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Scare(y) Decisis: reversing rights and wrongs

If stare decisis is too readily discarded, then the Constitution becomes "nothing more than what five Justices say it is" at any point in time. - Justice Lewis F. Powell

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Last month's column, Dicta Ain't Necessarily So, explored the question of how to discern dicta from holdings in case law. But what it didn't address is why that's an important question. There was no motivation to do that because we all already know the answer: Only holdings have precedential effect under stare decisis. See Humphrey's Exr. v. U.S., 295 U.S. 602, 626 (1935). But stare decisis itself is now under tremendous scrutiny, given how "the Supreme Court has been dismantling precedent at a rapid clip." Kiel Brennan-Marquez, Aggregate Stare Decisis, 97 Ind. L.J. 571, 572 & n.1 (2022). Commentators wonder if stare decisis is dead, gravely ill, radically weakened, teetering "on the brink of collapse," or merely "reeling." See, e.g., id. at 572, 608. Meanwhile, the popular podcast "Strict Scrutiny" has marketed merch emblazoned with the insouciant slogan "stare decisis is for suckers." See also CFPB v. All Am. Check Cashing, 952 F.3d 591 (5th Cir. 2020) (Smith, J., dissenting, invoking the phrase).

"The legal doctrine of stare decisis derives from the Latin maxim 'stare decisis et non quieta movere,' which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem." Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., conc.). The notion of following precedent is a "cornerstone of our legal system" and (along with the case and controversy requirement) is "what makes courts courts" in contrast to other governmental entities. Brennan-Marquez, at 578; see also Justice Kagan's remarks at Northwestern University School of Law, Sept. 14, 2022 ("What makes a court legitimate is that the court is acting like a court … doing something that's recognizably law-like").

Interestingly, stare decisis has no explicit grounding in the U.S. (or California) Constitution, nor is it a matter of statute. Rather, it is merely "a fundamental jurisprudential policy" (Samara v. Matar, 5 Cal.5th 322, 336 (2018)), implicitly baked into the structure of court systems, intended to promote values such as stability, fairness, efficiency, and predictability. See Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("stare decisis embodies an important social policy" representing "an element of continuity in law … rooted in the psychologic need to satisfy reasonable expectations").

"Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the

judicial process. … Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.' Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

Stare decisis comes in two flavors: vertical and horizontal. Vertical requires "lower" courts to follow precedents from "higher" courts. See Auto Equity Sales v. Superior Court, 57 Cal. 2d 450, 455 (1962); Myers v. Carini, 262 Cal. App. 2d 614, 620 (1968) ("As intermediate appellate judges we make up the Light Brigade in the army of the judiciary. We look down for the facts and up for the law. Where the rule is explicit … it is not ours 'to reason why.' Brilliant concept or grievous blunder, we must accept it as it is given to us by higher authority. Indeed, we have no jurisdiction to do otherwise."). This form of stare decisis appears solid, with only occasional instances of chafing. See, e.g., Inquiry Concerning Justice J. Anthony Kline, No. 151 (Cal. Com. Jud. Perf. Aug. 1999).

Horizontal stare decisis – concerning the precedential effect of a court's own decisions – is where things get interesting. This always arises at a Supreme Court level, where there is no "higher" court to supply binding precedent. (Justice Robert Jackson famously quipped, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., conc.).) As Justice Brandeis put it because stare decisis is not an "inflexible" or "inexorable command," whether precedent should be followed is "entirely within the discretion of the court." Burnet v. Coronado Oil & Gas, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see Hertz v. Woodman, 218 U.S. 205, 212 (1910). Indeed, the Supreme Court has overruled itself well over 200 times between 1798 and 2022. See Library of Congress' Table of Supreme Court Decisions Overruled by Subsequent Decisions, https://constitution.congress.gov/resources/decisions-overruled/.

Thus, the question becomes how and when to overrule precedent. (Of course, one easy way to avoid the issue is to never grant review of cases already governed by existing law.)

A key consideration in overruling precedent is to recognize the sort of decision at issue. The force of a precedent may turn on whether the decision is based in constitutional analysis, statutory analysis, or case law analysis. "Stare decisis effectively comes in three different strengths": "constitutional weak," "common

law normal," and "statutory strong." Amy Coney Barrett, Statutory Stare Decisis in the Court of Appeals, 73 Geo. Wash. L. Rev. 317 (2005).

Stare decisis is at its weakest for constitutional interpretation because the Supreme Court's "interpretation can be altered only by constitutional amendment or by overruling our prior decisions." Agostini v. Felton, 521 U.S. 203, 235 (1997); see also Ramos, 140 S. Ct. at 1405 (stare decisis at its weakest on constitutional decisions because a mistaken judicial interpretation is "practically impossible" to correct through other means), 1409 (stare decisis "is at its nadir in cases concerning" constitutional criminal procedure rules) (Sotomayor, J., conc.).

For statutory-based precedent, the burden on the party seeking to reverse a precedent is greater because unlike in the context of constitutional interpretation, "the legislative power is implicated, and Congress remains free to alter what we have done." Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

Stare decisis is at its "acme in cases involving property and contract rights, where reliance interests are involved," and conversely very weak in cases involving procedural or evidentiary rules. Payne, 501 U.S. at 828.

One early and classic jab at stare decisis comes from Oliver Wendell Holmes Jr., The Path of the Law, 10 Harv. L. Rev. 457 (1897): "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." And the notion of changed circumstances continues to be important. Ramos at 1405 ("stare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true").

