> [Stare decisis] is a maxim among ... lawyers, that whatever has been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.
> — Jonathan Swift, *Gulliver's Travels*.

How *stare decisis* Subverts the Law

Jon Roland
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One of the most important doctrines in Western law is that of *stare decisis*, a Latin term of art which means "to stand by decided cases; to uphold precedents; to maintain former adjudications".[1] In modern jurisprudence, however, it has come to take on a life of its own, with all precedents being presumed to be well-founded, unbiased legal decisions, rather than political decisions, and presumed to have both the authority of the constitutional enactments on which they are based, plus that of the precedents on which they are based, so that later precedents are presumed to be more authoritative than earlier ones.

The doctrine also tends to give great weight to the opinion in the case, even to the point of treating the opinion as though it was law, even though only the order and findings have the actual force of law, and only in that case, and an explanation of how the decision was reached is only *dictum*, or commentary. This means that a poorly-worded opinion can define a set of legal positions that exceed the bounds of the underlying constitutional enactments, and become the basis for future precedents, as though they were constitutional enactments themselves. The problem is exacerbated by the failure of judges to clearly delineate the boundaries between edict and dictum.

The doctrine tends to disfavor legal argument that precedents were wrongly decided, especially if they are precedents established at a higher level in the appeals hierarchy, and to demand the litigants "distinguish" their cases from adverse precedents, arguing that those precedents do not apply to the present case because of elements that make it different from the cases on which the precedents were established. This can be very difficult to do if there are a great many recent cases on the same issues which cover most of the possibilities.

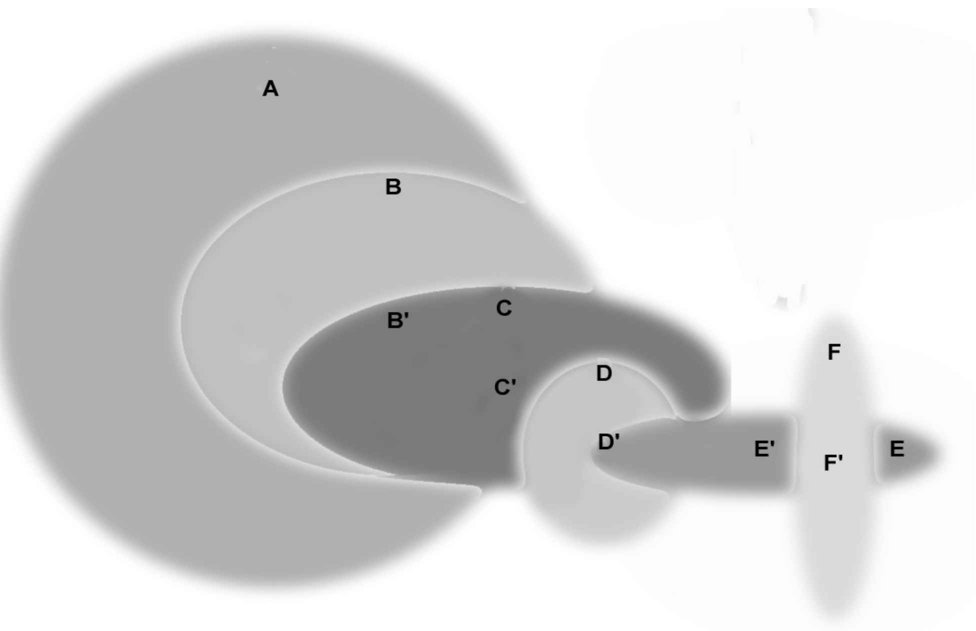
The situation can be made more difficult by the rules of most courts which limit the length of briefs the litigants may file. In working backward through a long line of wrongful precedents, a litigant can reach the length limit before the argument can make it back to the foundations where the chain of precedents began to drift away from its authority in the constitutional enactments.

