IN DEFENSE OF STARE DECISIS

BY MICHAEL GENTITHES[†]

I. INTRODUCTION

> The tribunate is not a constituent part of the city, and should have no share in either legislative or executive power, but this very fact makes its power the greater: for, while it can do nothing, it can prevent anything from being done. It is more sacred and more revered, as the defender of the laws, than the prince who executes them, or the Sovereign which ordains them.[1]

The argument for a rule of stare decisis that frequently controls Supreme Court jurisprudence is often entangled with the controversial issues the Court faces when it must choose to either invoke or ignore the doctrine. But those issues distract attention from the centrality of stare decisis to democratic governments' vitality. By taking a unique, systemic perspective this article demonstrates that stare decisis, though not a strict rule of constitutional construction, plays a vital role in the preservation of democracy. Respect for the Supreme Court's prior decisions lends legitimacy to a body with a transitory membership. It assures citizens that the Court's decisions are not merely the whims of Justices' personalities, and renders the Court "strong" in the sense that it can issue decisions in the country's most pressing controversies that both the parties and society at large consider final. I will apply this new perspective to the Court's current stare decisis doctrine and analyze its effectiveness. Finally, I will suggest original factors that the Court should consider when applying stare decisis by looking not just backward to the decision potentially being overruled, but also forward to the decision which may replace it.

This article proceeds in four parts. Following this introduction, Part II uses examples of recent political turmoil in several nations to

---

† Research Attorney, Illinois Appellate Court, First District; J.D. DePaul University College of Law 2008; B.A. Colgate University 2005.

1. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762), *reprinted in* THE SOCIAL CONTRACT AND DISCOURSES 121-22 (G. D. H. Cole trans., E. P. Dutton & Co., Inc. 1950).

explain why a "strong" high court whose decisions garner citizens' respect is of such importance to successful democratic governance. Part III describes the necessary role stare decisis plays in establishing such strength in the Court, and why stare decisis is therefore not a mere guiding principal but rather an imperative element in the Supreme Court's legal analysis. Part IV proceeds in two sections. The first uses this original justification for stare decisis to clarify the doctrine's terms, with the Supreme Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] as a starting point for the analysis. The second section suggests alternative factors to include in stare decisis analysis, both those that look backward to the opinion that may be overruled and forward to the new opinion that may be adopted. Part V offers a brief conclusion.

II. WHY THE STRENGTH OF A COUNTRY'S HIGHEST COURT IS VITAL TO PRESERVING A DEMOCRATIC SYSTEM

Below, I argue that stare decisis allows the Supreme Court to earn the respect of the people and the coordinate branches of government. But a discussion of how the Court maintains popular respect is only relevant when framed by the significance of that respect itself. The judiciary's strength, meaning its ability to render decisions that are respected throughout the country, is absolutely paramount to successful democracy. This point can be illustrated by a comparison of recent political history in the United States, Pakistan, and Kenya.

The 2000 presidential election cycle was unique in American history. As time pressed on and no official winner was declared, supporters of Democrat Al Gore and Republican George Bush grew more fervent in their determination to capture the White House. Ultimately, Bush turned to the Supreme Court in search of a definitive ruling on the recount procedures ordered by Florida's Supreme Court.[3] In a per curiam opinion that reflected deep division, the Court held that Florida's recount procedures violated the Equal Protection Clause.[4] Despite the divided nature of the Court's opinion, Al Gore quickly announced his respect for the Court's ruling and his decision

2. 505 U.S. 833 (1992).
3. *See* Bush v. Gore, 531 U.S. 98 (2000).
4. *Id.* at 104–11.

