The Rule and Role of Higher Law: When Stare Decisis Produces Injustice[1]

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> *It is a maxim among these lawyers that whatever has been done before, may legally be done again: and therefore, they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly*[2]*.*

Overview of the Doctrine

A. A negative prescription – it prevents courts from deciding similar cases differently.

B. *"Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'"* ***Payne v. Tennessee***, 501 U.S. 808, 828 (1991) (citation omitted).

C. Nevertheless, it is the preferred course. ***Crawford v. Washington***, --U.S.--, 124, S. Ct. 1354, 1378 (2004).

D. *"[I]n 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 (1932) (Brandeis, J., dissenting). This language is often quoted by the Supreme Court *See, e.g.,* ***Agostini v. Felton***, 521 U.S. 203, 235 (1997).

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[1] This topic is adapted from a presentation by the Honorable James L. Ryan, United States Courts of Appeals for the Sixth Circuit, delivered during the 2004 session of **The Blackstone Fellowship**, a legal internship for exceptional law students sponsored by Alliance Defense Fund. Judge Ryan's syllabus has been freely utilized in composing this outline. Any defect or inaccuracy, legal or otherwise, rests in toto on the author and not His Honor.

[2] Jonathan Swift, ***Gulliver's Travels*** (Part IV, ch. V).

E. Although *"'the doctrine of stare decisis is of fundamental importance to the rule of law[,]'…[o]ur precedents are not sacrosanct."* ***Ring v. Arizona***, 536 U.S. 584, 608 (2002) (citation omitted).

F. *"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."'"* ***Hubbard v. United States***, 514 U.S. 695, 711 (1995) (citations omitted).

Historical Development[3]

A. Medieval England

1. The doctrine was virtually non-existent

2. Judges guided by reason and "that which is right"

3. Judges *"were not for a moment "bound" by previous decisions of which they did not approve; justice stood above all precedent."'* Healy, 104 W. Va. L. Rev. at 61 (2001).

B. Late 16th to early 17th century

1. Precedent began to have a greater role, but was by no means binding

2. Sir Edward Coke believed strongly that example and tradition should be followed, that the common law was ancient custom dating from time immemorial, and that the best way to learn custom was to study the decision of earlier courts.

3. His influence helped to strengthen reliance on precedent.

C. Blackstone's Era

1. Blackstone was a leading proponent of stare decisis in the eighteenth century

[3] *See generally*, Thomas Healy, ***Stare Decisis as a Constitutional Requirement***, 104 **W. Va. L. Rev**. 43 (2001).

2. *"In his Commentaries on the Laws of England, published in 1765, he argued that adherence to precedent not only promoted certainty and stability in the law, but also flowed from the judge's duty to find the law rather than make it."* Healy, at 70.

3. This statement was qualified by the following: judges were not bound by precedents that were "flatly absurd or unjust," or "evidently contrary to reason."

4. *"[J]udicial decisions," said Blackstone, "are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."* William Blackstone, ***Commentaries*** 69

5. Lord Mansfield, a contemporary of Blackstone, disagreed: *"[P]recedent, though it be Evidence of law, is not Law itself, much less the whole of the Law."* Healy, at 71 (citations omitted).

D. Acceptance of the doctrine grew slowly in America

1. When the doctrine of stare decision crossed the Atlantic, it was more liberally construed than it was in England. American jurists treated stare decisis as creating a rebuttable presumption that former decisions were correct. If it were shown that the law was misunderstood or misapplied in a given case, stare decisis did not bind.
2. *"The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law."* Healy, at 87.

3. Justice Story described adherence to precedent as *"a central feature of American jurisprudence." Id*.

4. *"'A more alarming doctrine could not be promulgated by any American court,' [Justice Story] wrote, 'than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.'" Id*. (citation omitted).

E. Stare decisis remains a unique feature of Anglo-American law. Under the continental model, stare decisis does not have a place as part of the law itself.

Current Supreme Court Doctrine

1. Even when a prior decision is wrong, stare *decisis "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'"* ***Dickerson v. United States,*** 530 U.S. 428, 443 (2000). This is true even in constitutional cases, *"in which stare decisis concerns are less pronounced***."** ***Harris v. United States***, 536 U.S. 545, 557 (2002).

