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The Rule of Law and the Perils of Precedent

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INTRODUCTION

In a world where circumstances never changed and where every judicial decision was unassailably correct, applying the doctrine of stare decisis would be a breeze. Fidelity to precedent and commitment to sound legal interpretation would meld into a single, coherent enterprise. That world, alas, is not the one we live in. Like so much else in law, the concept of stare decisis encompasses a series of trade-offs—and difficult ones at that. Prominent among them is the tension between allowing past decisions to remain settled and establishing a body of legal rules that is flexible enough to adapt and improve over time.[1]

Notwithstanding pervasive disagreement over the application of stare decisis to particular disputes, the doctrine is well established in American jurisprudence.[2] Indeed, the Supreme Court has gone so far as to describe stare decisis as indispensable to the rule of law.[3] But as Jeremy Waldron skillfully reminds us, justifying the doctrine requires more than platitudes.[4] Even a proposition as fundamental and seemingly intuitive as the ability of stare decisis to promote the rule of law conceals a considerable amount of analytical nuance. Professor Waldron concentrates on developing what we might think of as the rule-of-law case for precedent. Central to his project is the recognition that rule-of-law benefits arise at several distinct points along the path from initial ruling to subsequent application. The touchstone is the

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1. For some further thoughts on this tension in the realm of constitutional law, see Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109419.

2. For notable exceptions, see, for example, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMM. 289 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23 (1994).

3. *See* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987).

4. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

principle of "generality," pursuant to which individual jurists subjugate their personal beliefs to the vision of a unified court working across space and time to fashion generally applicable norms.[5]

In this Essay, I wish to build on Professor Waldron's thoughtful analysis by saying something more about the other side of stare decisis. The rule-of-law benefits of stare decisis are invariably accompanied by rule-of-law costs. In light of those costs, the ultimate question is not whether there are ways in which stare decisis promotes the rule of law. Rather, it is whether stare decisis advances the rule of law *on net*. Some departures from precedent can promote the rule of law, and some reaffirmances can impair it. Even if the rule of law were the only value that mattered, excessive fidelity to flawed precedents would be cause for concern.[6] That rule-of-law ambivalence, I will suggest, should be brought to bear in calibrating the strength of deference that judicial precedents receive.

I. THE RULE-OF-LAW CASE FOR PRECEDENT

In constructing his operating definition of the rule of law, Professor Waldron emphasizes the generality principle. Briefly stated, generality entails making legal decisions by developing and announcing general rules whose application extends beyond the case at hand. This is not simply a matter of treating like cases alike; the requirement of generality goes further, "command[ing] judges to work together to articulate, establish, and follow legal norms."[7]

To examine the mechanisms by which stare decisis fosters generality and contributes to the rule of law, Professor Waldron divides the adjudicative process into distinct layers. The bottom layer involves the "Precedent Judge," who is initially called upon to resolve a dispute. The requirement of generality compels the Precedent Judge to approach the case before her as an instantiation of a broader problem. She must resolve the case by reference to a general rule that will carry over into the future.[8] In discharging this duty, the Precedent Judge acts as if she is both deciding a concrete dispute and setting a precedent. Professor Waldron helpfully notes

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5. *Id.* at 18.

6. For purposes of this Essay, I employ the terms "precedent" and "stare decisis" interchangeably to refer to a subsequent court's practice of according deference to the court's own past decisions.

7. Waldron, *supra* note 4, at 4.

8. To the extent we might have concerns about this type of judicial mentality as venturing beyond the case or controversy presented for decision, it is worth recalling Larry Alexander's reminder that "*[a]ll* rules resolve issues not before the court." Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 25 (1989).

that the Precedent Judge's mandate of generality does not depend on any subsequent decisionmaker's actually according respect to her decision. To the contrary, the Precedent Judge's obligation is the same regardless of what the future may hold.[9] But within a system that recognizes judicial precedents as meaningful, the Precedent Judge also sets the tone for later adjudication by establishing the general norm that will serve as the guiding framework for subsequent jurists.[10]

