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Stare Decisis as a Decisional Rule in the United States

by

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Stare decisis, the doctrine that judges should follow prior judicial rulings on the same issue, is a central feature of judicial decisionmaking in the United States. At first glance, the doctrine appears odd. Why should yesterday's decisions constrain today's judges? Should judges really perpetuate rulings that they believe are wrong as a matter of policy? Perhaps most important, should stare decisis play any role when interpreting constitutional or statutory provisions? Why should judges defer to their former colleagues rather than to the text before them or the clear intentions of the text's drafters?

Despite these criticisms, stare decisis remains an important ideal in American law. In this report, I briefly review the justifications for stare decisis. I then note the circumstances in which courts find stare decisis especially compelling, as well as those in which the doctrine's pull is less important. I conclude with some observations about the frequency with which the United States Supreme Court actually follows stare decisis in its decisions.

I. Justifications for Stare Decisis

Judges have articulated at least six reasons supporting the principle of stare decisis. First, stare decisis expresses the fundamental rule that "law, not caprice, governs." If a court decides that one eighteen-year-old is a "minor" within the meaning of a statute that bans "cigarette purchases by minors," then it should reach the same result with respect to another eighteen-year-old who violates the same statute the following week. If the court changes its mind and decides that the second eighteen-year-old is not a "minor," then the decisions look arbitrary. The public may suspect that the court simply liked the second eighteen-year-old better than the first. Rigorous adherence to stare decisis strengthens the courts' image as an impartial arbiter of justice.

Second, a related but distinct rationale is that stare decisis makes the law predictable and allows citizens to order their lives based upon the law. If a court interprets the Internal Revenue Code to hold that taxpayers may deduct the cost of a home computer from their income taxes as a "business expense," taxpayers will rely upon that ruling to purchase computers. If the court later changes the ruling to exclude home computers from the "business expense" category, computer owners will pay more taxes than they expected. Some of them may complain that they would not have bought a computer at all but for the tax incentive. These disrupted expectations are a social cost. Indeed, a strong defender of stare decisis would argue that the cost of disrupting all of these taxpayers' expectations is higher than the cost of maintaining an erroneous interpretation of the law.

Predictability and reliance are even more important in criminal law. If a court interprets a criminal statute banning the sale of "hand guns," and decides that a hunting rifle is not a "hand gun," citizens who enjoy hunting will feel free to purchase those rifles. If the court then changes position and decides that rifles are "hand guns," it would be unfair to punish citizens who had purchased rifles in reliance upon the first decision. Indeed, this type of retroactive punishment would violate constitutional principles. Even if the law is applied only prospectively, however, to citizens who retain their rifles in defiance of the new ruling, there is an element of unfairness. The hunters invested money in rifles believing those guns were lawful; they will now have to throw away their investments.

Third, stare decisis conserves the court's own energy. If judges reconsider the same issues continually, they will not be able to keep up with the cases brought to them. Especially in criminal cases, defendants may raise the same procedural challenges repeatedly. Once a court decides that the police may search an automobile after arresting the driver, the court may summarily reject all further challenges to similar searches by criminal defendants. Stare decisis allows judges to concentrate on new, hotly contested issues rather than continuously revisiting old, settled ones.

Fourth, stare decisis is essential for maintaining consistency in a judicial system with many tribunals. Once the United States Supreme Court speaks, its decision binds every municipal, state, and federal court throughout the nation. A contrary rule would allow inconsistent judgments on important matters. Recently, for example, an appellate court with jurisdiction over three of our fifty states ruled that it is unconstitutional for public universities to practice affirmative action when admitting students. The ruling appears to contradict a prior decision by the Supreme Court, one that is followed by courts in the other forty-seven states. As a result of this departure from stare decisis, citizens in three states are subject to a different constitutional rule -- on an issue of great public controversy -- than are citizens in the other forty-seven states.

Fifth, stare decisis allows a nation to build a set of shared ideals or legal principles. Consensus on legal principles is part of what binds a society together. The consensus itself has value beyond the benefits of consistency and predictability I have already mentioned. Racial and sexual equality are now bedrock principles of American law. To reconsider those principles to suggest that the government might exclude women from practicing law or African Americans from attending school -- would do more than simply upset settled expectations of individual citizens. Changing these legal principles would redefine our society. In fact, the very act of reconsidering them would disrupt our sense of who we are.

