58, 64; holding, among other things, that the right of an employee and an employer to enter into an employment contract was protected by the due process

clause of the fourteenth amendment. Id., 53 ("[t]he right to purchase or to sell labor is part of the liberty protected by [the fourteenth] amendment [to the United States constitution], unless there are circumstances [that] exclude [that] right"). If, upon reconsideration, the United States Supreme Court had continued to adhere to the holding in *Lochner* and its progeny, the result would have been to immunize certain labor policies from majoritarian and legislative consideration. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 861 (observing that overruling of *Adkins* v. *Children's Hospital*, 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 [1923], by *West Coast Hotel Co*. v. *Parrish*, 300 U.S. 379, 400, 57 S. Ct. 578, 81 L. Ed. 703 [1937], "signaled the demise of *Lochner*").

[21] In fact, Professor Lash argues that such cases should receive reverse stare decisis treatment, that is, the presumption should be for overruling, not sustaining, such cases. See K. Lash, supra, 93 Va. L. Rev. 1442, 1458, 1461. We need not go so far as to declare that such cases are presumptively invalid; it is sufficient to say that, in order to sustain such cases under the doctrine of stare decisis, the reliance interests to be protected must be extremely significant.

[22] See, e.g., *Montejo* v. *Louisiana*, 556 U.S. 778, 792, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) ("the fact that a decision has proved unworkable is a traditional ground for overruling it" [internal quotation marks omitted]); *Lawrence* v. *Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (noting that *Bowers* v. *Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 [1986], can be overruled because it creates uncertainty insofar as its central holding was inconsistent with other United States Supreme Court precedent); *Helvering* v. *Hallock*, 309 U.S. 106, 119, 60 S. Ct. 444, 84 L. Ed. 604 (1940) ("stare decisis is . . . not a mechanical formula of adherence to the latest decision . . . when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience").

[23] See Conn. Const., art. I, § 8 ("[n]o person shall be . . . deprived of *life*, liberty or property without due process of law" [emphasis added]); Conn. Const., amend. IV ("no person shall, for a *capital offense*, be tried by a jury of less than twelve jurors without his consent" [emphasis added]); Conn. Const., amend. XVII ("[i]n all criminal prosecutions, the accused shall have a right . . . to be released on bail upon sufficient security, except in *capital offenses*, where the proof is evident or the presumption great" [emphasis added]); Conn. Const., amend. XVII ("[n]o person shall be held to answer for any crime, *punishable by death* or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law" [emphasis added]).

[24] I note my belief that the textual references alone are sufficient to secure capital punishment's constitutional status. The events of the 1965 constitutional convention simply make me more resolute in my conclusion.

[25] Chief Justice Rogers misstates my stare decisis analysis when she asserts: "[D]istilled to its essence, [Justice Zarella's analysis asserts] that, if a past decision was manifestly incorrect and there has been no reliance on it, principles of stare decisis may not require the court to stand by that decision." Footnote 2 of Chief Justice Rogers' concurring opinion. As I have clearly stated, stare decisis does not require us to stand by a decision if "the costs of preserving judicial error outweigh any reliance interests . . . ." Part I A 2 c of this opinion. Although Chief Justice Rogers is partially correct insofar as stare decisis *does not* require a court to adhere to a manifestly incorrect decision that has engendered no reliance, her recitation of my test requires too much. Under my approach, stare decisis does not apply if the costs of adhering to an erroneous decision outweigh the reliance interests that would be upset by overruling that decision. Thus, if a case has not garnered any reliance, it could be overruled if adherence to such decision would impose the slightest of costs, regardless of whether it is *manifestly* wrong.

[26] It would be remiss of me not to note that the quandary regarding the change in court membership is entirely a problem of the court's creation. This court had the opportunity and idea to decide the present appeal before the appeal in *Santiago*, thereby allowing the full and current panel of the court to decide whether the prospective repeal of the death penalty set forth in P.A. 12-5 made it unconstitutional to carry out the death sentences then in place. In fact, the present appeal was originally argued on July 10, 2014, more than one year before *Santiago* was decided on August 25, 2015. Nevertheless, the court decided, despite our policy to have important constitutional issues decided by the full and current panel of this court, to answer

the novel question raised by the passage of P.A. 12-5 in *Santiago*, with a panel that included a justice who had long since reached the mandatory retirement age. Moreover, and as Justice Espinosa correctly notes in her dissenting opinion in the present case, the panel that decided an earlier appeal in *Santiago*; see *State* v. *Santiago*, 305 Conn. 101, 49 A.3d 566 (2012); in which the court did not reach the contention of the defendant, Eduardo Santiago, that the death penalty was per se unconstitutional, was different from the panel that decided Santiago's later appeal to this court in *State* v. *Santiago*, supra, 318 Conn. 1. I do not suggest it was improper for Justice Norcott to remain on the panel in *Santiago*. In fact, he was well within his right to do so under General Statutes § 51-198 (c). Instead, my concern is only over the order in which *Santiago* and the present appeal were decided.

[27] Justice Robinson suggests that I am overly optimistic about the public's ability to look past the panel change and to understand that the overruling of this court's recent decision in *Santiago* would not be because of the panel change but because, as I have just explained, a majority of the justices in the present case have concluded that (1) *Santiago* is wrong, and (2) the costs of adhering to *Santiago* greatly outweigh the benefit. See footnote 8 of Justice Robinson's concurring opinion. As a "cautionary tale," he refers to a recent decision of the Kansas Supreme Court, namely, *State* v. *Petersen-Beard*, Docket No. 108,061, 2016 WL 1612851 (Kan. April 22, 2016). Footnote 9 and accompanying text of Justice Robinson's concurring opinion. In that case, which was released April 22, 2016, the Kansas Supreme Court overruled three of its "prior" decisions, all also released April 22, 2016. *State* v. *Petersen-Beard*, supra, 2016 WL 1612851, *1. Arguments in the three prior decisions had been heard approximately one year before argument in *Petersen-Beard*, by a panel that contained a trial judge who was sitting by designation of the Chief Justice while a vacant seat on the court was filled. That seat was filled, and the new panel heard *Petersen-Beard*, reaching, as Justice Robinson notes, the opposite conclusion. Justice Robinson then notes that "the rapid overruling was . . . widely noticed, and primarily attributed to the change in personnel of the Kansas Supreme Court." Footnote 9 of Justice Robinson's concurring opinion. Justice Robinson does not refer to any evidence, however, that the public is outraged or has lost confidence in the court due to this overruling. Instead, he refers to a few legal scholars who observe the panel change and concurrent change in the court's position. See id. The brunt of the consternation noted by the scholars and the dissenting justices in *Petersen-Beard*, however, seems to be over the court's decision to delay the release of the three overruled cases for approximately eight months in order to draft the opinion in *Petersen-Beard*, which overruled those cases, thereby delaying the relief afforded the individual defendants and depriving similarly situated individuals of the benefit of the holding of the three overruled cases. In fact, the dissenting justices in *Petersen-Beard* do not even allude to stare decisis or the dangers of overruling a recent decision when the only change is in the composition of the panel. Thus, I respectfully disagree that *Petersen-Beard* illustrates why this court should refrain from overruling *Santiago*.

Finally, in response to a concern that Justice Palmer raises in his concurring opinion, I would like to note that *Petersen-Beard* provides an example of a court of last resort quickly reversing its own constitutional ruling.