The onward march of time inevitably brings the march of more aggrieved litigants into the courts. As it does, Professor Waldron leads us through additional layers of the rule-of-law case for stare decisis. These upper layers relate to the actions of the "Subsequent Judge," who determines how to apply past decisions to a new dispute. The norm of generality remains crucial. The Subsequent Judge must imagine herself as working alongside the Precedent Judge to decide cases according to a generally applicable rule.[11] Of course, any such rule must resolve the dispute that is pending before the Subsequent Judge by reference to a broader framework that extends across cases; after all, today's Subsequent Judge is tomorrow's Precedent Judge.[12] Yet the Subsequent Judge must also ensure that the rule she articulates pays appropriate respect to the Precedent Judge's decision. This is the second way in which stare decisis affects the rule of law: By giving precedents their due regard as embodying "genuine legal norm[s]," Subsequent Judges promote the ideal of a legal order that transcends the details of particular disputes and the proclivities of particular judges.[13] Legal rules become the products not of individuals, but of courts.

Professor Waldron also considers the rule-of-law effects of a court's decision to overturn a precedent despite its applicability. A legal system that accepts some overrulings can remain simpatico with the rule of law, he explains, so long as it meets certain conditions.[14] In particular, a baseline regard for the value of legal constancy must guide the Subsequent Judge who is contemplating a departure from precedent. Adopting that perspective will lead to the preservation of an essentially stable equilibrium notwithstanding occasional incidences of adjudicative change. Recognizing the importance of systemic stability is vital in dissuading the Subsequent Judge from overruling each and every precedent that she finds

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9. *Id.* at 20.

10. *See id.* at 12.

11. *See id.* at 21.

12. *Cf.* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573 (1987) ("Today is not only yesterday's tomorrow; it is also tomorrow's yesterday.").

13. Waldron, *supra* note 4, at 23.

14. *See id.* at 26.

unconvincing.[15] Instead, the judge will reserve her overrulings for situations in which the need for judicial correction or innovation is pronounced, and she will reasonably expect her successors on the bench to do the same.

II. The Rule-of-Law Case Against Precedent

Professor Waldron provides a valuable service by applying his characteristic rigor to the rule-of-law benefits of precedent. My modest aim is to offer some thoughts about how the relationship between precedent and the rule of law can run in the opposite direction as well. Professor Waldron himself notes this point,[16] but given the focus of his project on articulating the layers of justification for stare decisis, he understandably devotes less attention to the implications of its rule-of-law costs. It will thus be instructive to say something more about the rule-of-law case *against* precedent.

One category of potential rule-of-law costs relates to the dangers of stifling the practical effectiveness of reasoned argumentation. There is value in a citizen's power to advocate her interests before governmental bodies and to receive an explanation for defeat that is more satisfying than unadorned path-dependence.[17] That value can find itself at odds with judicial deference to precedent. This tension is mitigated to some extent by the prevailing American characterization of stare decisis as a rebuttable presumption rather than an "inexorable command."[18] Nevertheless, the prospect of overruling does not entirely eliminate the rule-of-law concerns that may arise from deference to past decisions; the litigant who seeks change must still overcome a presumption that her case is a loser.

A second category of rule-of-law costs involves a court's choice to depart from its best reading of a primary legal source in order to remain faithful to precedent. Imagine that you are a Supreme Court justice faced with a case involving the right of corporations to make independent expenditures on behalf of political candidates.[19] Your understanding of the Constitution—whether based on its original public meaning, its implementation in light of contemporary mores and policy objectives, or some other interpretive referent—indicates that corporations do, in fact, possess such a right. Yet there is clear precedent to the contrary. You might

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15. *See id.* at 28.

16. *See id.* at 7–8.

17. *Cf.* Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga. L. Rev. 1, 7–9 (2008).

18. *See, e.g.*, Payne v. Tenn. 501 U.S. 808, 828 (1991).

19. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

well conclude that the importance of leaving matters settled, as informed by the rule-of-law benefits of constancy and stability, overrides the importance of applying the Constitution in the manner you would otherwise favor.[20]

But note that your decision is not an unmitigated boon for the rule of law. By deviating from the reading of the Constitution that you view as most compelling, you compromise your solicitude for the Constitution's role in contributing to the "framework of public norms" that "provide a basis of legal accountability" for the exercise of governmental power.[21] Fidelity to judicial precedent sometimes entails the subordination of "fidelity to the Constitution."[22] This is no accident; it is inherent in the nature of constitutional stare decisis.[23] Even so, the fact remains that the principle of generality demands regard for judicial precedent and enacted law alike. Tilting the scales in favor of the former can undermine the resonance of the latter to the detriment of the rule of law.[24]

III. Responding to Rule-of-Law Ambivalence

We can now see that the relationship between stare decisis and the rule of law is not all to the good. Deferring to precedent can generate rule-of-law costs that may offset the countervailing benefits. What is to be made of the resulting tension?

In doctrinal terms, there are three possible reactions. First, the rule-of-law concerns might lead a legal system to consider jettisoning stare decisis altogether. Second, judges might attempt to work out the tension on the micro level by resolving individual cases in such a way as to promote the rule of law. And third, the rule-of-law ambivalence might operate at the macro level to influence how much deference judicial precedents receive. I discuss each option in turn before suggesting that the third holds the most promise.

A. *Jettisoning Stare Decisis*

The most severe response would be to treat rule-of-law concerns as undermining the very foundations of stare decisis. That approach strikes me

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20. Not everyone will agree with this claim, especially those who view judicial precedents as constitutive of the Constitution. For present purposes, I will merely note that I am not entirely convinced by that position.

21. Waldron, *supra* note 4, at 3.

22. *Id.* at 7.

23. *Id.* at 7.

24. One might attempt to circumvent this problem by contending that the Constitution commands a particular level of respect for precedent. For now, I will simply note that such an argument is far from obvious (to me, at least).

as an overreaction, in large part because it would sacrifice the potential rule-of-law benefits that Professor Waldron so effectively describes. Nor is the abolition of stare decisis a realistic alternative as a practical matter, at least in the foreseeable future. Despite its tendency to come under fire in particular cases and to generate disputes about its proper application, the abstract notion of stare decisis continues to command significant allegiance among most judges and scholars.

B. *Case-by-Case Assessments of the Rule of Law*

Rather than abandoning stare decisis, courts might respond to its rule-of-law ambivalence at the level of individual cases. The decision of whether to defer to precedent would depend on the rule-of-law implications of deference in the case at hand.

A prominent example of this type of analysis comes from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[25] in which the Supreme Court reaffirmed the core holding of *Roe v. Wade*[26] despite equivocation about *Roe*'s soundness as an initial matter. The *Casey* Court was overtly interested in maintaining its institutional legitimacy, which it described as intertwined with a robust rule of law. According to the Court, overruling *Roe* would have been perceived as acceding to the demands of citizens who urged the decision's reversal. That perception, in turn, would have exacted a serious cost on both "the Court's legitimacy, and . . . the Nation's commitment to the rule of law."[27]

The problem with the Court's reasoning is that it is by no means clear that the rule of law is best promoted by the perpetuation of arguable error on an issue of considerable magnitude, especially when the professed reasons for perpetuating the error include the enhancement of the judiciary's public standing. Why didn't the countervailing rule-of-law costs match, or even exceed, the rule-of-law benefits of deference? The *Casey* Court provided no satisfying answer. Moreover, if part of the value of the rule of law comes from serving as a source of genuine constraint for governmental actors, it seems curious to allow those actors to invoke the rule of law to justify protecting their own institutional prerogatives. At the very least, the rule-of-law effects would require more explication before they could be accepted as positive on net. Whether or not there were plausible reasons to retain *Roe* on other grounds, *Casey*'s undertheorized invocation of the rule of law was unpersuasive.

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25. 505 U.S. 833 (1992).
26. 410 U.S. 113 (1973).
27. *Casey*, 505 U.S. at 869.