pressure from American and European governments,[14] Musharraf declared a state of emergency in early November, ordered the justices of the supreme court to take an oath promising to abide by a "provisional constitutional order" in lieu of the existing constitution, and dismissed those justices, including Chaudhry, that failed to do so.[15] Although Musharraf would later step aside as Pakistan's leader amidst threats of impeachment,[16] the stains to the court's legitimacy remain; political leaders considered the court illegitimate after Musharraf's replacement of the sitting justices with those of his own choosing.[17] Many in Pakistan continued to view the supreme court as illegitimate into 2009, as political wrangling in the post-Musharraf era began.[18] Chaudry was eventually reinstated in March 2009 after an extended campaign by Pakistan's lawyers, but whether he can effectively stabilize the judiciary and restore faith in its decisions remains to be seen.[19]

Another example from sub-Saharan Africa demonstrates the

WLR45-4_G

some political theorists shed light on the balance that Justices should seek. Thomas Hobbes believed that the force of law is derived solely from the authority of its author:

> I grant you that the knowledge of the Law is an Art, but not that any Art of one Man or of many how wise soever they be, or the work of one and more artificers, how perfect soever it be, is Law. It is not Wisdom, but Authority that makes a Law.[27]

Montesquieu argued that law derives its power from its precision, and from avoiding the perception that law is merely the opinion of the judge.[28] To be effective, "judgments should be fixed to such a degree that they are never anything but a precise text of the law. If judgments were the individual opinion of a judge, one would live in this society without knowing precisely what engagements one has contracted."[29]

But what makes the law appear to be more than the individual opinion of the judge, and instead seem authoritative and precise? A plausible argument can be made that the ultimate source of authority in constitutional jurisprudence is the Constitution itself, and any decision that deviates from that text must be eradicated to inspire the utmost confidence in the Court's integrity.[30] Critics emphasize that the Constitution's text contains no allusions to the necessity of stare decisis.[31] Any form of the doctrine is therefore fundamentally corrupting because, under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Constitution is the ultimate source of law, not the Court's decisions: "If the Constitution is not alterable whenever the judiciary shall please to alter it, then 'a [judicial precedent] contraryctrine is therefore625 0 [(Cour

Paulsen asserts that the legitimacy of the Court "rests on its ability to render *non*-political legal judgment in accordance with principles of interpretation that stand outside the judges' personal sense of what is expedient, practical or desirable as a policy matter."[33] But often, in cases where strong arguments exist on both sides and the nation's attention is drawn, Justices must decide controversies whether or not there exist any clear legal conclusions based on principled constitutional interpretations. In the closest cases, it is likely that several Court members will reach opposite conclusions from their interpretive principles. In those cases—which often draw the most public2fttention is dratioargesspposd, -1(ers wTJ0.021ies whetheraloftepptro ke6( )]TJ(m)6(ac(of t)6(

citizen ignoring it, but rather an entire branch of government. As noted by Thomas W. Merrill, "If judges are restrained, that is, if they adhere to the jurisprudence of no surprises, then the proponents of social change through law will have to look elsewhere in order to achieve their reforms."[38] Thus, stare decisis holds great value in its ability to avoid the problems of perpetual litigation and afford a necessary finality to the Court's decisions.

The advantages of stare decisis are also clear in cases that draw significant public scrutiny. In those cases, perpetual litigation is the norm and parties refuse to concede any perceived gains they have made towards their positions. Once a decision has been reached, that decision should be final, so as to avoid drawn-out uncertainties that have arisen in some political controversies.[39]

One might respond that the need for consistency is overblown; instead, and especially in those cases which are most hotly contested and fiercely debated, reaching a correct resolution should be even more important than in trivial disputes.[40] My response is simply that, were such clearly "correct" resolutions possible, it would certainly seem right to favor them. But both at the time of the original controversy and in later cases which present similar or identical issues, the correct outcome is seldom obvious. Further, each decision that can be described as a "correction" of earlier jurisprudence proclaims the Court's fallibility, and alternatively suggests that the Court's interpretation of the Constitution is driven by the personalities that happen to occupy its bench. A decision that "corrects" prior jurisprudence risks altering a holding that may not clearly be "wrong" or "right," and does so with the potential cost of the Court's legitimacy and the respect which citizens and other branches of government ascribe to the institution—a tremendous risk.