Finally, and perhaps most important, stare decisis in the United States is closely linked to the legitimacy of judicial review. When judicial interpretations of statutory phrases and constitutional words remain constant over time, citizens believe that judges are interpreting the law rather than exercising raw political power. This point is similar to the first point I made, that stare decisis promotes the perception of judicial fairness. Here, however, I am speaking not just of fairness in each individual case but of the legitimacy of the entire system. Without some consistency in judicial decisionmaking, citizens might begin to question whether courts lack the competence to interpret statutes or constitutional text at all.

II. Circumstances In Which Stare Decisis is Especially Important

The six justifications for stare decisis may be summarized as fairness, predictability, efficiency, consistency, consensus, and legitimacy. Despite the strength of these justifications, courts do not always follow the rule of stare decisis. Legal principles do change. For that reason, it is important to distinguish the circumstances in which courts find stare decisis especially important from those in which they find the doctrine less important. Courts have suggested three circumstances under which stare decisis may carry special weight.

First, courts have said that stare decisis is particularly significant for legal rules

involving property or contract rights. In these areas, reliance may be especially important because parties make agreements based on these expectations. An interpretation of a statute restricting the use of beachfront property, for example, will affect the value of all property fronting the beach.

Homeowners will decide whether to purchase beachfront property based on the statute's interpretation. Changing the rule could dramatically affect property values, creating a windfall for some owners and an unexpected loss for others. In this type of situation, predictability may be more important than any other principle, including correct interpretation of the statute.

Second, courts have said that stare decisis is more important in statutory cases than constitutional ones. If the legislature disagrees with judicial interpretation of a statute, it can amend the statute to make its meaning clear. Over time, moreover, the legislature's failure to amend a statute may show tacit assent to the judicial interpretation. Given the legislature's ability to correct judicial mistakes, and the possibility that legislative inaction may imply agreement with the court's interpretation, many judges endorse a heightened role for stare decisis in statutory cases.

These first two rationales for heightened deference are both subject to criticism. With respect to the property/contract rationale, predictability with respect to civil liberties may in fact be more important than predictability with respect to property or contract rights. Indeed, property owners often anticipate possible changes in the law and draft contract clauses to cover that possibility. With regard to the statutory interpretation rationale, amending statutes in the legislature is a time consuming process that deflects attention from other pressing issues. Legislators may tolerate an erroneous judicial ruling, not because they agree with that ruling, but because other problems command their attention. Legislative bodies, moreover, change composition frequently. Even if the current legislature agrees with the court's interpretation, the legislators who framed the statute may not have agreed. Some would argue that courts should enforce the original legislative intent rather than contemporary legislative views.

Despite these reservations, courts continue to articulate special adherence to stare decisis under these two circumstances. A third circumstance favoring special deference to stare decisis arises less frequently but may be especially important. Under some circumstances, courts perceive a special need to adhere to stare decisis in order to preserve their own legitimacy. In the United States, for example, citizens opposed to abortion have spent years attacking the Supreme Court's decision declaring a constitutional right to choose abortion during the early months of pregnancy. Opposition to this decision became a litmus test for several Supreme Court appointments. When a Supreme Court staffed with Justices who had passed this litmus test reconsidered the constitutionality of abortion, they decided -- somewhat surprisingly -- to abide by the precedent. A majority of the Justices probably disagreed with the precedent as a substantive matter, but they nonetheless followed the rule of stare decisis.

They did so largely because a departure from precedent in this highly publicized case would have suggested that the constitutional rule depended upon the politics of the Justices rather than the content of the Constitution. Even more damaging, a constitutional change after a judicial selection process that focused on this very issue would have suggested that the President and Congress could determine the content of the Constitution by their choice of judges. In a general sense, that is always true. Allowing a change in this hotly contested and highly visible

area, however, would have undermined the Court's independence and legitimacy in a way that the Justices could not countenance. Stare decisis assumed special importance as a way of maintaining the Court's own integrity.