Judges also make individualized inquiries into the rule-of-law effects of stare decisis where one line of precedent stands in tension with another. In such cases, the Subsequent Judge might declare that abandoning the "errant precedent" is the outcome best aligned with enhancing jurisprudential coherence and promoting the rule of law.[28] Yet even where a prior judge offers a less-than-compelling basis for distinguishing a precedent, her decision still becomes part of the general rule that all future judges on her court are jointly charged with respecting and applying. When a Subsequent Judge confronts the body of relevant precedents in a future case, she must accord respect not only to the original precedent, but also to its intervening applications. If the Subsequent Judge chooses to renounce certain precedents because she views them as unfaithful to others, her action has both costs and benefits for the rule of law. To be sure, her decision may promote the rule of law in some measure by enhancing jurisprudential coherence and bringing the governing legal norm into closer proximity with the general principle that the original precedent embodied. But fidelity to the original precedent comes at the expense of fidelity to the intervening applications, and it is profoundly difficult to discern whether the rule-of-law benefits of the former outweigh the rule-of-law costs of the latter.

The more basic point is simply to illustrate the challenges of making on-the-fly determinations about whether deference to precedent supports the rule of law in a given case. The rule of law is a valuable principle for organizing the operation of a legal system, and it can certainly take some options—for instance, resolving a dispute based on personal affinity or political preference—off the table in individual cases. But it is an awkward tool for determining when to stand by a particular precedent and when to depart.

C. *Calibrating the Strength of Deference*

How, then, should the doctrine of stare decisis account for the fact that adherence to precedent can both promote and impair the rule of law? I suggest a systemic answer, one that goes to heart of the doctrine's design. The interplay between precedent and the rule of law can be channeled into the central inquiry of how *strong* a presumption of deference precedent should receive—or, to use the parlance of the Supreme Court, how "special" a justification is necessary to warrant a break from the past.[29] It is there, in determining how powerful the practice of precedent-following ought to be,

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28. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

29. *See, e.g.*, *id.* at 377 (Roberts, C.J., concurring) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

that the complicated relationship between stare decisis and the rule of law can make a doctrinal difference.

In any judicial system that treats precedents as deserving of deference but ultimately defeasible, there arises a question as to how much overruling is optimal. A variety of goals may inform the answer to that question. They include avoidance of disruption, consistency of outcomes, and efficiency of judicial decisionmaking. And, of course, they include promotion of the rule of law. The ambivalent relationship between precedent and the rule of law suggests that, to the extent the doctrine of stare decisis is justified by the rule of law as opposed to other values, the presumption of deference ought to be meaningful but measured. Meaningful deference is necessary to ensure that Subsequent Judges respect their predecessors' decisions as bona fide components of the legal order. Likewise, meaningful deference provides a safeguard against excessive overrulings, which otherwise might undermine stakeholders' abilities to understand and assimilate legal principles.

At the same time, maintaining the realistic possibility that erroneous decisions will be overruled preserves a role for reasoned argumentation by citizens who seek to alter the path of the law. It also provides a mechanism for correction when prior judicial pronouncements veer away from the best reading of the primary authorities that judges are charged with interpreting. Attentiveness to the rule of law can support the retention of some flawed precedents on grounds of stare decisis. But it cannot support a presumption that is so powerful as to foreclose occasional adoption of new interpretations that furnish a better framework for the adjudication of future disputes.

All of this brings us back to the basic point that it is inaccurate to depict every departure from precedent as a dent in the rule of law. A system of precedent formulated with the rule of law in mind will contemplate a certain amount of overruling. This is not only because other benefits can accompany the overruling of precedent. That is surely true, just as it is true that overruling precedent can create other costs—such as the disruption of plans and understandings—that might militate in favor of deference to past decisions. But even if the rule of law were the only value that mattered, it would not justify excessive fidelity to flawed precedents.

CONCLUSION

Jeremy Waldron's discourse on stare decisis and the rule of law is sure to become a standard entry in the field, influencing our understanding of the core justifications for precedent-based adjudication. I have tried to show that from Professor Waldron's analysis of the rule-of-law benefits of stare decisis, it is but a short step to recognize the ramifications of the rule-of-law case against precedent. The complexity that characterizes the relationship between precedent and the rule of law does not support abandoning stare

decisis altogether. But it does suggest that the doctrine's rule-of-law costs must be considered alongside its rule-of-law benefits in striking the appropriate balance between past, present, and future.