In Federalist No. 78, Alexander Hamilton arguably supports stare decisis directly when he says that courts "should be bound down

---

38

that they otherwise feel are wrong. The proper mechanics of such a rule are difficult to devise; I make an effort to do so below. But an effort to formulate such a rule is necessary. If applied sloppily, stare decisis is just as likely to destabilize the judiciary by creating the impression that the Justices' policy preferences guide decisions, rather than a guiding respect for precedent. However, a simple, bright-line "inexorable command"[44] might go too far in restricting the Court's ability to decide new, challenging controversies. The question thus becomes: assuming that some adherence to precedent is required to establish a strong judiciary capable of sustaining a democratic system, what factors should the Court look to in implementing the doctrine?

A. Factors Drawn from Current Supreme Court Jurisprudence

The Supreme Court often purports to apply the doctrine, but typically includes little discussion of the appropriate mechanics. The Court's clearest illustration came in its *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision, which outlined four factors justices should consider when deciding whether to apply the doctrine.[45] I use these factors to guide my discussion. It is important to note that I do not intend to craft a doctrine that fits with the current state of Supreme Court jurisprudence. One of the primary motivations for this article was the difficulty in understanding and predicting when the Court would apply stare decisis. The Court's decisions provide a useful starting point for the inquiry, but it is the very inconsistency of the Court's application of the doctrine that requires clarification to allow it to best achieve the desired results.

1. Whether the Rule Had Proven to Be Intolerable Simply in Defying Practical Workability[46]

The workability of a prior decision refers primarily to the ease with which judges can apply that decision. Taken this way,

44. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

45. 505 U.S. 833, 854–55 (1992). The opinion also contains an extended discussion justifying stare decisis as a whole, which Professor Paulsen has helpfully nicknamed the "judicial integrity" justification. Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86

"workability" does little to lend the Court the social capital required to resolve difficult conflicts. In order for the Court to maintain a democratic system, its decisions need not be easy for judges to apply; they simply must be respected. Complex rules can fit within a jurisprudence that gains the trust and respect of actors within the system.

However, taking a view more focused on the rational actor's perception of the Court's authority, there is a point at which decisions become so vague as to lose citizens' respect. Complex rules are not inherently harmful, as long as the rules do not lead to inexplicable, sudden shifts in jurisprudence or create uncertainty as to their application. In those situations, rational citizens may believe that judges intentionally maintain overly complex systems unintelligible to the layperson simply so they can manipulate that jurisprudence at will through rhetorical flourish. Clearer opinions, on the other hand, make the Court more accessible. If workability is taken to mean a jurisprudence that allows laypersons to predict and apply it, actors within the system will almost certainly hold the Court in higher regard and more readily accept the Court's power to ultimately decide controversies if its decisions are workable.

But the difficulty comes in defining and consistently applying this factor. As Professor Paulsen highlights, the Court has indicated a willingness to both maintain decisions that could fairly be called "unworkable" and overturn decisions with holdings that were simple to apply.[47] But workability is not a threshold for the Court's stare decisis analysis, nor should it be. Cases that have no meaning whatsoever because their rules are susceptible to interpretations that are polar opposites may, on workability grounds alone, be overturned. But such cases are rare. More often, Justices will find a particularly complex line of jurisprudence unwieldy, one which the average citizen would certainly have difficulty using to predict future decisions and applying to their lives.[48] What this suggests is only that the presence of a workability problem should lead the Justice to consider restructuring the rules. Decisions need not be unworkable to be overturned, but workability problems should alert the Justice that

47. Paulsen, *supra* note 33, at 1175–77.

48. Admittedly, Supreme Court Justices may not be the best evaluators of average citizens' capabilities. But they can certainly determine when applying precedent is a strain on their own faculties, and it seems a safe assumption that in those cases average citizens would struggle as well.

she can avoid a stare decisis argument against change. Again, complex rules may be maintained, and those that are unworkable, as I have defined the term, may at times be a necessary evil. But at a minimum, such decisions should be closely examined for possible overruling, especially when other stare decisis factors that counsel in favor of reversal are present.