2. ***Planned Parenthood v. Casey,*** 505 U.S. 833 (1992), synthesized the various factors from the line of "special justification" precedent, organizing them into four "prudential and pragmatic considerations."

   a. The first consideration *is "whether the rule has proven to be intolerable simply in defying practical workability."*

   b. Second, the Court will consider *"whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."*

   c. Third, the Court stated it would consider *"whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."*

   d. The fourth consideration *was "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."*

   e. Finally, the Court indicated that a factor to be considered is whether a decision to overrule will impact the public's perception of the Court's legitimacy.

3. The above factors are not rigorously applied in every case. Sometimes only some of the above factors make it into the Court's analysis. *See, e.g.,* ***Lawrence v. Texas****.* 539 U.S. 558 (2003) (sodomy); ***Dickerson***, 530 U.S. 428 (declining to abandon ***Miranda***).

4. In ***Lawrence***, Justice Scalia criticized the majority for announcing a formulation of stare decisis that invited the overruling of an erroneously decided precedent if: "(1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning."

5. In short, that the Court now requires, at least in theory, some "special justification" for abandoning stare decisis, aside from the impropriety of the former decision.

A. The doctrine has two forms. The first, horizontal stare decisis, concerns the respect a court owes to its own prior decisions. The second, vertical stare decisis, concerns the respect a lower court owes to the decisions of courts above it in the judicial hierarchy.

a. Horizontal stare decisis

1. It has been called a "policy" by the Supreme Court, but it is applied as something stronger than mere policy.

b. Vertical Stare Decisis

i. *"But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."* ***Hutto v. Davis***, 454 U.S. 370, 375 (1982).

ii. Currently regarded as an absolute duty.

iii. Might be called "hierarchical precedent."

c. Although the justifications for each are largely the same, the hierarchical nature of our court systems provides additional reasons to follow an "incorrect" decision by a higher court.

i. Theoretical and prudential considerations

ii. Respect for the hierarchy system

iii. Cost, inconvenience, uncertainty, integrity of the court and the system

The Rule of Law versus *Stare Decisis*

A. The Natural Law

a. Recent Examples

i. Confirmation Hearing of Hon. William Pryor

ii. Decalogue Litigation and Justice Roy Moore

b. Is Referencing the Natural Law Feasible?

> *Judge Posner concludes that "the enterprise, now several thousand years old, of establishing the existence and content of a natural law that underwrites positive law is hopeless under the conditions of modern American society."*[4]

c. Contexts for Abandoning Stare Decisis

i. Stare Decisis Demands a Result Contrary to the Natural Law

1. Examples

a. Augustine: Is it even Law?

b. ***Roe v. Wade***, 410 U.S. 113 (1973)

c. ***PBA cases***

d. ***United States v. Lynch,*** No. 96-6137, 1996 WL 717912 (2d Cir., December 11, 1996)

[4] Paul V. Niemeyer, *Law and Conscience*, 69 **Notre Dame L. Rev**. 1011, 1014 (1994) (quoting Richard A. Posner, ***The Problems of Jurisprudence*** at 235 (1990)).

[The Defendants] argue instead the FACE (and abortion) are anathema, and thus violate principles superior to the Constitution. Under Supreme Court precedent, well-settled constitutional principles, and the rule of stare decisis, we decline to invalidate a federal statute (on its face or as applied) on the basis of natural law principles.[5]

e. Justice Marshall's persistent dissents in death penalty cases?

f. Nuremberg War Tribunals

g. ***Buck v. Bell***, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough")

h. ***Dred Scott v. Sandford,*** 60 U.S. 393 (1857)

B. The Constitution

1. Justice Frankfurter: *"[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."* ***Graves v. New York***, 306 U.S. 466, 492 (1939) (Frankfurter, J., concurring).

2. Justice White: *"In my view, the time has come to recognize that Roe v. Wade, no less than the cases overruled by the Court in the decisions I have just cited [**Darby**, **Parrish**, **Brown**], "departs from a proper understanding" of the Constitution and to overrule it.* ***Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists,*** 476 U.S. 747, 788 (1986)

[5] J. Heckman, *id*., at 2.

(White, J., dissenting) (after years of following ***Roe*** under the doctrine of stare decisis).

3. In the context of constitutional cases, the Supreme Court has stated:

   a. *"[S]tare decisis is 'at its weakest when we interpret the Constitution because our interpretation can be altered by constitutional amendment or by overruling our prior decisions.'"* ***Agostini v. Felton***, 521 U.S. 203, 235 (1997).

   b. *"This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"* ***Payne v. Tennessee***, 501 U.S. 808, 828 (1991) (citation omitted).

   c. *"I do not myself believe in rigid adherence to stare decisis in constitutional cases."* ***Lawrence***, 539 U.S. at___, 123 S. Ct. at 2488 (Scalia, J., dissenting).