[28] Professor Thomas R. Lee, in discussing factors that might explain the United States Supreme Court's tendency to overrule prior decisions, stated: "One statistical study has suggested, for example, that the [c]ourts that have disproportionately altered precedent have been characterized by significant changes in membership. . . . A familiar example is the Hughes Court, which overturned [fifteen] precedents during its last nine years after the [c]ourt's entire membership was transformed between 1937 and 1941. . . . Similarly, most of the Warren Court's decisions overruling precedent were handed down after Justice [Felix] Frankfurter's retirement in 1962, while most of the Burger Court's overruling decisions came after [Justice] Douglas' retirement in 1975." (Citations omitted.) T. Lee, supra, 52 Vand. L. Rev. 650 n.14.

[29] There is a great irony in Chief Justice Rogers' reasoning that gives me pause. While she is occupied with explaining that she, Justice Espinosa, and I have already espoused, "at great length," why we think *Santiago* is incorrect; footnote 2 of Chief Justice Rogers' concurring opinion; noting that Justices Palmer, Eveleigh, and McDonald continue to believe that *Santiago* was correctly decided, and speculating about how Justice Norcott would rule, she overlooks the elephant in the room: What does Justice Robinson, *a current member of this court sitting on this case*, think?

Of course, this is not the only problem that stems from Chief Justice

Rogers' reasoning, although it is the most important. She correctly notes the obvious, namely, that stare decisis does not require this court to stand by a manifestly incorrect decision that has not been relied on. See id. She then states: "In *Santiago*, however, [she], Justice Espinosa and I explained at great length why we believed that the majority decision was incorrect . . . and we were unable to persuade the majority." (Citations omitted.) Id. Isn't this a curious notion? Apparently, when determining whether a previous decision of this court was manifestly incorrect, we consider whether the dissenting justices in the prior case successfully persuaded the majority justices that they, the majority, had reached a manifestly incorrect decision. If the dissenting justices had prevailed in the prior decision, would the outcome not have been different? Obviously, it would have been, so Chief Justice Rogers must mean something else. Perhaps, what she is trying to suggest is that she, Justice Espinosa, and I must now come up with a *new* reason that *Santiago* is incorrect. Why, if *Santiago* was incorrect when decided for the reasons that we then stated, would it not still be incorrect for the same reasons today? After all, as Chief Justice Rogers has observed, it has been less than one year since we decided *Santiago*. Moreover, I am again back to that vexing question, what does Justice Robinson think? That seems like a particularly important question under the current circumstances when three of the current members of the court think *Santiago* is correct and three others have explained why it is demonstrably wrong. If Justice Robinson could offer a different explanation for why *Santiago* is erroneous, would that get us past Chief Justice Rogers' unique test?

Finally, Chief Justice Rogers notes that those justices who were in the majority in *Santiago*, and join in the per curiam opinion in the present case, continue to believe that *Santiago* is correct, almost as to suggest that, if only one of them had changed his mind, perhaps we would then be permitted to overrule *Santiago*. Again, she leaves the reader to create his or her own explanation. Unfortunately, I can be of no help. I cannot think of any constitutional, statutory, or common-law rule that bestows greater authority on a justice who was in the majority of a prior decision when that decision is being reconsidered.

[30] During Chief Justice Rogers' tenure on this court, we have overruled prior precedent in twenty-five cases. See *State* v. *Wright*, 320 Conn. 781, 810, A.3d (2016); *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 268–69 n.24, 125 A.3d 172 (2015); *Campos* v. *Coleman*, supra, 319 Conn. 38, 57; *State* v. *Moreno-Hernandez*, 317 Conn. 292, 308, 118 A.3d 26 (2015); *Haynes* v. *Middletown*, 314 Conn. 303, 316, 323, 101 A.3d 249 (2014); *State* v. *Artis*, 314 Conn. 131, 156, 101 A.3d 915 (2014); *State* v. *Elson*, 311 Conn. 726, 754, 91 A.3d 862 (2014); *Ulbrich* v. *Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013); *State* v. *Moulton*, 310 Conn. 337, 362–63 and n.23, 78 A.3d 55 (2013); *State* v. *Polanco*, 308 Conn. 242, 260–61, 61 A.3d 1084 (2013); *State* v. *Sanchez*, 308 Conn. 64, 80, 60 A.3d 271 (2013); *State* v. *Guilbert*, 306 Conn. 218, 253, 49 A.3d 705 (2012); *State* v. *Paige*, 304 Conn. 426, 446, 40 A.3d 279 (2012); *Gross* v. *Rell*, 304 Conn. 234, 270–71, 40 A.3d 240 (2012); *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 201, 39 A.3d 712 (2012); *State* v. *Payne*, 303 Conn. 538, 541–42, 34 A.3d 370 (2012); *State* v. *Kitchens*, 299 Conn. 447, 472–73, 10 A.3d 942 (2011); *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 778–79 n.26, 6 A.3d 726 (2010); *State* v. *Connor*, 292 Conn. 483, 528 n.29, 973 A.2d 627 (2009); *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 729 n.37, 966 A.2d 188 (2009); *State* v. *DeJesus*, supra, 288 Conn. 437; *State* v. *Salamon*, supra, 287 Conn. 514; *Jaiguay* v. *Vasquez*, 287 Conn. 323, 348, 948 A.2d 955 (2008); *State* v. *Grant*, 286 Conn. 499, 535, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008); *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 771, 941 A.2d 917 (2008). In all twenty-five cases, the subsequent overruling panel was different from the panel that decided the cases being overruled. Moreover, Chief Justice Rogers either authored or joined the majority in nineteen of these cases. See *State* v. *Wright*, supra, 830; *Campos* v. *Coleman*, supra, 64; *State* v. *Moreno-Hernandez*, supra, 292, 312; *Haynes* v. *Middletown*, supra, 305; *State* v. *Artis*, supra, 131, 161; *State* v. *Elson*, supra, 726, 785; *Ulbrich* v. *Groth*, supra, 470; *State* v. *Moulton*, supra, 337, 370; *State* v. *Polanco*, supra, 242, 263; *State* v. *Sanchez*, supra, 64, 87; *State* v. *Guilbert*, supra, 274; *Gross* v. *Rell*, supra, 237; *Arrowood Indemnity Co.* v. *King*, supra, 179, 204; *State* v. *Payne*, supra, 541; *State* v. *Kitchens*, supra, 500; *State* v. *Connor*, supra, 483, 533; *State* v. *DeJesus*, supra, 420; *State* v. *Grant*, supra, 502 ; *Gibbons* v. *Historic District Commission*, supra, 755, 778. Chief Justice Rogers dismisses my point by stating that there is no inconsistency in her position in the foregoing cases and the position she takes in the

present appeal. See footnote 1 of Chief Justice Rogers' concurring opinion. *Anyone who reads the cases Justice Espinosa and I cite, however, will discover that not once, in any of these twenty-five cases, has this court, or Chief Justice Rogers, ever raised a concern over a change in panel membership or queried how a departed justice who was in the majority would have ruled if he or she had still been a member of the court.* In fact, in seventeen cases—*Wright*, *Arras*, *Moreno-Hernandez*, *Haynes*, *Ulbrich*, *Sanchez*, *Paige*, *Gross*, *King*, *Payne*, *Kitchens*, *Bysiewicz*, *Connor*, *St. Joseph's Living Center*, *Inc.*, *DeJesus*, *Grant*, and *Gibbons*—the words "stare decisis" cannot be found in the majority opinions at all.