2. 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[49]

With this factor of stare decisis, the Court comes closest to describing the importance of citizens' reliance interests. That people are able to rely on the decisions of the Court seems to be inherently required for the coherence of our legal system; for the Court and the country to function, people must have faith in the Court's opinions.[50] But this factor is susceptible to inconsistent application. The difficulty arises in deciding which cases have induced the type of reliance that would counsel against overruling and which do not. If stare decisis is valuable in part as a means to promote a positive perception of the Court that induces citizens' and government actors' reliance upon its decisions, it is circular to suggest that only some decisions induce a "special" type of reliance that requires application of the doctrine in the first place. The doctrine is designed to create this very reliance upon the Court's decisions. If it is functioning properly, all of the Court's decisions should induce reliance. The distinction between those that citizens rely on especially and those

undermine the Court's legitimacy by making it appear manipulable by those wealthy and determined enough to engage in perpetual litigation. Whether conservative actors can litigate abortion repeatedly until the Court comes to adopt their position piece by piece or liberal thinkers, through continuous litigation, can chip away at the Court's recent Second Amendment decision[60] until their interpretation of the right to bear arms comes to prevail, the results will be similar. Such litigation will signal to rational actors throughout the country—and more specifically in other branches of government—that the Court is not to be taken at its word. To allow the Court to be persuaded, over time and with changes to the bench, to adopt a position because certain parties fought vociferously for it is to admit that the Court's jurisprudence is a function of Justices' personalities. Such a conclusion can be devastating when an issue that threatens the strength of our union as a whole is presented.

Steven G. Calabresi has argued that in many cases where the Court purports to adhere to precedent, the rule to which it adheres is itself a departure from prior precedent, and that the entire history of English and American law weighs more heavily in favor of abandoning a ruling which may have only been decided fifty years ago.[61] Thus, in certain cases an apparently fundamental decision properly ought to be overruled in favor of one consistent with more longstanding traditions.[62] Such a conclusion assumes that it will consistently be clear whether a modern decision is faithful to our legal history and traditions; in many, if not most, cases, this is a difficult conclusion for judges and scholars to

itself, is that they are primarily backward-looking; that is, they focus on the characteristics of the previous opinion the Court may modify or overrule. But this ignores a large field of potential analysis. Some part of the decision to invoke or ignore stare decisis should look forward towards the proposed overruling opinion. Justices should consider the characteristics of the new decision, especially its likely effects on the Court's integrity and citizen's perceptions of the Court's reliability. That is not to say that the text of the Constitution should not remain the touchstone of a Justice's legal analysis, as I reaffirm below. But where the outcome of a controversy remains unclear upon consideration of the text, these factors may also help to guide Justices in crafting new decisions where appropriate while avoiding significant damage to the Court's legitimacy through unnecessarily frequent changes of jurisprudential course.

This section proceeds in two parts: First, it considers possibilities for new backward-looking factors in the stare decisis analysis.[70] Then it outlines a few possible forward-looking factors.[71]

1. *Backward-Looking Factors*

a. *Unanimous or Heavy-Majority Opinions Ought to Be Upheld*

ew5(thl5(T7iturnvalu titiong fnifli)5(li deranrse.)]TJETEM52 1179.41.959324 Tc48ir)f/Arting f

b. When the Prior Decision Builds Upon, Rather than Undercuts, the Analysis of an Even Earlier Decision, Justices

problem in allowing Justices' *de novo* interpretations of its text guide the Court's jurisprudence irrespective of precedent. Justices will quickly find it difficult to command respect if they claim to understand the Constitution better than their predecessors, simply because of the inherently debatable nature of much of the text. Again, the Constitution must be a starting point for Justices' analyses. But to the extent that both the old rule and the new rule are arguable points of constitutional law—which I believe should be the Justices' presumption in most cases where a prior decision exists—a further consideration of the decisional criteria for the application of stare decisis is warranted.

