



Stare Decisis: The Problem With Precedent

By Jonathan J. Miltimore

The war over the Supreme Court has begun. It appears Republicans won the first tilt when John Roberts Jr. was confirmed as Chief Justice, replacing his former mentor the late William Rehnquist. However, the nomination of Judge Samuel Alito Jr. to replace the retiring Sandra Day O'Connor is likely to prove a more contentious affair.

Anybody closely following recent Court drama has likely become familiar with the term *stare decisis*. Translated from its Latin origin, it means “stand by things decided,” and it is the legal principle that Courts should adhere to past decisions. *Stare decisis* binds lower courts to the rulings of higher courts, and the Supreme Court, at least to a certain degree, to previous Supreme Court decisions. Following precedent provides order and stability as citizens become accustomed to what they may and may not legally do.

Stare decisis is a concept neither new nor revolutionary. As early as 1788 Alexander Hamilton noted in the Federalist No. 78, “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”¹ Historically, *stare decisis* has been a concept championed by conservatives. This is not surprising as it involves using the past to shape the future — an inherently conservative concept. Thus it is noteworthy, and not without irony, that the most liberal bloc of the Senate Judiciary Committee has spent a great deal of time demanding to know if Roberts and Alito would “honor and uphold” the doctrine of *stare decisis*.

Though *stare decisis* is a sound principle, it is not without snags, and in the realm of Constitutional law these snags can have far-reaching consequences. First, the effectiveness of *stare decisis* is predicated on Courts deciding cases correctly. If not, the established precedent could fundamentally alter the Constitution. A second, more subtle, consequence is that over great lengths of time precedents will, inevitably, undermine a written Constitution. These potential dangers were not unknown to our Founding Fathers. In Federalist No. 81, Hamilton alludes to the apprehensions of many who feared (without reason, he believed) that vesting Constitutional discretion in a single Court would “enable that court to mould [laws] into whatever shape it may think proper.”² Thomas Jefferson, in a statement eerily prescient, declared, “The germ of dissolution of our federal government is in the constitution of the federal Judiciary; working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped.”³

Nobody, of course, is suggesting that Roberts or Alito abandon *stare decisis* as a tool in jurisprudence. However, settled cases that clearly do not pass Constitutional muster deserve to be reheard if they come before the High Court. *Stare decisis* is not absolute. If it was, racial segregation in public schools would still be constitutionally permissible [*Plessey v. Ferguson, 1896*]. It was *Plessey* that established the doctrine of “separate but equal” and created a Constitutional precedent that protected state segregation laws in conflict with the Fourteenth Amendment’s equal protection clause. This precedent ushered in generations of constitutionally protected Jim Crow until *Brown v. Board of Education (1954)*, when the Court, abandoning the principle of *stare decisis*, reversed a ruling that had stood for sixty years.⁴

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Decisions that stray from the text and spirit of the Constitution subvert its authority and purpose. It is clear the Framers regarded the Constitution as the supreme governing authority, subject to amendment but unalterable, as George Washington stated in his farewell address, “till changed by an *explicit* and *authentic* act.”⁵ Today many reject the notion that our legal system should be inconveniently encumbered by this wordy, faded document. Supreme Court Justice Stephen Breyer in his new book *Active Liberty: Interpreting Our Democratic Constitution* chides Constitutional literalists for “placing weight upon eighteenth-century details . . . for a twenty-first-century court.”⁶

In recent years, the Court has demonstrated an alarming tendency to abandon these pesky “eighteenth-century details.” During the early 1960s the Warren Court — made up largely of social engineers, remnants of FDR’s New Deal — unleashed the previously dormant power of the Court to foster social and economic equality. By the mid 1960s “the Warren Court was moving toward the creation of constitutional guarantees of national basic minimums in education, housing, subsistence, legal services, political influence, birth control and other facets of the modern welfare state.”⁷ This not only birthed the Court’s newfound ability to enact policy, it created precedent for future generations to do so. The cumbersome and protracted processes of democracy were abandoned for the expediency of an active judiciary, which could enact policy with the stroke of a gavel. Judges became celestial arbiters of justice, transforming the Court nearly overnight from an exclusively legal body into a political one. The Constitution became a “living document” subject to “evolving standards of decency.” This created an unprecedented level of judicial latitude, for as one judicial scholar writes, “Evolving standards...are no standards at all; they mock the concept of a written Constitution.”⁸

The Framers created a Constitution enumerating specific inalienable rights. They understood that rights merely bestowed upon the people by a governing body were not immutable rights; what is freely given can be freely seized. The Constitution was created as the safeguard of these rights, but that safeguard has weakened over time. Today one may argue that it is openly flaunted, as Courts uphold the Constitutionality of the compulsory transfer of property from one private party to another under the euphemistic guise of “economic development,” and decisions that do not pass Constitutional muster are sustained by invoking legal precedents of foreign courts. Freed from the careful fetters of a Constitution, social engineers and ideologues, swathed in robes of black, can manipulate policy in a way the Framers never intended.

When he was sworn in as Chief Justice, John Roberts stated, “Every generation in its turn must accept the responsibility of supporting and defending the Constitution and bearing true faith and allegiance to it.”⁹ Americans, for a brief time, failed in this watch. Fortunately, we are not bound indefinitely by precedent.

(Endnotes)

¹ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter, Mentor Books, New York, 1961, pp. 471.

² *Ibid.* 482.

³ Mathew Spalding (ed.), *The Founders’ Almanac*, The Heritage Foundation, Washington D.C., 2002, pp. 166.

⁴ James C. Foster and Susan M. Leeson, *Constitutional Law: Cases in Context, Volume I: Federal Governmental Powers and Federalism*, Simon & Schuster, New Jersey, 1998, pp.51-52.

⁵ Spalding, *The Founder’s Almanac*, 307, italics mine.

⁶ Emily Bazelon, “Take That, Nino: Breyer dukes it out with Scalia,” <<http://slate.msn.com/id/2125479/>> (October 24, 2005).

⁷ Ronald Kahn, *The Supreme Court and Constitutional Theory: 1953-1993*, University of Kansas Press, Lawrence, 1994, pp.12.

⁸ Michael M. Uhlman, “The Supreme Court 2005,” *First Things*, No. 156, October 2005, pp.37.

⁹ The Public Broadcasting Station, “John Roberts Becomes Chief Justice of the United States,” September 29, 2005, <http://www.pbs.org/newshour/bb/law/supreme_court/roberts/> (October 25, 2005).

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