[31] At oral arguments in the present appeal, counsel was asked whether our ruling in *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 141, 147–48, 957 A.2d 407 (2008), also a controversial four to three decision, which held that a statute purporting to prohibit same sex marriage was unconstitutional, could be attacked and overruled. I again note that a decision should not receive special stare decisis consideration because it was decided by one vote rather than two or three. In addition, and more important, I doubt that this court, notwithstanding the United States Supreme Court's recent decision in *Obergefell* v. *Hodges*, U.S. , 135 S. Ct. 2584, 2604–2605, 192 L. Ed. 2d 609 (2015), could overrule *Kerrigan* in light of the tremendous reliance interests that decision has engendered. First, the day after we decided *Kerrigan*, marriage licenses were being issued to same-sex couples. Second, there has been a reordering in employee benefits and health insurance in light of *Kerrigan*. Third, it is likely that the principles represented by *Kerrigan* have become part of the consciousness of the citizens of this state. Undoubtedly, there has been even more reliance on *Kerrigan* than that which I just outlined.

In his concurring opinion, Justice Robinson suggests that the reliance in the present case is different only in kind and not in degree from the reliance interests that would be at stake if *Kerrigan* were reconsidered. See footnote 6 of Justice Robinson's concurring opinion. In light of my analysis in part I B of this opinion, I cannot fathom the logic behind such a claim.

ESPINOSA, J., dissenting. " 'Twill be recorded for a precedent, And many an error by the same example Will rush into the state." W. Shakespeare, The Merchant of Venice, act IV, sc. i.

I write this dissenting opinion not to address the concurring opinion of Justice Palmer, who continues to believe that *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), was rightly decided.[1] I have already addressed the merits of *Santiago*, or rather, the lack thereof, in my dissenting opinion in that case. Id., 388. Of course, my dissenting opinion in *Santiago* pales in comparison to the dissent issued by Chief Justice Rogers, who wrote that "[e]very step" of the majority's analysis in that decision was "fundamentally flawed"; id., 231; and then, over the course of 110 blistering pages, painstakingly and methodically exposed those flaws one by one, ripping the majority's all too vulnerable analysis to shreds, revealing it to be both a violation of the principle of stare decisis; id., 238; and so lacking in foundation that it was built upon "a house of cards, falling under the slightest breath of scrutiny." Id., 233. Accordingly, I refer any readers who retain doubts as to whether *Santiago* was clearly wrong to the dissenting opinion of the Chief Justice. Id., 231–341.

I also need not address the barely two paragraph disdainful majority opinion in the present case. I do note, however, that it is hardly surprising that the majority has decided to issue its opinion as a terse and dismissive per curiam, suggesting that the state's arguments in favor of overruling *Santiago* do not merit serious consideration. This is particularly troubling considering the importance of the issue presented in this appeal. It is this court's duty to give full consideration to the claims of the parties who come before it. In many cases less significant than the present one, the court as a matter of courtesy and respect answers all the claims raised by the parties, even when the court may believe that such claims lack merit. Dismissing the state's arguments in the present case in a *per curiam* opinion creates the appearance that the outcome was predisposed, and that oral argument was allowed merely to avoid the perception that the state was being treated unfairly. Indeed, Mark Rademacher, the assistant public defender who argued this appeal, stated that the purpose of granting the state's motion for oral argument was " '[to make] the state feel good about losing.' " J. Charlton, "Connecticut High Court Revisits Death Penalty," Fox 61, January 7, 2016, available at http://fox61.com/2016/01/07/Connecticut-high-court-to-revisit-death-penalty/ (last visited May 16, 2016).

I write to address the concurring opinion of the Chief Justice who frames the issue presented in this appeal

in this manner: May the court overrule a recently established precedent solely because there has been a panel change since the now challenged decision? Taking that as her starting point, the Chief Justice voices the concern that overruling *Santiago* would call into question the integrity of this court because doing so: (1) would create the appearance that the court is governed by the whims of individual justices rather than the rule of law; (2) would create the public perception that the result of a case depends on the composition of the panel; and (3) would undermine the stability and predictability of the law, on which litigants rely. The short answer to those concerns is that they are unjustified and irrelevant when the prior precedent at issue is clearly wrong. As I explain in this dissenting opinion, this is particularly true when the clearly wrong, recently decided case has violated the doctrine of stare decisis—under those circumstances, that doctrine *requires* that the prior precedent be overruled. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 233–34, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The position of the Chief Justice in the present case, therefore, is irreconcilable with her position in her dissenting opinion in *Santiago*, that the decision was clearly wrong. See *State* v. *Santiago*, supra, 318 Conn. 231. A panel change cannot insulate a clearly wrong decision from being overruled.[2]

Because of the importance of the issue presented in this appeal, a longer response is necessary. This court's appearance as an impartial decision-making body, governed by the rule of law rather than the proclivities of individual panel members, is vital. No one disputes that, nor does anyone question the integral role that stability and predictability play in our legal system. But the protestations of the Chief Justice are predicated on a straw man that employs post hoc reasoning and finds no support in our stare decisis jurisprudence. In this dissent, I consider these two flaws in the analysis of the Chief Justice, and thereby illustrate the central flaw in her opinion—it overlooks the overarching stare decisis principle of which even playwrights are aware—a clearly wrong decision is dangerous, because it will be relied on as precedent. As this court frequently has noted, "[i]t is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." (Internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 660, 680 A.2d 242 (1996). And when a decision is so clearly wrong that the Chief Justice felt compelled to write in her dissent that the "fundamentally flawed" analysis suffers from a "complete absence of any historical support," relies on "irrelevant" factors; *State* v. *Santiago*, supra, 318 Conn. 231; is so "riddled with non sequiturs . . . [that] to enumerate all of them would greatly and unnecessarily increase the length of this [110 page] dissenting opinion," engages in "speculation" and relies on propositions that are "devoid of any

substantive content"; id., 242–43; "misstates both the eighth amendment jurisprudence of the United States Supreme Court and the state constitutional jurisprudence of this court"; id., 249; is "untenable"; id., 254; "illogical"; id., 256; "troubling"; id., 257; and "deliberately vague"; id., 261; is predicated on a legislative history that was created by "cherry pick[ing] extra-record sources that provide slanted and untested explanations for the history of the death penalty in this state"; id., 264 n.30; and constitutes a "judicial invalidation, without constitutional basis, of the political will of the people"; id., 278; that decision, which itself violated the doctrine of stare decisis, does not merit the application of that doctrine.

I

POST HOC STRAW MEN ARE UNPERSUASIVE

The Chief Justice misstates the issue presented in this appeal, framing it as whether this court should overrule a recently decided case *because* the panel has subsequently changed. By formulating the issue in that manner, she erects a straw man. Obviously, if this court were to overrule a decision merely *because* the panel had changed, the court would do damage to the rule of law. That causal connection exists, however, only in the opinion of the Chief Justice, who certainly finds herself more than capable of knocking down the proposition she has put forward. But the mere fact that a decision overruling *Santiago* would have occurred after the panel changed does not necessitate the conclusion that the panel change would have *caused* the court to overrule *Santiago*, and is nothing more than a logical fallacy, an example of "post hoc, ergo propter hoc"[3] reasoning.

