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## A DEFENSE OF STARE DECISIS

By HERBERT C. KAUFMAN\*

The term "Stare Decisis" means to adhere to precedent and not to unsettle things that are settled. It is supposed to embody a rule of common sense, to wit: Rules of Conduct should be settled so society will know how to conduct itself in the future. Laws are nothing but rules of conduct binding on the members of society as such. With this in mind, is the rule of stare decisis a good or bad rule? Is it sometimes good and sometimes bad? To answer these questions we must look into the history of the rule and then apply the rule of common sense.

By the doctrine of stare decisis, the common law gives authority and weight to judicial decisions upon a given issue of law; judicial decisions become authoritative sources of the rules of law by which the legal rights and obligations arising from a particular mode of conduct are determined.

Stare decisis in England has real meaning. The House of Lords has taken the position that once it has decided a point of law, that decision is conclusive, not only on all inferior tribunals, but binding on itself. Blackstone declares:<sup>1</sup>

Precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted without due consideration.

Is it not presumptuous of the members of a high court to refuse to follow the rule of stare decisis and thus be at the mercy of latter day members of the same court who again refuse to follow the rule and overrule the last decision of their own court?

For Mr. Justice McReynolds of the United States Supreme Court, the common law was a protector of society because it was certain, and precedent was not to be overruled. His dissenting opinion in the Gold Clause Cases does not include some extemporaneous remarks: "The Constitution, as we have known it, is gone. It seems impossible to overestimate the result of what has been done here today. The guarantees to which men and women heretofore have looked to protect their interests have been swept away."

If a layman had spread in front of him at one time all the decisions of the Supreme Court since *Marbury v. Madison*, he would not only lose his respect and reverence for the Court, but would be convinced that his wel-

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<sup>1</sup> 1 BLACKSTONE, COMMENTARIES \*70.

fare and liberty were ultimately at the mercy of a self-conceived super-legislature instead of a court of law. In the words of Mr. Justice Cardozo, what is more important to remember is that stare decisis is the "every-day working rule of our law."

Decisions on constitutional questions should be dealt with in the same manner as any other decision under stare decisis. The rule being designed to prevent uncertainty and inconvenience, constitutional constructions can hardly be changed without terrific hardship and disadvantage to the public. The Supreme Court has, in fact, adopted stare decisis in constitutional cases, but the problem is to what extent the Court will follow the rule and refuse to be wiser and more learned than the Court in the past with different members. Mr. Justice Roberts felt that the tendency of the Supreme Court to overrule its former decisions

... [I]ndicates an intolerance for what those who have composed this court in the past conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom resides in us which was denied to our predecessors.

The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.<sup>2</sup>

The rule of stare decisis rests on an obvious sense of justice as well as convenience. Law to be obeyed or followed, must be known; to be known it must be fixed; to be fixed, what is decided today must be followed tomorrow, and that is all stare decisis means.

Lawyers, in advising their clients and trying to practice law intelligently, use their talents to looking up precedents. The lawyer seeks a safe harbour where his client can be safely anchored. Every lawyer yearns for security in an age of doubt and confusion. Thus, the lawyer clings with all his heart to the rule of stare decisis—without the rule he is lost. He cannot practice law for he cannot advise his clients. He knows that there can never be equal justice under law if a rule is applied in the morning but not in the afternoon. Stare decisis serves to take the capricious element out of law and give stability to our society.

If the Constitution, as interpreted by the Supreme Court, is the supreme law of the land, by what right does the Court reinterpret the supreme law of the land. What limitation, if any, is there on the Court to prevent frequent interpretations of the same question, and how are men to know what the supreme law of the land is and how long it will remain the supreme law of the land?

<sup>2</sup> Dissenting in *Smith v. Allwright*, 321 U.S. 649, 666, 669 (1944). The overruled case to which he refers was *Grove v. Townsend*, 295 U.S. 45 (1935).

