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Three Levels of Stare Decisis: Distinguishing Common-law, Constitutional, and Statutory Cases

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THREE LEVELS OF *STARE DECISIS*: DISTINGUISHING COMMON-LAW, CONSTITUTIONAL, AND STATUTORY CASES

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The doctrine of *stare decisis*, assuming that you see it as a policy choice rather than a constitutional requirement, rests on two foundations. First, people rely on judicial decisions. Fairness, stability, and reliance require that precedents be followed. As Justice Brandeis put it, "In most matters, it is more important that the applicable rule of law be settled than that it be settled right."[1] (He said, "in most matters," of course, not in every matter.) Second, there is a judicial ideal that judges do not make up the law; they find the law that is already there and apply it retrospectively to the case at hand.

What you think about *stare decisis* likely has a lot to do with what you think about those two propositions. In individual cases, reliance interests may be important, but your belief about the proper role of the judge will likely affect your broader view. If you think that judges really do just find the law, or at least that they should, then you are not going to be as comfortable as your legal realist associates with judges changing old precedents or making rulings that are purely prospective.

The legal scholarship in this area (which unlike some legal scholarship is actually based on looking at real cases and what courts actually do) says that courts should and do treat *stare decisis* differently based on what sort of case the court is faced with—

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1. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

whether it is a common-law case, a constitutional case, or a statutory case.[2]

In the common-law context, the theory goes, the court has a relatively low barrier for overturning itself.[3] In the common-law context, judges are more akin to lawmakers. State courts, in particular, are more involved in common-law decision making, than federal courts. You can argue whether they are lawmakers or not, but when state judges decide common-law precedents, they are acting more like lawmakers than when they are interpreting statutes. In fact, many state judges are even elected, if you can imagine such a thing. And so, they are accountable lawmakers, *elected* accountable lawmakers, in some sense. If you view it that way, then overturning a case is not much different than a legislature repealing or mooting a statute with a subsequent statute. For that reason, *stare decisis* is less appropriate, it carries less weight, and making a decision that is prospective-only is more acceptable. This is the common view; I will express my own below.

In constitutional cases, unlike in the common-law, the courts are supposedly interpreting rather than making law. If they are finding the law that already exists, then making a prospective-only decision is less justifiable. But we also have to view it from the perspective of what we do when a mistake is made. In a constitutional case, if an earlier court has made a mistake, we have to ask who is institutionally able to fix that mistake. The legislature cannot simply pass a law to undo that precedent.[4] It is also difficult to amend the Constitution. So, if a constitutional decision truly is wrong, the court is the institutional actor in the best position to fix it. And so, the standard theory goes, we do not want to say that you have to amend the Constitution every time the courts make a bad decision (although if you look at the U.S. Constitution, that accounts for several amendments).[5] There too, then, the barrier for *stare decisis* is lowered; it is easier to overturn cases.[6]

2. *See generally* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); William Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

3. *See* Eskridge, *supra* note 2, at 1362–63 (contrasting "strong presumption" of correctness of previous decisions in common-law cases to "super-strong presumption" in statutory cases).

4. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (concerning an unsuccessful attempt by Congress to overturn a Supreme Court precedent).

5. *See, e.g.*, U.S. CONST. amend. XI (overturning Chisholm v. Georgia, 2 U.S. 419 (1793)); *id.* amend. XIV (overturning Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)); *id.* amend. XVI (overturning Pollock v. Farmer's Loan & Trust, 157 U.S. 429 (1895)).

6. *See* Eskridge, *supra* note 2, at 1362 (contrasting "strong presumption" of correctness of previous decisions in common-law cases to "relaxed, or weaker, form of that presumption" in statutory cases).

