Why Constitutional Protection of Property Becomes Less Certain Over Time

Alan Lockard
George Mason University

The promise of *stare decisis*

This paper examines the demise of *Stare Decisis* over time. It presents an economic explanation as to why the incentives to adhere to precedent decay over time. It uses the Supreme Court=s taking jurisprudence as an illustrative example. Since the Fifth Amendment=s taking clause protects against the seizure of property without just compensation, the demise of *stare decisis* in takings jurisprudence necessarily makes property rights less secure in the United States. The specific changes here appear consistent with more respect for property rights, but I will argue that the force that drives the change is not a permanent increase in respect for property rights. It is a predictable breakdown in *stare decisis* (respect for legal precedent). The pro-property rights precedents being created now will prove to be at least as fragile as the anti-property rights ones being overturned.

The principle of *stare decisis* is that the court should adhere to the precedents established by previous decisions in its interpretation of the law. As disputes spontaneously arise within a society, they are resolved under the direction of a judge, and that decision enters the body of the law. The principle of *stare decisis* prescribes a program of continual, incremental refinement of the law. Issues, once settled, remain settled.

Human production in a complex, exchange-based economy is highly dependent on the ability of persons to make reliable plans for the future. Prosperity requires specialization, which, in turn, requires coordination. That degree of social cooperation is impossible unless persons can make reliable plans for the future. Investment, especially, is highly problematic where legal rights are unsettled. The binding quality of legal precedents allows rational agents to know what they can claim title to, and how those titles can be exchanged through

binding contracts. Settled law allows agents to apply their resources to productive enterprises, rather than directing them to defending the possession of currently held property. Adherence to *stare decisis* thus contributes to maximizing of the production of wealth.

Each new precedent should shrink the realm of uncertainty. The rough form created by the Constitution is gradually brought into sharp relief. In the process, the principle of *stare decisis* functions much like lighting candles in a darkened room. Each new precedent further illuminates the law. Once an aspect is raised from obscurity, it remains visible to all. Citizens living under the rule of law are able to make plans about the future with increasing confidence. Their ability to apply their own resources and intelligence in pursuit of their own objectives is enhanced, as are, consequently, liberty and prosperity.

Nowhere is the predictability of the law more critical than in regard to the power of the state to seize or regulate the property of its citizens. Through its monopolization of the legal application of coercion and force, the state has the means to take anything from anyone, or to require anything to be used in any manner specified. When considering takings jurisprudence, it is important to remember that everything—literally all property of any kind, physical or intellectual—is at stake.

If the principle of *stare decisis* does not hold, uncertainty reigns. What appeared to be settled law one day may be reversed the next. Property rights are not secure. Resources that could be directed productively are, instead, applied defensively. Since persons cannot be sure that they will retain the fruits of their labor, their incentive to produce, especially through entrepreneurial risk, is greatly reduced.

The Supreme Court=s takings decisions, in particular, have exhibited an incoherence, completely incompatible with the notion of binding precedence (Rose-Ackerman, 1992; Peterson, 1989, pp. 1305-1355). Liberty, prosperity and justice are all at risk if the law is becoming increasingly uncertain. I argue that *stare decisis* is indeed breaking down, as a result of the manner in which the incentives change for Supreme Court Justices to adhere to *stare decisis,* as the law becomes more thoroughly developed.