On another level, what the Chief Justice appears to suggest is that, because the panel in *Santiago* would have been unwilling to overrule that decision, the current panel is prevented from doing so. She even goes so far as to tally the unchanged votes of the remaining three members of the majority panel from *Santiago* that are on the panel for this appeal, counting that as support for her decision to accord stare decisis effect to *Santiago*. She appears to suggest, therefore, that if one of the members of the majority in *Santiago* had come to the realization that *Santiago* was clearly wrong, a majority of the panel in the present case would be justified in overruling *Santiago*. First, if that notion does not create the appearance that the personally held beliefs of individual justices govern the outcome of the present appeal, I do not know what would. Second, the Chief Justice does not give her own vote, or the votes of the other two original dissenting justices, sufficient weight. By my tally, those votes also totaled three. Finally, if the notion advanced by the Chief Justice—that an opinion should not be overruled because the original majority continued to believe the case was

rightly decided—held any weight, *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), overruled by *Brown* v. *Board of Education*, 347 U.S. 483, 494–95, 74 S. Ct. 686, 98 L. Ed. 873 (1954), would still be good law.

II

STARE DECISIS PRINCIPLES APPLIED TO A DECISION THAT FLOUTED STARE DECISIS

This court has stated that "[one] well recognized exception to stare decisis under which a court will examine and overrule a prior decision . . . [is when that prior decision] is clearly wrong." (Internal quotation marks omitted.) *Conway* v. *Wilton*, supra, 238 Conn. 660. The exception to the doctrine of stare decisis for decisions that are "clearly wrong" is perhaps the oldest and most well established, dating back to William Blackstone, who explained: "[I]t is an established rule to abide by former precedents, where the same points come again in litigation . . . . Yet this rule admits of exception, where the former determination is *most evidently contrary to reason*; much more if it be contrary to the divine law. . . . The doctrine of the law then is this: that precedents and rules must be followed, *unless flatly absurd* or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration." (Emphasis added.) 1 W. Blackstone, Commentaries on the Laws of England (1775) pp. 69–70.

Contrary to the position of the Chief Justice, the United States Supreme Court has held that when a recently decided case has ignored and contravened existing precedent, the doctrine of stare decisis *requires* that the decision be overruled. As explained by D. Arthur Kelsey, now a justice of the Supreme Court of Virginia, when "a court overrules a more recent case that, itself, violated stare decisis and thus represented a divergence from settled precedent . . . the court does not flout stare decisis by overruling the anomalous case. Rather, it 'restore[s]' the prior 'fabric of [the] law' that the anomalous case departed from. *Adarand Constructors*, *Inc.* v. *Pena*, [supra, 515 U.S. 234]. Thus, in *Adarand Constructors*, *Inc.*, the [c]ourt overruled its recent opinion in [*Metro Broadcasting*, *Inc.* v. *Federal Communications Commission*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990)], stating: '*Metro Broadcasting* [*Inc.*] itself departed from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting* [*Inc.*], then, we do not depart from the fabric of the law; we restore it.' " D. Kelsey, "The Architecture of Judicial Power: Appellate Review and Stare Decisis," 45 Judges' J., p. 13 n.29 (Spring 2006).

I observe that there were significant panel changes in the five years that passed between *Metro Broadcasting*, *Inc.*, and *Adarand Constructors*, *Inc.* The majority in

Metro Broadcasting, Inc., was comprised of Justices Brennan, White, Marshall, Blackmun and Stevens. *Metro Broadcasting, Inc.* v. *Federal Communications Commission*, supra, 497 U.S. 550. The dissenters were Chief Justice Rehnquist, and Justices O'Connor, Scalia and Kennedy. Id. When the court overruled *Metro Broadcasting, Inc.*, in *Adarand Constructors, Inc.*, none of the original panel members changed their positions, but only Justice Stevens remained of the original majority. *Adarand Constructors, Inc.* v. *Pena*, supra, 515 U.S. 202–203. Writing for the majority in *Adarand Constructors, Inc.*, Justice O'Connor distinguished this context—when the court considers overruling a recent decision that contravened well established precedent—from the context presented in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 844, 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), in which the court considered whether to overrule *Roe* v. *Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). *Adarand Constructors, Inc.* v. *Pena*, supra, 233. When *Casey* was decided, *Roe* had become "integrated into the fabric of law." Id., 234. By contrast, *Metro Broadcasting, Inc.*, created a tear in that fabric by violating the principle of stare decisis; the doctrine therefore required that the damage be controlled by overruling the anomalous decision as soon as possible. Id., 233–34.

The United States Supreme Court relied on the very same principle in *United States* v. *Dixon*, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), in which it overruled its decision in *Grady* v. *Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), following a panel change. The court in *Dixon* explained that "*Grady* contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion . . . ." (Internal quotation marks omitted.) *United States* v. *Dixon*, supra, 711. Letting that decision stand, therefore, would "mock stare decisis." Id., 712; see D. Kelsey, supra, 45 Judges' J., p. 13 n.29.

That is precisely the context in the present case. The Chief Justice detailed the manner in which the majority in *Santiago* cast aside a vast body of existing precedent, simply because the majority of the panel in that case held a contrary view, in complete contravention to applicable precedent and with flagrant disrespect for the principle of stare decisis. *State* v. *Santiago*, supra, 318 Conn. 238–39 (*Rogers, C. J.*, dissenting). She observed that essential to the majority's analysis was its position that "this court's previous holdings that the due process provisions of the state constitution do not bar the imposition of the death penalty for the most heinous murders are now questionable . . . ." Id., 238 (*Rogers, C. J.*, dissenting). She then criticized the majority, not only for its lack of respect for precedent, but also for its lack of intellectual honesty. She pointed out that the majority—unwilling to openly acknowledge the fact that it was overruling dozens of decisions, which

repeatedly had upheld the constitutionality of the death penalty, solely because the majority would have held a different view—"carefully avoid[ed] suggesting . . . [that those decisions] were wrongly decided." (Citation omitted.) Id., 238 n.5.

In fact, the Chief Justice's dissenting opinion in *Santiago* makes clear that the majority decision in that case was driven by naked judicial activism, in contravention to the existing law of this state. She explained: "[B]ecause there is no legitimate legal basis for finding the death penalty unconstitutional under either the federal or the state constitution, I can only conclude that the majority has improperly decided that the death penalty must be struck down because it offends the majority's subjective sense of morality." Id., 276–77. It was a classic example of a court giving no effect or even consideration to the principle of stare decisis, and represented a drastic departure from our death penalty jurisprudence. Inevitably, such decisions are, as the Chief Justice expressed eloquently, "based on a house of cards, falling under the slightest breath of scrutiny." Id., 233. In other words, such decisions inevitably are clearly wrong and destroy the fabric of the law. Stare decisis requires that such decisions be overruled.

In the present case, accordingly, the question is not whether the court should overrule *Santiago because of* a panel change. The question that the Chief Justice should be asking is whether stare decisis principles support the conclusion that a panel change *prevents* this court from being able to overrule a clearly wrong, recently decided case that constitutes an abrupt departure from well established precedent. And the clear answer to that question is no; stare decisis requires that the fabric of the law be restored by overruling the anomalous decision.

The Chief Justice cannot point to a single case to support the proposition that a panel change prevents the court from overruling clearly wrong precedent, because none exists. My research has revealed that all of this court's decisions overruling prior precedent have happened *following* a panel change. During her tenure, for instance, my research also has revealed that this court has overruled its prior precedent on at least *twenty-five occasions*. In every single one of those cases, the panel that overruled the prior precedent differed from the panel that had decided the original case. See *State* v. *Wright*, 320 Conn. 781, 810, A.3d (2016) (overruling in part *State* v. *DeJesus*, 270 Conn. 826, 856 A.2d 345 [2004]); *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 268–69 n.24, 125 A.3d 172 (2015) (overruling *Pollard* v. *Norwalk*, 108 Conn. 145, 142 A. 807 [1928], "to the extent that *Pollard* supports the dissent's position" in *Arras*, on basis that if dissent's reading of *Pollard* were correct, *Pollard* would be inconsistent with *Bortner* v. *Woodbridge*, 250 Conn.