The traditional view takes a very different approach when looking at statutory interpretation; there, there is a "super-strong" weight attached to precedent and statutory interpretation.[7] It is less likely and less appropriate for courts to overturn previous decisions, because if the court makes a mistake here, the legislature can act, too. Also, there is a sense that a decision of statutory interpretation becomes part of the fabric of the statute, and so overruling the earlier opinion is almost like repealing and rewriting the statute, which is something that only the legislature is supposed to do. It is one thing if a court overrules a common-law precedent; statutes are only supposed to be overruled if they are unconstitutional. So that is the conventional understanding: strong *stare decisis* for statutory cases; weaker for common-law and constitutional cases. Start here

I would like to challenge that a bit here. First of all, common-law decisions are not law. They are points on a plane, which form patterns from which we can deduce the law. Common-law courts have many alternatives for shaping those patterns other than overruling cases: they can limit decisions to their facts; they can narrow their scope. This improves and increases stability. Because the court has options besides overruling itself, *stare decisis* is more appropriate than the classic understanding would have it. Even in the common law, it is appropriate for judges to see their role as finding rather than making the law—for the sake of humility and restraint, if nothing else.

Constitutional cases also should not be overturned as readily as the classic understanding would have it. You can make the same argument about constitutional decisions becoming part of the fabric of Constitution as you do about statutes. In any case, just because it is hard for anyone else to fix the court's mistakes does not mean that the court should so blithely consider its own precedents as being somehow weaker for that reason.[8]

Finally, in statutory cases, the presumption perhaps should not be as strict as the classic understanding has it. A statute may have been written vaguely on purpose, with the legislature intending for the court to develop a sort of common-law development of those vague terms and move along in a common-law way. Examples in the federal context include the Sherman Act and Section 1983.[9] If you look at

7. *See id.* at 1362–63.

8. One could argue just as easily that courts, having a larger share of institutional responsibility in such cases, should presume that they take that responsibility more seriously, deciding such cases more carefully.

9. 15 U.S.C. §§ 1–7 (2000); 42 U.S.C. § 1983 (2000).

what the U.S. Supreme Court has actually done, they have, while talking about this higher presumption in statutory cases, overturned plenty of statutory interpretation decisions.[10] This might be less common at the state level, but it is still something to consider.

Also, to say simply that a legislature can fix a bad decision is to overstate things. First of all, the legislature that passed the initial legislation might be long gone and the new legislature might be no better a guardian of the meaning of the original law than the new court is. In fact, a new court might be a much better guardian of the original purpose of the statute as expressed in its text. If the first decision really was wrong, moreover, the court should be willing to fix it.

Second, legislatures do all sorts of things for all sorts of reasons. Silence from the legislature might indicate apathy; it might indicate misunderstanding of the judicial precedent; it might represent political realities or choices; or it might indicate acquiescence or consent to the earlier opinion. It could mean all of those things without meaning acceptance of the precedent. A court does not have to read legislative silence as acquiescence and as a reason not to overturn the statute. Sometimes courts forget that legislatures do not have dockets in which issues come up and must be addressed; sometimes legislatures do not address things and it means nothing at all.

In real life, the fact is that courts overturn precedents all the time. They might say they are more reluctant to do so in statutory cases, but they still do it a lot. Whether or not a court overturns precedent boils down to the two factors that I first suggested: the presence of reliance interests and the court's ideal of the proper role of judges. These considerations are more important than the statutory/constitutional/common-law distinction.

We look for reliance interests. Where are they strongest? Contract, property, estate planning cases—but even there, courts have the ability to be prospective only. And even venerable precedents on which people rely are only going to be relied on as long as they exist. *Roe v. Wade*, which was preserved by *Planned Parenthood v. Casey* because it was a venerable precedent, only would entail reliance until a few months after it was overruled, if it were.[11]

In common-law cases, reliance is lower. In statutory cases, reliance might be higher. In some states, the legislature may be more active

10. *See, e.g.*, Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).

11. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

and may follow judicial precedents more closely. But reliance is a circular matter. The more people rely on decisions, the less likely you are to overturn them, which makes people more likely to rely on them. If many decisions are overturned, then the opposite is true.

So, when should courts overturn precedent? Not just when a decision is wrong, and not just when it is *really* wrong. The new opinion needs to be right, but the institutional and structural role that the court is playing by changing the law needs to be right, too. Despite the fact that the reality of *stare decisis* is that courts overturn precedents when they want to, it might not do us much good to have them say so. To have a strong doctrine of *stare decisis* that is not always honored would probably result in more stability than admitting that *stare decisis* is not the strong doctrine we think it is.

In sum, courts should overturn themselves less often than they want to. And judges should carefully consider their roles as judges rather than legislatures.