b. Whether the Newly Adopted position Is Truly Original

Justices should ask whether the view they are adopting in place of standing precedent has been advocated consistently and repeatedly since the original ruling. If so, adopting that position might again prompt rational actors to perpetually relitigate against opinions with which they disagree. But if instead the new position represents a fresh development in legal thinking, it suggests that thinking within the culture or, more narrowly, the legal community has since changed. This does not require the Court to directly measure some variety of changed cultural or sociological facts through an investigation that could better be performed by legislators. It only requires that Justices avoid adopting positions that are essentially those of previously displeased parties with enough money and will to relitigate. Through something resembling judicial notice, Justices can use the originality of a litigant's position as a means to determine when thinking has changed on an issue and, looking forward beyond the standing precedent, when overruling a prior decision is appropriate.

It is important to temper this point. There may be some positions litigated in the past that require fresh examination after time, and the Court should be able to adopt them when appropriate. But a break from repeated litigation of the same points is not undesirable. At a minimum, it will allow those on both sides of the issue to reexamine the logic of the opposing position, as well as observe the effects of the adopted stance in society. If after time the opposing position is stronger, it can again be argued to the Court, and can still be considered uniquely justified by the ways in which the view has changed, or perhaps been reinforced, through the years of experience while the other view carried the day. This factor will therefore

promote the argument of fresh ideas, reduce perpetual litigation, and allow for the possibility of reargument at a later time

c. Whether the New Decision Definitively Resolves a Long-standing Controversy

Clearly, all cases before the Court involve controversies which the parties find intractable and causes for which litigants have deep passion. But in some cases, earlier opinions did not make clear the full extent of a party's rights.[73] In those scenarios, the Court should not hesitate to write an opinion that uses more sweeping language to fully decide the controversy at issue. Such a decision would analytically and definitively state that the Constitution, as written, will dictate a particular set of results concerning similar situations or litigants.

It may seem that this view will encourage over-broad decisions, rather than restricting opinions to the case before the Court. But to truly settle the string of litigation, such sweeping language is necessary.[74] Further, such opinions encourage those who oppose the decision to seek to overcome the negative ruling through the enactment of legislation or, ultimately, constitutional amendment. Such an outcome relieves the Court of the duty to measure popular unrest with their decisions.[75] If the Court remains reluctant to overturn earlier decisions, it may stimulate actors that favor change to seek other avenues within the democratic process, a not altogether undemocratic or undesirable outcome.

V. CONCLUSION

The line which separates the United States of American from wavering governments such as Pakistan and Kenya is much thinner than many believe. Essentially, each country is led by self-interested individuals that seek the most possible power through the most expedient means within their system, and then seek to preserve that

73. Illustrative are cases concerning homosexuals' Equal Protection rights, which as discussed above have been subject to alternating opinions which have to this point failed to clearly define their full extent. *See supra* text accompanying notes 53–56.

74. Justice Scalia makes some compelling arguments for such clear, broad rule-making in the Court's jurisprudence. Scalia, *supra* note 38, at 1179–80.

75. Professor Merrill highlights the fact that, although a robust form of stare decisis limits the capacity for rapid legal change, "change is not ruled out. The Constitution can be amended, statutes can be enacted, new administrative regulations can be promulgated." Merrill, *supra* note 23, at 276.

power amongst themselves and a hand-picked group of political elites. However, the limitation on this predictable, self-interested behavior comes from the strength of the institutions within each system that define the boundaries of the law for the actors within it. In times of great stress, only a robust respect for the decisions of those institutions can prevent disintegration of the rule of law and, potentially, of the system as a whole. Stare decisis is not an inexorable constitutional command; it is an imperative tool necessary to maintain order in a system built on confrontation and competition.