241, 736 A.2d 104 [1999], and *Sadlowski* v. *Manchester*, 206 Conn. 579, 538 A.2d 1052 [1988]); *Campos* v. *Coleman*, 319 Conn. 36, 57, 123 A.3d 854 (2015) (overruling *Mendillo* v. *Board of Education*, 246 Conn. 456, 717 A.2d 1177 [1998]); *State* v. *Moreno-Hernandez*, 317 Conn. 292, 308, 118 A.3d 26 (2015) (overruling in part *State* v. *Gonzalez*, 222 Conn. 718, 609 A.2d 1003 [1992]); *Haynes* v. *Middletown*, 314 Conn. 303, 323, 101 A.3d 249 (2014) (overruling in part both *Purzycki* v. *Fairfield*, 244 Conn. 101, 708 A.2d 937 [1998], and *Burns* v. *Board of Education*, 228 Conn. 640, 638 A.2d 1 [1994]); *State* v. *Artis*, 314 Conn. 131, 156, 101 A.3d 915 (2014) (overruling *State* v. *Gordon*, 185 Conn. 402, 441 A.2d 119 [1981], cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 [1982]); *State* v. *Elson*, 311 Conn. 726, 746–48, 748 n.14, 754, 91 A.3d 862 (2014) (overruling in part *In re Jan Carlos D.*, 297 Conn. 16, 997 A.2d 471 [2010], *State* v. *Cutler*, 293 Conn. 303, 977 A.2d 209 [2009], *In re Melody L.*, 290 Conn. 131, 962 A.2d 81 [2009], *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 951 A.2d 520 [2008], *State* v. *McKenzie-Adams*, 281 Conn. 486, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 [2007], *State* v. *Commins*, 276 Conn. 503, 886 A.2d 824 [2005], *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 876 A.2d 1178 [2005], and *State* v. *Ramos*, 261 Conn. 156, 801 A.2d 788 [2002]); *Ulbrich* v. *Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013) (overruling in part *Flagg Energy Development Corp.* v. *General Motors Corp.*, 244 Conn. 126, 709 A.2d 1075 [1998]); *State* v. *Moulton*, 310 Conn. 337, 362 n.23, 363, 78 A.3d 55 (2013) (overruling "prior precedent to the contrary" of court's conclusion that "[General Statutes] § 53a-183 [a] proscribes harassing and alarming speech as well as conduct"); *State* v. *Polanco*, 308 Conn. 242, 245, 261, 61 A.3d 1084 (2013) (overruling in part *State* v. *Chicano*, 216 Conn. 699, 584 A.2d 425 [1990], cert. denied, 501 U.S. 1254, 111 S. Ct. 2899, 115 L. Ed. 2d 1062 [1991]); *State* v. *Sanchez*, 308 Conn. 64, 80, 60 A.3d 271 (2013) (overruling in part *Finley* v. *Aetna Life & Casualty Co.*, 202 Conn. 190, 520 A.2d 208 [1987], overruled in part on other grounds by *Curry* v. *Burns*, 225 Conn. 782, 786, 626 A.2d 719 [1993]); *State* v. *Guilbert*, 306 Conn. 218, 253, 49 A.3d 705 (2012) (overruling in part *State* v. *McClendon*, 248 Conn. 572, 730 A.2d 1107 [1999], and *State* v. *Kemp*, 199 Conn. 473, 507 A.2d 1387 [1986]); *State* v. *Paige*, 304 Conn. 426, 446, 40 A.3d 279 (2012) (overruling in part *State* v. *Greenberg*, 92 Conn. 657, 103 A. 897 [1918]); *Gross* v. *Rell*, 304 Conn. 234, 270–71, 40 A.3d 240 (2012) (overruling in part *Lesnewski* v. *Redvers*, 276 Conn. 526, 886 A.2d 1207 [2005]); *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 201, 39 A.3d 712 (2012) (overruling in part *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 538 A.2d 219 [1988]); *State* v. *Payne*, 303 Conn. 538, 541–42, 564, 34 A.3d 370 (2012) (overruling *State* v. *King*, 187 Conn. 292, 445 A.2d 901 [1982], "and its progeny," and overruling in part *State* v. *Tomas D.*,

296 Conn. 476, 995 A.2d 583 [2010]); *State* v. *Kitchens*, 299 Conn. 447, 472–73, 10 A.3d 942 (2011) (overruling in part *State* v. *Ebron*, 292 Conn. 656, 975 A.2d 17 [2009]); *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 778–79 n.26, 6 A.3d 726 (2010) (overruling *In re Application of Slade*, 169 Conn. 677, 363 A.2d 1099 [1975]); *State* v. *Connor*, 292 Conn. 483, 528 n.29, 973 A.2d 627 (2009) (overruling in part *State* v. *Day*, 233 Conn. 813, 661 A.2d 539 [1995]); *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 729 n.37, 966 A.2d 188 (2009) (overruling *Fanny J. Crosby Memorial, Inc.* v. *Bridgeport*, 262 Conn. 213, 811 A.2d 1277 [2002], and *United Church of Christ* v. *West Hartford*, 206 Conn. 711, 539 A.2d 573 [1988], to extent that those cases were inconsistent); *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008)[4] (overruling in part *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 [2008] [*Sanseverino I*], superseded in part by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 [2009] [*Sanseverino II*]); *State* v. *Salamon*, 287 Conn. 509, 513, 542, 949 A.2d 1092 (2008) (overruling entire line of cases interpreting kidnapping statutes as allowing conviction for kidnapping even when restraint involved was merely incidental to commission of another offense, most recently stated in *State* v. *Luurtsema*, 262 Conn. 179, 811 A.2d 223 [2002]); *Jaiguay* v. *Vasquez*, 287 Conn. 323, 348, 948 A.2d 955 (2008) (overruling in part *Johnson* v. *Atkinson*, 283 Conn. 243, 926 A.2d 656 [2007]); *State* v. *Grant*, 286 Conn. 499, 535, 944 A.2d 947 (overruling in part *State* v. *Whipper*, 258 Conn. 229, 780 A.2d 53 [2001]), cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008); *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 771, 941 A.2d 917 (2008) (overruling in part *Stankiewicz* v. *Zoning Board of Appeals*, 211 Conn. 76, 556 A.2d 1024 [1989]).

The Chief Justice presided over many of the appeals in which this court overruled prior precedent. Accordingly, this court's existing practices in adhering—or not adhering—to the stare decisis principles that the Chief Justice currently invokes are relevant in evaluating the persuasiveness of her claim that the doctrine prevents this court from overruling *Santiago*. I note that many of this court's recent decisions overruling prior precedent include no discussion whatsoever of the doctrine of stare decisis. See, e.g., *Haynes* v. *Middletown*, supra, 314 Conn. 323 (overruling in part both *Purzycki* v. *Fairfield*, supra, 244 Conn. 101, and *Burns* v. *Board of Education*, supra, 228 Conn. 640, with no mention of stare decisis or underlying principles); *State* v. *Sanchez*, supra, 308 Conn. 78 (overruling in part *Finley* v. *Aetna Life & Casualty Co.*, supra, 202 Conn. 190, with no mention of stare decisis or underlying principles); *State* v. *Paige*, supra, 304 Conn. 446 (overruling in part *State* v. *Greenberg*, supra, 92 Conn. 657, with no mention of stare decisis or underlying principles). The Chief Justice's stated concern in her concurring opinion in

this case, that overruling *Santiago* would raise questions "about the court's integrity and the rule of law in the state of Connecticut," cannot be reconciled with the number of times this court has overturned its prior decisions without even considering whether doing so would be consistent with the doctrine.

