

OBSTRUCTING PRECEDENT

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Egbert v. Boule

142 S. Ct. 1793 (2022)



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“A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed.”



“[A] restless and newly constituted Court sees fit to refashion the standard anew to foreclose remedies in yet more cases.”

Shinn v. Ramirez (2022) → *Martinez v. Ryan* (2012)

Oklahoma v. Castro-Huerta (2022) → *McGirt v. Oklahoma* (2020)

West Virginia v. EPA (2022) → *Chevron v. NRDC* (1984)

Kennedy v. Bremerton School District (2022) → *Lemon v. Kurtzman* (1971)

Jones v. Mississippi (2021) → *Montgomery v. Louisiana* (2016)

Edwards v. Vannoy (2021) → *Teague v. Lane* (1989)

“The Other Way the Supreme Court is **Nullifying** Precedent”

–Jeffrey L. Fisher, POLITICO

“In *Shinn v. Ramirez*, the court **gutted** its own precedents.”

–Cary Sandman, N.Y. ST. B. J.

“[T]he Court failed to justify its **stealth overruling**.”

– Leading Case, HARV. L. REV.

“The court ... is ... **smashing and grabbing** precedent.”

–Leah Litman, SLATE

“The Supreme Court seems hell-bent on **disrespecting** precedent”

–Janai Nelson, TWITTER

“Justice Sotomayor’s dissent calls out this **stealth overruling** of *Lemon*.”

Rick Hasen, TWITTER

Obstructing Precedent

1. What Is Obstructing Precedent?
2. How Do Courts Obstruct Precedent?
3. Why Not Obstruct Precedent?



1. What Is Obstructing Precedent?

Slogan:

The subsequent court is refusing to cooperate – is acting at cross purposes with – the precedent court.

1. What Is Obstructing Precedent?

Consistency: A set of legal rules is consistent when no two rules in the set would yield incompatible answers to the same legal question.

Coherence: A set of legal rules is coherent when a single ordering of values or purposes could justify every rule in the set.

1. What Is Obstructing Precedent?

Definition: A court obstructs a precedent *P* if and only if (1) the court answers a legal question one way, (2) the ordering of values or purposes justifying *P*'s holding clearly requires answering the question a different way, and (3) the court does not overrule *P*.

1. What Is Obstructing Precedent?

Obstructing What?

Obstructing one precedent

Example

Egbert as to Bivens

Obstructing a line of precedent

Egbert as to Biven, Davis, Carlson

Obstructing a court's holdings
in an entire area of the law

*Egbert as to all the Court's holdings
on implied private rights of action (?)*

2. How Do Courts Obstruct Precedent?

At least four methods:

- Acutely distinguishing (e.g., *Egbert* → *Bivens*).
- Revising (e.g., *Edwards* → *Teague*)
- Undercutting (e.g., *Shinn* → *Martinez*)
- Ignoring (e.g., *West Virginia* → *Chevron*)

2. How Do Courts Obstruct Precedent?

Takeaways:

- Each method facilitates obstructing precedent.
- Each is consistent with our law/practice of precedent under some circumstances.
- Obstructing precedent does not necessarily involve any legal error.
- It does necessarily involve elevating a new ordering of values or purposes over that implied by the precedent.

3. Why Not Obstruct Precedent?

We can ask:

- Is obstructing precedent necessarily all-things-considered morally wrong?
- Is obstructing precedent necessarily pro tanto morally wrong?
 - Consider: (1) coherence, (2) predictability, (3) sincerity, (4) good faith, or (5) transparency.

3. Why Not Obstruct Precedent?

We can ask:

- Is SCOTUS's recent pattern of obstructing precedent pro tanto morally wrong?
 - The Court currently has a strong reason to render *impersonal decisions*.
 - This is a reason for the Court not to obstruct precedent.