Much unrest exists in our society because our state appellate courts as well as the United States Supreme Court refuse to pay more than lip service to the time-honored rule of stare decisis. Where will this lead? A breakdown in law and order will result, for men no longer can respect courts that cannot make up their minds. It seems that our courts are following a trend that ignores the rule of stare decisis. Each case is decided the way the particular court thinks it should be decided with little or no regard for precedent. In fact, precedent only tends to embarrass some courts, for they are put to the task of explaining it away. Law is supposed to be a rule of reason binding on the members of the community as such. It is true, when the reason for the rule changes, so should the rule. But when reason and logic have not changed and expediency is the only reason to change a rule, courts should stay with precedent.

The judge is one of the basic cornerstones of the process of justice. In deciding a case, to quote Justice Cardozo, he

[S]hould draw his inspiration from consecrated principles; he is not to yield to spasmodic sentiment, to vague and unregulated benevolence, but must exercise a discretion tempered by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life.

Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which these conceptions had their origin, and which, by a process of interaction, they have modified in turn.

Logic and history, custom and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely on the comparative importance of the social interests that will be thereby promoted or impaired.

Of course, there is sound reason for applying the rule of stare decisis strictly in cases involving property rights, contracts, torts, probate and wills. Society, in cases such as these, has a right to know what the law is, that the law is fixed and will not be overturned or reversed by a court that is second guessing. The advantages to society as a whole can be met only by a wholesome respect for the doctrine of stare decisis.

In the field of constitutional law, Washington said in his farewell address:<sup>3</sup>

If in the opinion of the People the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the in-

<sup>3</sup> 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *Farewell address of President George Washington*, 1796 213, 220 (1896).

strument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use itself can at any time yield.

Jefferson wrote: "There is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court."

Disrespect for precedent turns our government into one of men instead of a government of laws. Government of men will kill our American way of life as we know it. We must fight to retain a government of laws so that the State will ever be the servant, not the master. Our Supreme Court must not amend our Constitution by judicial decision. Furthermore, a decision by the Supreme Court interpreting a provision of the Constitution is integrated into and becomes part of the Constitution itself, and any different interpretation thereafter placed upon it must, to be valid, be by amendment in the manner provided in the Constitution.

The biggest issue confronting the American people today is rarely mentioned. The issue is whether the people shall be governed by a written Constitution which is subject to change only by their will or whether that Constitution shall be rewritten by Supreme Court justices to suit their personal or ideological whims. This is the same issue which caused a stir in 1937 when the late President Franklin D. Roosevelt declared that Congress should enact a law which would have the effect of increasing the number of justices by six so he could appoint new judges who would conform to his views. Congress rejected the proposal, but Mr. Roosevelt was able a few months later to "pack" the Court anyhow through the vacancies that occurred. Many of the professors and deans of the law schools, and certainly many of the "self-styled liberals" of those days felt then, and many still feel, that the Supreme Court should change the Constitution at will.

A notable exception is Alfred J. Schweppe of Seattle, former dean of the law school of the University of Washington, and at present one of the editors of the American Bar Association Journal. He writes in a recent issue of *U.S. News & World Report*:<sup>4</sup>

I absolutely reject the idea that the Supreme Court has the power to rewrite the Constitution according to its concepts of sociological or economic change. That is what the amendatory process is for. I do not accept Justice Douglas' blunt view that the amendatory process is "too slow" as anything but a violation of the oath to support the Constitution in all of its parts.

The reference was to a speech by Justice Douglas in 1949 in which he said: "It must be remembered that the process of constitutional amendment is

<sup>4</sup> *Pro and Con in Growing Debate over Powers of Supreme Court*, U.S. News & World Report, October 24, 1958, pp. 110-13.

a long and slow one." This was precisely FDR's argument in the "Court packing" fight.

It is not improper to criticize the decisions of the Supreme Court. Its justices have often conceded this point themselves. Last August 23rd the chief justices of 36 states approved a report which said:<sup>5</sup>

We are not alone in our view that the [Supreme] Court, in many cases arising under the Fourteenth Amendment, has assumed what seems to us primary legislative powers . . . We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

By a 36-8 vote, the state chief justices adopted this unprecedented report. The committee of justices, headed by Maryland's Chief Judge Frederick W. Brune, had worked for a year on this report. Said Brune:<sup>6</sup>

It has long been an American boast that we have a Government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. . . . Frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court [on] what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. . . . It is our earnest hope . . . that the great court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers.