These recent decisions also call into question the assertion of the Chief Justice that stare decisis must be adhered to in the present case because "neither the factual underpinnings of the prior decision nor the law has changed . . . ." She contends that one of these changes is necessary before a court may overrule a decision. Presumably, because she recognizes no exception for clearly wrong decisions despite its well established roots in our law, and because she obviously believes that *Santiago* was clearly wrong; see *State* v. *Santiago*, supra, 318 Conn. 231–341 (*Rogers*, *C. J.*, dissenting); she takes the position that even when a decision is clearly wrong, it must be accorded stare decisis effect unless one of these two conditions is present. She claims that in the absence of one or both of those two conditions, the decision to overrule prior precedent is based merely on "a present doctrinal disposition to come out differently from [the prior decision]." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 864.

In a case that was decided mere months ago, however, the Chief Justice joined the majority in overruling prior precedent, despite the absence of either of these two conditions. And in doing so, the court recognized a new cause of action, hardly a small change in the law. In *Campos* v. *Coleman*, supra, 319 Conn. 57, this court overruled *Mendillo* v. *Board of Education*, supra, 246 Conn. 456, 461, 477–96, in which the court had declined, based on an exhaustive analysis of the relevant policy principles and applicable precedent, to recognize a derivative cause of action for loss of consortium by a minor child. The justification provided by the court in *Campos* for overruling *Mendillo*, which had been decided by an en banc panel before the court adopted that practice for all cases, is illuminating: "Upon reconsideration of the relevant considerations, including the five factors that this court found determinative in *Mendillo*, we now agree with the concurring and dissenting opinion in *Mendillo* that the public policy factors favoring recognition of a cause of action for loss of parental consortium outweigh those factors disfavoring recognition." *Campos* v. *Coleman*, supra, 43. The opinion then proceeded to consider each of those factors and explain why the present panel now "disagree[d]"; id., 45; with the evaluation conducted by the panel in *Mendillo* of each of those factors. Id., 44–57. In other words, the panel in *Campos* simply disagreed with the conclusion arrived at by the panel in *Mendillo*, so *Mendillo* was overruled. Nothing in the factual underpinnings or the law had changed in the more than seven-

teen years since *Mendillo* was decided. The court in *Campos* relied on many of the identical authorities on which the court in *Mendillo* had relied, but the court in *Campos* arrived at a different conclusion.

One would expect, considering the Chief Justice's claim that the court is bound by the doctrine of stare decisis in the present case, that she would have expressed similar concerns regarding the risk that the court might appear to be deciding cases on the basis of the personal moral beliefs of individual justices, and that *Campos* would include an extensive and considered discussion of why stare decisis should not apply to *Mendillo*. Not so. Not only did *Campos* restrict its passing reference to the doctrine of stare decisis to a brief footnote, but it also misstated one of the basic principles underlying the doctrine. Id., 57 n.16. Specifically, as I have explained in this dissenting opinion, the exception to the doctrine of stare decisis for clearly wrong decisions is well established. That exception, however, is quite narrow, and does not apply to a decision when a current panel concludes merely that, although the original decision was "wrong," reasonable jurists could disagree. We have therefore limited the application of the "clearly wrong" exception to stare decisis to those instances when overruling prior precedent is compelled by "the *most cogent* reasons and *inescapable* logic . . . ." (Emphasis added; internal quotation marks omitted.) *Conway* v. *Wilton*, supra, 238 Conn. 660–61. The court in *Campos*, however, merely made the conclusory statement that its decision to overrule *Mendillo* was justified because "logic dictate[d] such a result." *Campos* v. *Coleman*, supra, 319 Conn. 57 n.16. This statement significantly lowers the bar. If all that were required in order for this court to overrule prior precedent was the present panel's conclusion that "logic dictated" that result, our definition of the word "precedent" would have to change radically.

Outside observers reading the *Campos* decision might be concerned that the *sole reason* for its conclusion was the *composition of the panel*. The Chief Justice, however, joined the majority, a position that is inconsistent with her concern in the present case to avoid the appearance of being driven by a mere doctrinal disagreement with the *previous panel*.

The Chief Justice's decision in *State* v. *DeJesus*, supra, 288 Conn. 418, is particularly problematic for her, because in that case, without any hesitation, she authored an opinion that accomplished precisely what she asserts today would so threaten the rule of law and the integrity of this court. In *Sanseverino I*, supra, 287 Conn. 612–13, decided less than two months before *DeJesus*, this court applied *State* v. *Salamon*, supra, 287 Conn. 509, to reverse the defendant's conviction for kidnapping. In *Salamon*, this court overruled a long

line of cases that had held that a conviction for kidnapping would lie even when "the restraint involved . . . [was] merely incidental to the commission of another offense perpetrated against the victim by the accused." Id., 513. The defendant in *Sanseverino I* had been convicted of both kidnapping and sexual assault. *Sanseverino I*, supra, 611–12. The majority in *Sanseverino I*, supra, 624, concluded that, under the new rule, which required that the state prove that the restraint involved was more than merely incidental to and necessary for the commission of the sexual assault, "no reasonable jury could have found the defendant guilty of kidnapping in the first degree on the basis of the evidence that the state proffered at trial." Accordingly, the proper remedy, the court concluded, was not a retrial on the kidnapping charge, but an outright acquittal. Id., 626. Justice Zarella dissented, arguing that the majority decision improperly had evaluated the sufficiency of the state's evidence presented at trial on the basis of the new rule. Id., 654. Justice Zarella observed: "The majority may be correct that, on the basis of the facts presented at the defendant's trial, the state did not demonstrate that the defendant perpetrated a restraint of the victim that has legal significance independent of the sexual assault. The state, however, had no knowledge when presenting its case to the jury that it was necessary to make such a showing." Id. (*Zarella*, *J.*, dissenting).

The Chief Justice, who had joined the majority in *Sanseverino I*, authored *State* v. *DeJesus*, supra, 288 Conn. 437, which, with the *addition of two new panel members*, overruled *Sanseverino I*. In *DeJesus*, the Chief Justice relied on the very same principles—in fact, the very same case law—that she and the other members of the majority in *Sanseverino I* had found unpersuasive less than two months earlier. Compare *Sanseverino I*, supra, 287 Conn. 648–64 (*Zarella*, *J.*, dissenting), with *State* v. *DeJesus*, supra, 288 Conn. 434–39. And she did so notwithstanding the objections of the dissent, which argued that the decision in *DeJesus* evinced a "lack of respect for the principle of stare decisis . . . ." *State* v. *DeJesus*, supra, 288 Conn. 529 (*Katz*, *J.*, dissenting). Specifically, the dissent in *DeJesus* levied an uncannily familiar accusation against the majority, stating that "[t]he majority's decision to overrule such *recent* precedent strikes at the very heart of [stare decisis]." (Emphasis added.) Id., 530 (*Katz*, *J.*, dissenting).