4. Examples

   a. Justice Rehnquist's dissent in ***Casey***

      (1) *"We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases."* ***Planned Parenthood v. Casey,*** 505 U.S. 833, 944 (1992) (Rehnquist, J., concurring in part and dissenting in part).

      (2) *"We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in Roe when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood 'strict scrutiny.'"* ***Casey***, 505 U.S. at 953 (Rehnquist, J.).

      (3) *"Erroneous decisions in such constitutional cases are uniquely durable, because*

correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that 'depar[t] from a proper understanding' of the Constitution." Id. At 954-55 (Rehnquist, J.).

(4) *"[I]n cases involving the Federal Constitution…[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." Id.* At 955 (citation omitted) (Rehnquist, J.).

(5) *"Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question." Id.* (Rehnquist, J.).

C. Excursus: Stare Decisis and Statutory Interpretation

1. It is possible to apply the same principles discussed above to statutory interpretation as well

2. Worth noting: the Supreme Court has stated that the doctrine of stare decisis applies with ***greater force*** in the statutory context:

   a. *"[T]he doctrine of stare decisis is most compelling when the Court confronts a "pure question of statutory construction."* ***Hilton v. South Carolina Pub. Rys.***

Comm'n, 502 U.S. 197, 205 (1991) (internal quotation marks and citation omitted).

b. *"'[F]or here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.'"* ***Hohn v. United States***, 524 U.S. 236, 251(1998) (quoting ***Patterson v. McLean Credit Union***, 491 U.S. 164, 172-173 (1989)).

c. Sometimes tacit Congressional approval is cited. That view has been criticized.

Practical Considerations

A. Ethics

a. Candor

b. Zealous advocacy

B. Rule 11

C. "Standing and principle" and Losing . . .

> *We have come corporately as a people, to hold the proposition that justice equals statute. A natural law man today, if he wishes to stay out of jail, must content himself with urging his convictions within his own sphere of influence in the hope that he can accomplish something on a limited scale . . . . An appeal tot the natural law will gain no lawyer his case in court—unless he is a spellbinder arguing before a jury uncorrupted by legal positivism and higher education, nor will such an appeal protect the rights of man before the higher judicial courts of appeal. The Supreme Court is possibly the highest repository of the denial of natural law in the nation.*[6]

[6] John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 **Regent U. L. Rev**. 471, 472 (1999-2000) (quoting Fredrick D. Wilhelmsen, ***The Natural Law Tradition and the American Political Experience***, in ***Christianity and Political Philosophy***, p. 191 (1978)).

But, the fruit of "tenacious patience"[7] in *"reclaiming what we've lost, protecting what we have, and shaping who we become,"*[8] is well worth the battle:

> *The eighteen American Tourists visiting China weren't expecting much from the evening's scheduled lecture. They were already exhausted from a day of touring in Beijing. But what the speaker had to say astonished them.*
>
> *"One of the things we were asked to look into was* ***what accounted for the success, in fact, the pre-eminence of the West*** *all over the world," he said. "We studied everything we could form the* ***historical, political, economic, and cultural perspective****. At first, we thought it was because you had* ***more powerful guns*** *than we had. Then we thought it was because you had the* ***best political system****. Next we focused on your* ***economic system****.* ***But in the past twenty years, we have realized that the heart of your culture is your religion: Christianity. That is why the West has been so powerful. The Christian moral foundation of social and cultural life was what made possible the emergence of capitalism and then the successful transition to democratic politics. We don't have any doubt about this."***
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> *This was not coming from some ultra-conservative from a think tank in Orange County, California, or from Jerry Fallwell's Liberty University in Lynchburg, Virginia. This was a scholar from one of China's premier academic research institutes,* ***the Chinese Academy of Social Sciences*** *(CASS) in Beijing in 2002*[9]*.*

If only our congress would speak this way---

If only our Supreme Court would speak this way---

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[7] An apt phrase coined by Dr. John Eastman, Ph.D., former law to the Honorable Clarence Thomas, and currently professor of law at Chapman University, Director of the Center for Constitutional Jurisprudence for the Claremont Institute as well as faculty for **The Blackstone Fellowship** and the National Litigation Academy.

[8] The three-fold purpose of the Alliance Defense Fund.

[9] David Aikman, ***Jesus in Beijing***, (Washington, D.C.; Regerny 2003), p. 5, 6.

If only our churches would speak this way---

If only our Christian Attorneys would teach them to do so!