III. Departures from Stare Decisis

Just as some circumstances counsel heightened adherence to stare decisis, others more readily permit departure from precedent. Courts have identified at least six situations in which stare decisis commands less weight.

First, sometimes when the society changes, the law changes as well. In the nineteenth century, courts ruled with little dissent that women could not practice law. It seemed obvious to nineteenth century thinkers that women were unfit for the practice of law, and that the Constitution allowed legislatures to exclude women from that profession. Today, it seems just as obvious that women are as competent as men to practice law, and that a constitutional commitment to equality precludes statutes attempting to exclude women from the profession. The Constitution did not change, but social attitudes did. This change required a change in the court's rulings.

Second, even if the society has not changed, a court may acquire new information that reveals the error of a previous ruling. New documentary evidence may show without doubt the original intent of the Constitution's Framers on a constitutional issue. New research on jury behavior may show that six-member juries are less representative than twelve-member juries -- and cause a court to rethink its ruling on the constitutionality of six-member juries. If historical or empirical evidence provides important support for a rule, changes in the evidence may prompt changes in the rule.

Third, a court may discover that its previous rule is unworkable. About twenty years ago, our Supreme Court held that the national government could not interfere with state governments in areas of "traditional governmental functions." For the next ten years, courts struggled to draw a defensible line between traditional and nontraditional government functions. Is administering a hospital a traditional governmental function? What about a subway system? The courts finally abandoned the principle as unworkable.

Even if the precedent originally was workable, intervening changes in the law may have rendered the rule unworkable. Suppose that, at a time when the voting age was twenty-one, a court interpreted a statute banning cigarette sales to "minors" as prohibiting sales to anyone under the age of twenty-one. The legislature then lowered the voting age to eighteen and also permitted eighteen-year-olds to purchase liquor. The original interpretation of the cigarette statute now is in tension with the new laws. If eighteen-year-olds are mature enough to vote and purchase liquor, why shouldn't they be able to buy cigarettes as well? The court may conclude that changes in the law have rendered its prior statutory interpretation unworkable.

Fourth, a court may conclude that the prior rule is unjust. Enforcing an unfair rule imposes large social costs. Each application of the rule perpetuates injustice. In addition, citizens may begin to question the fairness of the whole legal system if they see courts tolerating unfair results. At some point, the costs of unfairness outweigh the costs of disrupting settled

expectations.

Courts departing from stare decisis to further fairness, however, must be careful to distinguish situations in which a statute or constitutional provision intends to protect minority interests. Constitutions, for example, protect freedom of speech so that unpopular speakers may have their say. A large majority of citizens may think it is "unfair" for an individual to criticize the government. They may even find some criticisms outrageous. Bowing to that sense of "unfairness," however, would destroy the meaning of the constitutional provision. Many constitutional provisions exist precisely to protect minority members of the society from the majority's sense of "fairness."

Fifth, courts often say that stare decisis is less important in constitutional cases than in statutory ones. To some extent, this view reflects the previous point. If a constitutional decision is unfair, it is likely to seem more unfair than a statutory decision because it affects more fundamental rights. In addition, the constitutional decision is more difficult to change. Citizens who disagree with at least some constitutional rulings can overturn those decisions only through the difficult process of constitutional amendment -- or by persuading the court to change its mind. They cannot simply ask the legislature to enact a change. An erroneous constitutional decision is more difficult to fix outside the courts than is an erroneous statutory interpretation. For both of these reasons, courts have shown less allegiance to stare decisis in constitutional cases than in statutory ones.

Once again, however, this distinction deserves future scrutiny. Some types of constitutional decisions can be modified in legislatures or executive bodies. Twenty years ago, for example, our Supreme Court held that public universities may consider race as one factor when admitting students. Affirmative action, in other words, is constitutional in university admissions. The Constitution, however, does not compel affirmative action. Citizens who disagree with the Court's decision, therefore, do not have to seek a constitutional amendment to overturn that ruling. Instead, they may simply persuade university administrators or state legislatures to bar affirmative action in university decisions. Indeed, the citizens of one of our states have done just that. In this type of constitutional situation, where the rule permits action but does not compel it, perhaps stare decisis should be as strong as in nonconstitutional cases.