Writing for the majority in *DeJesus*, the Chief Justice quickly dismissed the dissenting opinion's arguments, voicing no concerns whatsoever that either the *subsequent panel* change or the quick nature of the about face presented any impediment to overruling *Sanseverino I*. *State* v. *DeJesus*, supra, 288 Conn. 437–38 n.14. This is particularly noteworthy for several reasons. First, as I have observed, the dissent expressly pointed out the

fact that *DeJesus* was released at a whiplash-inducing speed after *Sanseverino I*, which was controlling precedent as to the appropriate remedy for less than two months before the court changed its mind. Id., 529 (*Katz*, *J.*, dissenting). Second, the sole justification on which the majority in *DeJesus* relied for its decision to overrule *Sanseverino I* was that the rule announced was *clearly* "*wrongly decided*." (Emphasis added.) Id., 437 n.14. The opposite conclusion, the majority explained, was compelled by the most "inescapable logic . . . ." Id. This basis, that *Sanseverino I* was not merely wrong, but indisputably so, is the very same basis that the Chief Justice now asserts is somehow insufficient to overrule *Santiago*, despite her very public and very obvious belief that *Santiago* is clearly wrong. Lastly, I observe that because so little time passed between the publication of *Sanseverino I* and *DeJesus*, absolutely nothing had changed between the two decisions. This is particularly ironic, given the Chief Justice's insistence in the present case that in order for this court to overrule prior precedent, there must have been some subsequent change in the facts or the law, and that the conclusion that a decision was clearly wrong, on its own, is insufficient to justify a departure from stare decisis. One wonders what the Chief Justice might have responded in *DeJesus*, had the dissent pointed out, quite accurately, that "the only change that has occurred [since *Sanseverino I* was decided] is a change in the makeup of this court . . . ."

Do not misunderstand me to suggest that *State* v. *DeJesus*, supra, 288 Conn. 418, was wrongly decided. To the contrary, *DeJesus* is perfectly consistent with the doctrine of stare decisis, because *Sanseverino I*, supra, 287 Conn. 608, had ignored prior precedent. The panel in *DeJesus*, therefore, was required by the doctrine of stare decisis to overrule the portion of *Sanseverino I* that contravened well established precedent, regardless of how recently *Sanseverino I* had been decided, and regardless of whether there was a panel change. *DeJesus* repaired the fabric of the law. And *DeJesus* did so as quickly as possible, before the errant decision could do damage. That is precisely what we are asked to do in the present case.

The position of the Chief Justice, that when there has been a panel change, stare decisis precludes the court from overturning a recent, clearly wrong decision that flouted established precedent, conflicts with a fundamental principle underlying the doctrine of stare decisis, namely, that the doctrine, although grounded in stability and consistency, *cannot* be rigid. Otherwise, consistency and stability would require the court to follow precedent regardless of how wrong it may be. See *Conway* v. *Wilton*, supra, 238 Conn. 660 ("Stare decisis is not an inexorable command. . . . [A]lthough [s]tare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-

made law, [it] is not an absolute impediment to change. . . . [S]tability should not be confused with perpetuity. If law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires." [Citations omitted; internal quotation marks omitted.]). As this court has stated on many occasions, it is more important to be right than to be consistent. Id.

The two "rules" that the Chief Justice focuses on in her concurring opinion in the present case are: (1) this court cannot overrule a decision following a panel change; and (2) this court cannot overrule a recently decided case. As to the first supposed rule, she points to no instance in which this court overruled prior precedent, where there had not been an *intervening panel change*. She also fails to cite to a single decision by this court declining to overrule a prior precedent on the basis that it was too recently decided. Assuming, however, for purposes of discussion, that these two rules bar the court from overruling prior precedent, her rigid application of these principles, if carried out in the manner that they suggest is appropriate, would guarantee that a clearly wrong decision would stand uncorrected.

An excellent illustration of this principle is this court's decision in *Tileston* v. *Ullman*, 129 Conn. 84, 86, 26 A.2d 582 (1942), appeal dismissed, 318 U.S. 44, 46, 63 S. Ct. 493, 87 L. Ed. 603 (1943), which declined to overrule *State* v. *Nelson*, 126 Conn. 412, 11 A.2d 856 (1940), based in part on the principle that "a change in personnel of the court affords no ground for reopening a question which has been authoritatively settled." Just as in the present case, there had been a panel change between the two decisions; the panels differed by one member because Justice Hinman, who had been on the panel in *Nelson*, had retired. In *Nelson*, the court had rejected a challenge to General Statutes (1930 Rev.) §§ 6246 and 6562, which together, as construed by the court, made it a criminal offense for a physician to prescribe contraceptives to a married woman, even when "the general health and well-being of the patient require[d] it." *Tileston* v. *Ullman*, supra, 85. The court in *Nelson* expressly left open the question of whether an exception should be read into the statutes when a physician has concluded that pregnancy would jeopardize the life of the woman, which the court acknowledged was a commonly recognized exception in abortion statutes at the time. *State* v. *Nelson*, supra, 418; *Tileston* v. *Ullman*, supra, 85.

The plaintiff in *Tileston* was a licensed physician who sought a declaratory judgment that General Statutes (1930 Rev.) §§ 6246 and 6562 allowed for an exception when a physician had concluded that pregnancy would place a woman's life in danger. Although this was precisely the issue that had been left unresolved by *Nelson*;

State v. *Nelson*, supra, 126 Conn. 418; the court in *Tileston* characterized the claim as one that would require it to overrule *Nelson*, and declined to do so, in part because the panel had changed. *Tileston* v. *Ullman*, supra, 129 Conn. 86.

In *Tileston*, the court's reliance on the panel change obviated any need to reexamine the problematic public policy principles on which *Nelson* had rested. Specifically, in *Nelson*, the court had explained that the statutes' "plain purpose" was "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender . . . a virile and virtuous race of men and women." (Internal quotation marks omitted.) *State* v. *Nelson*, supra, 126 Conn. 425. The court's choice of the word " 'virile' " is revealing, in light of its additional observation that "not all married [women] are immune from temptation or inclination to extra-marital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent deemed desirable in the interests of morality." Id., 424. Because the women at issue in the appeal were all married, any child born as a result of a so-called "illegitimate pregnancy" would not actually be "illegitimate"; putative father laws would prevent that. The purpose of the statutes, accordingly, was to protect the "virility" of husbands by preventing them from being made into cuckolds! It is easy to see why the panel in *Nelson* would deem such a public "purpose" to outweigh any concerns over women's general health.

Similarly, the panel in *Tileston* had no difficulty balancing that noble public "purpose" against the considerably greater risk presented to the female patients at issue in that case—death. Indeed, for those women, the court had a perfectly legal, alternative solution: "absolute abstention." *Tileston* v. *Ullman*, supra, 129 Conn. 92. Writing for the majority, Justice Ells, the only new panel member, even offered a helpful observation: "Certainly [absolute abstention] is a sure remedy." Id.

The decision in *Tileston* illustrates the dangers of the rigid application of stare decisis. The court in *Tileston* was able to rely in part on a panel change to justify its refusal to allow for a statutory exception that had not been dictated by prior precedent, despite the fact that the exception was commonly allowed in the much more extreme case of abortion. Id., 85, 86. Similarly, the Chief Justice is able to rely on the panel change in the present case to justify her refusal to overrule a decision that blatantly violated the doctrine of stare decisis. *Tileston* also starkly demonstrates the fallacy of concluding that this court risks the appearance that its decision is driven by the doctrinal disposition of the panel only when a new panel overrules prior precedent. Most importantly, *Tileston* highlights the principle that some decisions are so wrong that duty requires that the court overrule them. If a slightly different panel than the one in the

present case had decided yesterday that physicians could be prosecuted for providing contraception to female patients, I have no doubt that the Chief Justice would voice no concerns that the rule of law or integrity of this court would be imperiled by overruling that clearly wrong decision.