The demise of *stare decisis* in takings jurisprudence

The takings clause of the Fifth Amendment states, Anor shall private property be taken for public use without just compensation.@[1] Reasonable questions of interpretation can be raised in the application of this constitutional constraint. For the better part of the nation=s history, the Supreme Court applied the principle of *stare decisis* in a consistent manner. The cumulative effect of the Court=s taking jurisprudence was to clarify the meaning of the law, reducing uncertainty, and facilitating an understanding of to what degree the property of the populace was at risk. Thus the issue of whether the Fifth Amendment=s restrictions on the exercise of the power of eminent domain were applicable to the states was settled in Barron v. Baltimore.[2] They were not. The court ruled that the Bill of Rights was a restriction of federal, and not state power.[3] The question of whether or not property could be taken for public use, even if to do so would impair the obligation of an existing contract, was addressed in The West River Bridge Co. v. Dix.[4] The contract clause[5] of the Constitution not withstanding, the Court ruled that, AAll property is held by tenure from the State, and all contracts are made subject to the right of eminent domain.@[6] The definition of Ataking@ was refined in Pumpelly v. Green Bay Company[7] to include the complete destruction of the value of property, in this instance by flooding, even if the title remains with the original owner. The proper definition of Ajust compensation@ was addressed in Monongahela v. U.S.[8] The case arose when the United States took, by condemnation, a lock and dam owned by the Monongahela Navigation Company. The Court ruled that justice required the compensation to be the full value, to the original owner, of the property taken.

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[1]U.S. Constitution, Amendment V.

[2]Barron V. Mayor & City Council of Baltimore, 32 U.S. 243 (1833).

[3]Those restrictions would be extended to the states through the ratification of the Fourteenth Amendment, in 1868.

[4]The West River Bridge Co. v. Dix et al., 47 U.S. 507 (1848).

[5]Article I, Section 10 of the U.S. Constitution states that ANo State shall ... pass any ... Law impairing the Obligation of Contracts.@

[6]Ibid.

[7]Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).

[8]Monongahela Nav. Co. v. U.S., 148 U.S. 312 (1893).

The boundaries between compensable takings and noncompensable exercises of police power were explored and illuminated in a series of cases. In Mugler v. Kansas,[9] the Court ruled that the destruction of a brewery, following the passage of state legislation prohibiting the manufacture or sale of alcoholic beverages, was an exercise of police power, and not compensable under the takings clause. Similarly, in Hadacheck v. Sebastion,[10] the Court ruled that Hadacheck was not entitled to compensation after Mr. Hadacheck=s profitable brick making operation, originally outside of city limits, was forced to close after the city of Los Angeles eventually enveloped it. The Court ruled in Welch v. Swasey[11] that discriminatory restrictions on the heights of buildings were an exercise of police power, and thus could not be considered as a compensable taking. Although these rulings are not as protective of property rights as some might hope, they are consistent, and serve to put property owners and entrepreneurs on notice regarding the risks of losses from regulation. Even if a different direction in the manner in which precedent was established would have been preferable, there is wisdom in Justice Brandeis observation in the issue, A*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.@[12]

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[9]Mugler v. Kansas, 123 U.S. 623 (1887).
[10]Hadacheck v. Sebastion, 239 U.S. 394 (1815).
[11]Welch v. Swasey, 214 U.S. 91 (1909).
[12]Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932).

For nearly 200 years, the Supreme Court=s taking jurisprudence developed in a coherent manner. Then, beginning in the 1980s, adherence to stare decisis broke down. The process is documented in the dissenting opinions of relevant cases. In First Lutheran Church v. Los Angeles County,[13] the Court ruled that an ordinance prohibiting all beneficial use of a piece of property was, in fact, a taking. It went even further, and ruled that overturning such ordinances was not enough. It would be necessary to compensate property owners for the time during which the use of the property was restricted, that is, for the temporary taking. This line of reasoning did not sit well with the minority Justices. In their dissenting opinion, they note the adverse effects of uncertainty in the law. Justice Stevens writes;

> (T)he loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.[14]

In Lucas v. South Carolina Coastal Council,[15] the Court ruled that the legislation barring Lucas from erecting any permanent residences on his beachfront property deprived him of all economically viable use of his property, and thus constituted a compensable taking. This drew two separate dissenting opinions, both of which complained bitterly about a lack of respect for established precedents. Justice Blackmun=s dissent began, AToday the Court launches a missile to kill a mouse,@ and went on from there;

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[13]First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).
[14]Ibid.
[15]Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow caseY[16]

Justice Stevens had a similar complaint;

Today the Court restricts one judge-made rule and expands another. In my opinion, it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of Aregulatory takings...@

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.[17]

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[16]Ibid.
[17]Ibid.