Finally, judges sometimes claim that stare decisis is less important when the precedent was decided by a narrow margin, or over a "spirited dissent." Again, this rationale is troubling. Since 1955, our Supreme Court has decided a majority of cases each year over at least one dissenting opinion. During recent years, one-fifth of the cases have been decided by a one-vote margin. Relying upon a spirited dissent or narrow decisional margin to reduce the impact of stare decisis, therefore, would throw a large number of Supreme Court precedents open to question.

More fundamentally, this rationale is troubling because it intensifies the political nature of a change in precedent and undermines the court's own legitimacy. If precedent is merely a matter of nose counting, then the law reduces to power. At some point, we need to believe that the decisions of courts are "right" -- or grounded in a larger body of coherent legal doctrine -- rather than merely the most recent result of an ongoing opinion poll. Even if one Justice made the difference between yes and no, the answer takes on a special significance that stare decisis recognizes.

IV. How Often Do Courts Disregard Stare Decisis?

Some academics believe that judges -- at least judges on our nation's highest court -- never follow the rule of stare decisis. The scholars speculate that judges decide cases according to their own sense of justice, invoking precedent when it is helpful and distinguishing or overruling precedent when it is not. According to these scholars, stare decisis plays no independent role in judicial decisionmaking. Instead, the doctrine is simply rhetoric.

This charge certainly goes too far. There are entire domains of law controlled by precedent that the courts would not dream of disturbing. The very security of the precedent makes these rules almost invisible. Settled interpretations mark the outer bounds of most statutes. Even in constitutional law, more things are settled than open. No one in the United States seriously doubts that our national administrative agencies are constitutional, while a national church would be unconstitutional. Some things are so clear, that no one questions them any more. It is stare decisis that helps produce this certainty.

We notice stare decisis only in the contested cases. Here, the record is less clear. In 1991, the Chief Justice of our Supreme Court counted 33 cases during the previous 20 years in which the Court had overruled a constitutional precedent. During the last seven years, the Court has overruled several other constitutional decisions. In a constitutional system that is already more than two hundred years old, this is a rather substantial amount of change.

Is it too much change? The answer depends in part on the individual cases, and on the relative weights in those cases of fairness, consistency, predictability, and the other values I have described. It is noteworthy, however, that both the legal and popular press in the United States have begun to criticize the Court for its degree of departure from precedent. Yes, we want judicial decisions to be "right," and if times change or previous courts were seriously wrong, we want today's judges to make things right. At the same time, we want courts to be consistent and to articulate consensus -- to appear above the political fray. Change itself carries costs; stare decisis recognizes those costs.

Conclusion

I began by noting a common criticism of stare decisis: that it allows the past to bind the present. I hope I have said enough to explain why stare decisis nonetheless carries significant weight in the American system. The doctrine allows courts to overrule precedents that have become unworkable or that were flawed from the beginning. The doctrine suggests, however, that courts should offer special justifications for these changes, that precedent itself carries weight.

In closing, I will simply note that stare decisis is not just a backward-looking doctrine. It is also a doctrine that looks to the future. Yesterday's decisions constrain today's cases, but today's rulings help shape tomorrow's decisions. Courts with a healthy respect for stare decisis frame their rulings with the future in mind. Often, the prospective weight of stare decisis prompts a court to narrow its decision or to tread carefully when interpreting a new statute, so

that future judges are not burdened by overly broad or ill-conceived decisions. In this way, stare decisis helps promote a dialogue among judges over time.

A Short Bibliography of Discussions of Stare Decisis

Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 **Columbia Law Review** 723 (1988).

Frederick Schauer, Precedent, 39 **Stanford Law Review** 571 (1987).

Johnson v. Transportation Agency, 480 U.S. 616 (1987) (recent discussion by Supreme Court Justices of the role of stare decisis in a statutory interpretation case).

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (recent discussion by Supreme Court Justices of the role of stare decisis in a statutory interpretation case).

Payne v. Tennessee, 501 U.S. 808 (1991) (recent debate among Supreme Court Justices over the role of stare decisis in a constitutional case).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (discussion of stare decisis in highly publicized constitutional decision regarding abortion).