Of course, the best evidence that the Chief Justice improperly relies on the doctrine of stare decisis to justify her conclusion that *Santiago* should not be overruled is *Santiago* itself. That is, the overwhelming irony is that the Chief Justice relies on the doctrine of stare decisis in declining to overrule a decision that she herself recognized tramped merrily over this court's entire body of death penalty jurisprudence, in complete disregard of that doctrine.[5] The decision in *Santiago* rewrote history, contorted both this court's legal precedent and the legislative history of No. 12-5 of the 2012 Public Acts (P.A. 12-5), and blatantly substituted its own moral judgment for that of the people of this state. Good jurisprudence, not the present doctrinal disposition of a slightly different panel, would justify overruling such an abuse of judicial power. As the Chief Justice notes in her concurring opinion, the court's decision in *Santiago* "raise[d] legitimate concerns by the people we serve about the court's integrity and the rule of law in the state of Connecticut." We now have the opportunity to restore the faith of the people of this state in this court's respect for the rule of law. The doctrine of stare decisis requires that we take that opportunity.

Overturning *Santiago* would not require justices to decide the present case according to their personal moral beliefs. The Chief Justice explained in her dissenting opinion in that case that *Santiago* was decided and governed by "the majority's subjective sense of morality"; *State* v. *Santiago*, supra, 318 Conn. 277; and was completely contrary to what was dictated by existing precedent and the legislative history of P.A. 12-5. Id., 270–76. I agree with her. Even a jurist who is deeply, morally opposed to capital punishment, however, has a duty to follow the law. I agree with the Chief Justice that the majority in *Santiago* ignored that duty, and resolved the appeal on the basis of their personal, moral opposition to the death penalty. Id., 277. Overruling that decision now, not after the decision has been "on the books" long enough to be relied on as precedent, is the best way to adhere to the principle of stare decisis and repair the damage that has been done to the rule of law. The United States Supreme Court has made clear that when a court is called upon to overrule a recent decision that has violated stare decisis, the doctrine of stare decisis requires that the prior decision be overruled. See *Adarand Constructors*, *Inc.* v. *Pena*, supra, 515 U.S. 233–34. By focusing on the panel change, rather than the damage that *Santiago* inflicted on the rule of law, the Chief Justice loses sight of what needs to be done in the present case—the fabric of the law

must be repaired. And the only way to do that would have been to overrule *Santiago*.

I respectfully dissent.

[1] Given that my dissenting opinion does not address his concurring opinion, it is puzzling that Justice Palmer feels the need to respond to my dissent.

[2] I observe that unlike Chief Justice Rogers, Justice Robinson does not embrace the notion that there are any circumstances when stare decisis requires the court to adhere to a clearly wrong decision.

[3] See Black's Law Dictionary (9th Ed. 2009) (noting Latin phrase post hoc, ergo propter hoc is translated as " 'after this, therefore because of this,' " and defining phrase as "relating to the fallacy of assuming causality from temporal sequence; confusing sequence with consequence").

[4] The similarity in case names between *State* v. *DeJesus*, supra, 270 Conn. 826, and *State v. DeJesus*, supra, 288 Conn. 418, is purely coincidental. Hereinafter, all references in this dissenting opinion to *DeJesus* are to *State* v. *DeJesus*, supra, 288 Conn. 418.

[5] I also note the irony that *Santiago* itself involved multiple panel changes. Justices opted in and out of the panel while it was being considered by this court, yet no one seemed to be concerned that those panel changes would give rise to the public perception that the result of an appeal before this court depended on the composition of the panel. A summary of the panel changes in that case reveals that they were quite numerous.

I begin with the panel that decided *State* v. *Santiago*, 305 Conn. 101, 49 A.3d 566 (2012), which was argued on April 27, 2011, and was the same appeal that gave rise to the decision in *State* v. *Santiago*, supra, 318 Conn. 1. That panel was comprised of Chief Justice Rogers, and Justices Norcott, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille. Over the course of the years during which the decision in *State* v. *Santiago*, supra, 305 Conn. 1, was pending before this court, the orders on the motions in that case reveal that Justice Palmer had recused himself from the case.

On May 9, 2012, more than one year after oral argument in *State* v. *Santiago*, supra, 305 Conn. 1, the defendant in that case filed a motion seeking permission to file a supplemental brief addressing the effect of No. 12-5 of the 2012 Public Acts on his appeal. The order denying that motion was issued by the same panel that heard oral argument in *State* v. *Santiago*, supra, 305 Conn. 101. The motion was denied "because, under the circumstances of this case, these constitutional issues would be more appropriately addressed in the context of postjudgment motions." Id., 308 n.167. The decision in *State* v. *Santiago*, supra, 305 Conn. 101, was released one month later.

On September 12, 2012, the original panel in *State* v. *Santiago*, supra, 305 Conn. 101, granted the defendant's renewed motion requesting permission to file a supplemental brief and his motion seeking permission to file a late motion for reconsideration. On September 14, 2012, the Chief Clerk of the Supreme Court notified the parties in a letter that Justice McLachlan, who was scheduled to leave the Judicial Branch at the end of that month, had withdrawn from the panel, and that Justice Palmer, "who is not recused on the legal issues implicated in the reconsideration, has been added to the panel." At that point in time, therefore, the panel in what was to become *State* v. *Santiago*, supra, 318 Conn. 1, now consisted of Chief Justice Rogers, and Justices Norcott, Palmer, Zarella, Eveleigh, Harper and Vertefeuille.

In November, 2012, Justice Harper reached the age of seventy. Although his continued participation in the case was authorized by this court's decision in *Honulik* v. *Greenwich*, 293 Conn. 641, 644, 658, 980 A.2d 845 (2009), and General Statutes § 51-198 (c), he withdrew from the panel. Similarly, although her status had not changed, and her continued participation in the case as a senior justice was authorized by § 51-198 (b), Justice Vertefeuille also withdrew from the panel. Justice McDonald and I were added to the panel after we joined the court, thus allowing the defendant's motion for reconsideration to be decided by all of the court's then current members. At that time, the panel in what was to become *State* v. *Santiago*, supra, 318 Conn. 1, now consisted of Chief Justice Rogers, and Justices Norcott, Palmer, Zarella, Eveleigh, McDonald and myself.

Oral argument was heard on the defendant's motion for reconsideration on April 23, 2013. Justice Robinson joined the court in December, 2013. Justice Norcott, at that time a judge trial referee, did not withdraw from the panel, and Justice Robinson was not added to it.

In the meantime, the present case was marked ready on May 13, 2014. At that time, the decision on the defendant's motion for reconsideration

was more than one year away from being published. See *State* v. *Santiago*, supra, 318 Conn. 1. Although the same issue presented in the motion for reconsideration in that case had been raised and briefed in the present case, and although the panel in the present case was comprised of the Chief Justice and sitting Associate Justices of this court, while the panel in *State* v. *Santiago*, supra, 318 Conn.1, was not, the court did not determine to address the issue in the present case.

The Chief Justice observes in her concurring opinion that in *State* v. *Santiago*, supra, 318 Conn. 1, "this court followed its standard procedures in determining which justices would sit on all phases of that case." I am not suggesting that the court did not follow its standard procedures; I merely observe that while the panel changes in that case were many and ongoing, in the end, those changes yielded the result that in one of the most important decisions this court has decided in recent history, the panel that decided the case was not comprised of all of the sitting justices of this court, contrary to this court's established policy in important cases. This could have been avoided if this court had resolved this issue in the present case.