The situation can be illustrated by the Venn diagram in Figure 1, in which the first set A represents the set of legal positions consistent with the Constitution, and the points outside the circle represent unconstitutional positions. It is noted that the boundary of the set is fuzzy, representing the ambiguity of interpretation at the boundary. The central point B' represents a court decision whose opinion defines a set of legal positions consistent with it, shown by the elliptical set with the letter B at the top, but a portion of that set extends beyond the bounds of A. The opinion in the next decision C' also falls within A and defines yet another region C of consistent positions, but which extends beyond both A and B. Decision D' falls within C, but not A or B, and further defines a consistency set that extends beyond A, B, and C. The Decision E' doesn't lie within any of the regions defined by the

previous precedents, but its region of consistency overlaps D and barely C, the kind of situation that might result from a legal argument that reaches to get a political decision not based on precedent. Finally, the last decision F' is based on E defines consistency set F but lies entirely outside A, B, C, and D.

The problem for jurisprudence, especially constitutional jurisprudence, is how to get back within A when one's opponent's position is supported by F and one cannot distinguish precedents taking the argument back to A within the brief page limits. It may be almost impossible unless or until one can get the case to the Supreme Court, which can ignore and reverse its own precedents, but which can take only about 75 cases a year, and is reluctant to issue sweeping opinions that can cover a large number of cases that might otherwise deserve to be granted certiorari, but which will never make it because the litigants are discouraged from making fundamental arguments that might work with the Supreme Court but which would be disfavored by lower courts.

Figure 1



It is difficult to estimate how many unconstitutional legislative provisions are adopted each year by Congress, but a plausible number is more than 20,000, or about as many as the number of bills introduced each year. There is simply no way that the federal courts can handle all the cases that might arise under that many provisions. They are almost forced to rely on the presumption of constitutionality of statutes, but members of Congress are increasingly reluctant to restrain themselves from adopting legislation they know to be unconstitutional, but which is supported by some of their constituents, and passing the duty to the federal courts of striking legislation that should never have been passed in the first place.

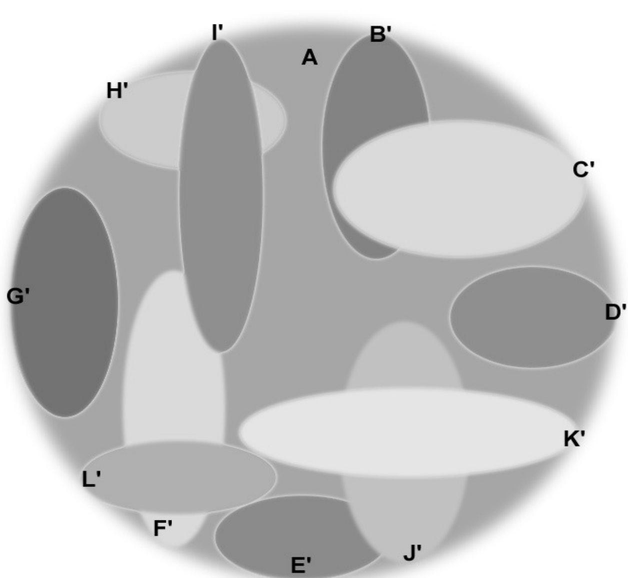
The way *stare decisis* is supposed to be used is indicated by the definition of it in Bouvier's *Law Dictionary* of 1856, which is closer to original practice and intent:

> *Stare decisis*. To abide or adhere to decided cases.
> 2. It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The doctrine of stare decisis is not always to be relied upon, for the courts find it necessary to overrule cases which have been hastily decided, or contrary

> to principle. Many hundreds of such overruled cases may be found in the American and English books of reports. Mr. Greenleaf has made a collection of such cases, to which the reader is referred. *Vide* 1 Kent, *Com*. 477; *Livingst. Syst. of Pen. Law*, 104, 5.[2]

This indicates that the way stare decisis is supposed to be used is to define the boundaries of the constitutional enactments, as shown in Figure 2, where the decisions B' ... L' lie on the fuzzy boundaries of the region of legitimacy A and sharpen those boundaries. This is accomplished by opinions that do not define a set of consistent propositions that extend beyond A. That is, every judge is careful to anticipate all the ways the words of his opinion might be misconstrued to support decisions beyond what is authorized by the constitutional enactments, and in particular, the Constitution.