Summary

- Frequent criticism of the Court for nullifying, gutting, or disrespecting precedent.
- Such criticism seems to frequently point to the Court's obstruction of precedent.
- Judges can obstruct precedent by a variety of methods, none of which necessarily involves any legal error.
- Generally, the question to ask is whether or when it is morally wrong for judges to obstruct precedent.
- The Court's aggressive pattern of obstructing precedent is likely a contributing cause to its present legitimacy crisis and so cause for concern.

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Comments welcome – email fwatson@law.harvard.edu

EXTRA SLIDES

2. How Do Courts Obstruct Precedent?

Background:

- Holdings as rules (e.g., "If *A, B, C*, then *X*").
- Option to follow, distinguish, or overrule.
- Extend or decline to extend.

2. How Do Courts Obstruct Precedent?

Acutely distinguishing precedent:

The subsequent court adds one or more fact-types to the holding's antecedent that greatly reduce the number of cases that it governs going forward.

Example: *Egbert* → *Bivens*

2. How Do Courts Obstruct Precedent?

Revising precedent:

The subsequent court modifies or subtracts fact-types in the holding's antecedent (while ensuring that the rule, as revised, still requires the precedent's result).

Example: *Edwards* → *Teague*

2. How Do Courts Obstruct Precedent?

**Undercutting
precedent:**

The subsequent court declines to extend a holding in a way that sharply undermines its practical effect.

Example: *Shinn* → *Martinez*

2. How Do Courts Obstruct Precedent?

**Ignoring
precedent:**

The subsequent fails to follow a precedent that seems, at least at first glance, to govern the case at hand, without expressly explaining why.

Example: *West Virginia* → *Chevron*

Table 1: The Rule Model

Opinion	Recorded Facts	Rule	Characterization
P	$a_1, b_1, c_1, d_1, e_1, f_1$	If A, B, C, then X	P's holding
S	a_2, b_2, c_2, e_2, f_2	If A, B, C, then X	Court follows P
		If A, B, C, D, then X	Court distinguishes P
		Not-(if A, B, C, then X)	Court overrules P
S'	a_3, c_3, d_3, e_3, g_3	If A, C, D, E, G, then X	Court extends P

Table 2: Methods of Obstructing Precedent

Opinion	Recorded Facts	Rule	Characterization
P	a ₁ , b ₁ , c ₁ , d ₁ , e ₁ , f ₁	If A, B, C, then X	P's holding
S	a ₂ , b ₂ , c ₂ , not-d ₂ , not-e ₂ , not-f ₂	If A, B, C, D, E, F, then X	Court acutely distinguishes P
S'	a ₃ , b ₃ , c ₃ , d ₃ , e ₃ , f ₃	If A, B, then X	Court revises P
		If A, B, D, then Y (and Y greatly reduces X's practical significance)	Court undercuts P
		(Court declines to follow P without explanation)	Court ignores P

Table 3: Justices' Votes

Case	Majority	Dissent
<i>Egbert</i>	Roberts, Thomas , Alito, Kavanaugh, Gorsuch, Barrett	Breyer, Sotomayor, Kagan
<i>Edwards</i>	Roberts, Thomas, Alito, Kavanaugh , Gorsuch, Barrett	Breyer, Sotomayor, Kagan
<i>Shinn</i>	Roberts, Thomas , Alito, Gorsuch, Kavanaugh, Barrett	Breyer, Sotomayor, Kagan
<i>Castro-Huerta</i>	Roberts, Thomas, Alito, Kavanaugh , Barrett	Breyer, Sotomayor, Kagan, Gorsuch
<i>Kennedy</i>	Roberts, Thomas, Alito, Gorsuch , Kavanaugh, Barrett	Breyer, Sotomayor, Kagan
<i>AHA</i>	Kavanaugh for a unanimous Court	
<i>NFIB</i>	Roberts, Thomas, Alito, Gorsuch, Kavanaugh, Barrett	Breyer, Sotomayor, Kagan
<i>West Virginia</i>	Roberts , Thomas, Alito, Gorsuch, Kavanaugh, Barrett	Breyer, Sotomayor, Kagan