When the Court has once interpreted a provision of the Constitution, it has exhausted its jurisdiction under our constitutional system. If this be not true, then we have a government of men, and the Constitution itself will be a hollow shell to be changed as often as the members of the Court desire to change it. If a provision of the Constitution, as interpreted by the Supreme Court, be thought to be wrong and in the public welfare, let the Constitution be changed by amendment as provided in the document itself. Many think this process of amendment is too cumbersome, but our founding fathers wanted just this form of amendment to take care of the impatient members of our society and to give time for mature consideration by all of our people. The founding fathers never dreamed of amendment by judicial fiat, thinking that the Constitutional clause providing for amendment was too clear to admit of a Court amending the Constitution by judicial legislation.

<sup>5</sup> *What 36 State Chief Justices Said About the Supreme Court, U.S. News & World Report*, Oct. 3, 1958, pp. 92, 102.

<sup>6</sup> *Ibid.*

Judges, being human, are tempted to legislate judicially; they must be restrained by our supreme and appellate courts and these courts in turn may only be restrained by their own good sense or by appropriate statutory or constitutional legislation.

The rule of stare decisis carries out Lord Coke's belief that "the known certainties of the law is the saftie of all," and the welfare of organized society is served best by close adherence to this conception. The ancient custom of following precedents helps us to hold fast to our basic principles of justice and equity, to establish knowable rules of conduct, to administer even-handed justice, and to maintain a uniformly consistent development of our legal system. How then to have our courts adhere to the rule of stare decisis? The problem must be solved to a great extent through education. We must start in our law schools. Young lawyers must be given more instruction in the history and background of stare decisis; the reasons for its use and the benefits to society. For all of our judges come from our schools of law and what they learn and respect in law school is later set forth in their decisions. A short but comprehensive course on the doctrine of stare decisis would be in order for our schools of law to teach. The law school can well teach its law students that traditionally the function of the judiciary is not the making of law but the ascertainment and application of existing law to the facts of the case at hand. Its function is not to change the law as its wisdom may direct, but to enforce the law as it exists.

Law, as we know it, has its basic roots in the customs and beliefs of the people. It is not the product of human will but is a reflection of the common conviction. Law must have stability and certainty. Any growth of the law must be ordered growth, legislative in character not judicial legislation. The legislature, acting for the people and directly responsive to the will of the people, is the logical and traditional agency through which error in announced law may be corrected or such law revised in accordance with public sentiment. The courts, with little or no public control over their determinations as to what is best for public welfare, are not designed for the democratic accomplishment of change—quite to the contra, the courts are the guardians of order, the protectors against disregard of the established rule of conduct. Public confidence in, and acceptance of, the judicial system demands careful attention to this judicial responsibility.

When does the doctrine of stare decisis not apply? Blackstone in his commentaries said:<sup>7</sup>

For it is an established rule to abide by former precedents, when the same points come again in litigation: . . . because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps

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<sup>7</sup> 1 BLACKSTONE, COMMENTARIES \*69-70.

indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: . . . Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to divine Law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.

Thus, it can be seen that the exception to the rule is strictly limited and should be so limited because of the temptation on the part of judges to ascribe to themselves a superior knowledge or wisdom over their predecessors on the bench. Judges, being human, will chafe and be unhappy over the discipline of stare decisis. This, however, is a just and proper discipline because, as has been heretofore pointed out, chaos would result if the rule is not followed. Our modern type of civilization demands that this salutary rule govern the conduct of our courts.

It is sad to think that in these times stare decisis needs a defense. The rule has been disregarded more in the past 25 years than in all the rest of recorded legal history. The tragedy is that this means we have rule of men rather than rule by law. It means a breakdown of government when judges can disregard precedent and declare law according to their sentiment and whim.

In conclusion, this article is a small, feeble voice crying in the judicial wilderness, trying to assist our courts from becoming lost in the jungle of the law.

Those things which have been so often adjudged ought to rest in peace.