Figure 2



There would appear to be only two ways out of our present predicament: Either the people must start electing different members of Congress, and demand that they strictly comply with the Constitution, or else the courts, especially the Supreme Court, need to start issuing sweeping opinions which overturn past precedents and strike down entire blocks of legislation.

However, the drift away from constitutional legitimacy represented by Figure 1 is not just the result of incompetence or confusion. There is a faction which has tended to dominate the federal government, especially during most of the 20th century, which has deliberately sought to extend precedents beyond the bounds of original constitutional understanding. It has done this by carefully selecting cases against weak or inadequately represented defendants, appealing only those cases they are sure they will win, and framing the arguments so that the judges often don't have a choice that is constitutional, but must choose between two unconstitutional positions. Ordinarily this is supposed to be guarded against by constitutionally protective parties filing *amicus curiae* briefs to argue a strict constructionist position, but such briefs are not always filed in important cases, or are often ignored by the court.

The Supreme Court, beginning with the decision in *United States v. Lopez*, 514 U.S. 549 (1995), and continuing in 2000 with several decisions like *United States v. Morrison*, Docket 99-5 and *Jones v. United States*, Docket 99-5739, which roll back the federal criminal legislation based on the Commerce Clause, is nevertheless still unwilling to issue sweeping opinions, but prefers to rely on narrowly constructed opinions that have the effect of introducing confusion and conflict into the system of precedents, perhaps in the hopes that lower courts will seize on them to create still more conflicts, which the Supreme Court will then only have to decide among, without drawing as much controversy to themselves as they would if they issued sweeping opinions.

By treating court opinions as though they are general law, and not just law for a particular case, we become accomplices in delegating legislative powers to judicial officials, which is forbidden by Art. I Sec. 1 of the U.S. Constitution and similar clauses of state constitutions, which delegate legislative powers exclusively to the legislative branch, and allow for no delegation of legislative power to other branches.

There is a fundamental logical problem with *stare decisis* as it is currently practiced, which is that it is a logically separate system of propositions that is independent of, and potentially inconsistent with, constitutional enactments.[3] [4] One who takes an oath to uphold the written constitution is bound to ignore precedents in conflict with it, and to rest decisions strictly on propositions that are logically derived from constitutional enactments, considering precedents only where they sharpen ambiguities in the language of the written enactments. To treat precedents as superior to constitutional enactments is to introduce contradictions into the law, and in any system of logical propositions, acceptance of a single contradiction accepts all contradictions, rendering every proposition logically undecidable. Contrary to the view of some judges, the law must be logical, or it is not law.

There are two variants on the doctrine of *stare decisis*. The problem we have discussed here is with the strong form, which treats precedents as *binding*. However, there is a weaker form, which treats precedents as merely *persuasive*. In this second variant, a dissenting opinion could be more persuasive than the prevailing opinion, if the person citing it agreed with it. In this variant, precedent becomes merely a convenient way to save time and words by citing the reasoning in another case, saying "My reasoning is similar to that", and nothing more. Historically, what came to be treated as binding started as persuasive. Returning to treatment of precedents as merely persuasive would solve the problem discussed here, but history shows us that judges are prone to drift back to treating them as binding unless some corrective mechanism is instituted to prevent it. Finding such a check would then be an essential component of any lasting reform.

Stare decisis is the way judges seek the safety of the herd. We need to demand they exhibit more courage, and return to fundamental principles, resorting to *stare decisis* only when the positions lie on the fuzzy boundary of the region of legitimacy.

Notes:

1. Henry Campbell Black, *A Law Dictionary*, 2nd ed., New York: West Pub., 1910.

2. John Bouvier, *A Law Dictionary*, Revised Sixth Edition, 1856.

3. Gary Lawson, The Constitutional Case Against Precedent, 17 *Harv. J.L. & Pub. Pol'y* 23, 24 (1994).

4. Gary Lawson, Mostly Unconstitutional: The Case Against Precedent Revisited, 5 *Ave Maria L.R.* 1 (2007).

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