Justice Gorsuch's formulation of overruling precedent is that when revisiting a precedent, the Supreme Court traditionally has considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." Ramos at 1405.

A more extreme view (and easier test to satisfy) is Justice Thomas' belief that overruling "demonstrably erroneous" precedents is simply a constitutional imperative – i.e., precisely what Supreme Court justices are supposed to do. Gamble v. U.S., 139 S. Ct. 1960, 1981 (Thomas, J., conc.). Under this view, if the earlier decision was wrong, it must be overruled.

A contrary approach is that mere disagreement with precedent is never enough to overrule it and that some "special justification" is required. See FTB v. Hyatt, 139 S. Ct. 1485, 1504 (2019) (Breyer, J., dissenting); Kimble v. Marvel Ent., 576 U.S. 446 (2015) (Kagan, J., dissenting). As Justice Kagan put it, "Respecting stare decisis means sticking to some wrong decisions." Id. at 455. Such special factors for overruling precedent include when the precedent has turned out to be unworkable; it is inconsistent with other decisions; or its factual or legal underpinnings have been eroded over time (i.e., it is not deeply entrenched in the law and the real world). Janus v. Am. Fed'n, 138 S. Ct. 2448, 2486 (2018).

The tension between these approaches boils down to this: If stare decisis is too readily discarded, then the Constitution becomes "nothing more than what five Justices say it is" at any point in time. Justice Powell, Stare Decisis and Judicial Restraint, 1991 J. Sup. Ct. Hist. 13, 16; see also Turner v. U.S., 396 U.S. 398, 426 (1970) (Black, J., dissenting) ("Our Constitution was not written in the sands to be washed away by each successive wave of new judges blown in by each successive political wind."). But if stare decisis is adhered to too slavishly, then the Constitution is nothing more than what five justices once said it was at one point (perhaps in the distant past).

How to resolve this tension is the focus of much cogitation. One idea is to ensure that stare decisis accounts for a precedent's original strength. Brennan-Marquez at 586 ("precedents laid down by thin majorities are less weighty than precedents forged through greater coalition"). If one accepts that "a precedent's durability should be a function of its original strength," then an aggregate voting rule can serve that purpose: i.e., the prevailing position must have a majority of votes from both the original court and current court combined. Thus, overruling a 5-4 opinion would require at least a 6-3 vote in the present case (so the total votes for the new rule/former minority view would be 10 to 8). There are, naturally, many details and mechanical issues that would need to be worked out for an aggregate voting rule. Brennan-Marquez at 593-599. But this interesting academic work aside, where are we now?

In Dobbs v. Jackson Women's Health Organization, the Supreme Court overruled Roe v. Wade and Planned Parenthood v. Casey. Justice Alito's majority opinion acknowledges that "overruling a precedent is a serious matter" that is "not a step that should be taken lightly." 142 S. Ct. 2228, 2264 (2022). The majority opinion then proceeds to analyze five factors favoring reversal of Roe

and Casey: "the nature of their error, the quality of their reasoning, the[ir] 'workability' …, their disruptive effect on other areas of the law, and the absence of concrete reliance." Id. at 2265.

In his concurring opinion, Justice Kavanaugh asserts "Stare decisis is rooted in Article III of the Constitution and is fundamental to the American Judicial system and to the stability of American law." Id. at 2306 (Kavanaugh, J., conc. ("Adherence to precedence is the norm, and stare decisis imposes a high bar before this Court may overrule a precedent.").) He then sets forth his view that "a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests." Id. at 2307.

Chief Justice Roberts concurred in the judgment only and would have issued a narrower decision to avoid "a serious jolt to the legal system." Id. at 2316 (Roberts, C.J., conc.).

The three-Justice minority opinion condemns "the majority's (mis)treatment" and abandonment of stare decisis. Id. at 2332-33, n.8. The Dobbs dissent acknowledged that "major legal or factual changes undermining a decision's original basis," rendering it obsolete, or an absence of reliance (particularly on relatively new precedent) could justify an overruling – but that none of these factors existed to overrule Roe and Casey. Id. at 2337-2341.

And what about in state courts? In determining whether to depart from precedent, most courts will consider whether the prior decision is unsound in principle, unworkable in practice, and what reliance interests are implicated. Our California Supreme Court recently explained that the policy of stare decisis "is just that– a policy – and it admits of exceptions in rare and appropriate cases." Samara, 5 Cal.5th at 336. Factors against reversing precedent are when many people have entered into transactions in reliance on the precedent, and if the party seeking to change the law could have easily avoided the problem had it acted differently. Factors the court may consider that favor reversing precedent are: the lack of satisfactory reasons for the earlier precedent; divergence from the Restatements; and significant critical or contrary authority from other jurisdictions. Id. at 337.

Not all states recognize all the same factors, however. In contrast to California, which is willing to consider the fabric of the law across the nation, Wisconsin, for instance, expressly disavows considering whether a large majority of states have decided differently. Johnson Controls, Inc. v. Emp'rs Ins., 264 Wis.2d 60, 120-121 (2003) ("This court has no apprehension about being a solitary beacon in the law if our position is based on a sound application of this state's jurisprudence."). That go-it-alone language from the Badger State is pretty tough and uncompromising. But if rights continue to fall prey to stare decisis exceptions, then more and more states may take individual compensating action.