The change in the Supreme Court=s taking jurisprudence that drew such bitter dissent was, in fact, towards a direction of more powerful protection of private property rights. There is, however, no reason to expect that these new decisions will prove any more binding than the previous precedents that were abandoned. The permanent abandonment of *stare decisis* is of more import than the temporary shift towards more secure rights. The demise of binding precedent renders property rights protections inherently uncertain. That demise, however, is completely predictable.

The role of incentives in the demise of *stare decisis*

Whenever there is a pattern apparent in the behavior of human beings it is reasonable to assume that a system of incentives is at play. In attempting to understand the evolution of the Supreme Court=s taking jurisprudence, and the demise of *stare decisis*, one needs to consider the incentives of those involved. It is important to note that the society as a whole has a strong interest in the preservation of *stare decisis*. As discussed above, adherence to precedent promotes clear and unambiguous laws. A stable and well understood legal system allows the members of society to make plans with confidence, and maximize the return on their productive efforts.

Those most responsible for the fate of *stare decisis* are neither litigants nor their attorneys, but the Justices themselves. Neo-classical economic theory suggests that human behavior can be understood in terms of constrained maximization. This leads to the question of what it is in the utility functions of Supreme Court Justices that is being maximized. My argument is that the demise of *stare decisis* over time does not require the existence of a common utility function for Justices. I make no assumptions regarding what is included in their utility functions. They could prefer that the Constitutional promise of a national government with only a few enumerated powers be realized; that society enjoy all the benefits that social engineering at the national level can bestow; or to award discriminatory benefits to favored groups. Even if each Justice has a unique utility function, and those functions remain completely unknown to outside observers, if it is possible for Justices to pursue any self interest whatsoever through their effect on the development of the law, we should expect

adherence to *stare decisis* to decline as the set of Supreme Court decisions increases.[18]

The assumptions of my model are as follows:

- Justices benefit from enacting their preferences into law B by establishing legal precedent.
- The benefit Justices realize is a function of the durability of the precedent. The longer the precedent binds, the greater the benefit.
- The opportunity for establishing new precedents, without overturning existing precedents, decreases as the body of law becomes more developed.
- Justices, participating in a majority decision, can create a new precedent by overturning an existing precedent.
- The overturning of a precedent reduces the benefit of establishing precedents because it reduces the expected durability of precedents. It does so by undermining the norm of respecting precedence (see above).

[18]Miceli and Cosgel (1994) develop a model wherein reputation is a major element in the utility function judges are maximizing. Reputation is optimized when a judge=s decisions are not overturnedCthat is, they attempt to optimize the degree to which the precedents they create are respected. My argument is distinguished from theirs by incorporating the effects of the volume of precedentCthe degree to which the relevant area of law is already developed.

There is an implied paradox in precedent establishing behavior with regard to *stare decisis*. Each time a Justice writes an opinion, refining some formerly unsettled aspect of the law, his chances of achieving a degree of legal immortality are enhanced by strict adherence *stare decisis*. His decision will stand, and if his words resonant with his current and future peers, he is apt to be cited each time, thereafter, the issue arises. But, if *stare decisis* is adhered to, the unsettled regions of the law are systematically eliminated. As the law becomes more refined, the opportunities for individual Justices to make bold impressions on the law recede. The optimal situation for each Justice, in this regard, is for themselves to not be bound by precedent, only their successors.[19] That, however, is an unlikely judicial norm. Either precedence is respected generally, or it is not. Whenever a judge overturns a precedent, he signals that precedents generally, including his own, are not necessarily binding. When few precedents have been established, and there is much unsettled law to be resolved, it is highly advantageous for Justices to have all precedents respected. As the law becomes more settled, the benefit to practicing Justices of adhering to precedent declines. We can define a parameter p, such that a value of p equal to zero indicates that the applicable area of the law is wide open for judicial interpretation. This is the condition that would exist on the first day of a new common law system - no precedents have been established. A value of p equal to 1 represents a perfectly developed body of law - existing precedents can handle any eventuality. There can be no new precedent established without overturning a pre-existing one. Obviously neither of those idealized conditions is ever realized in actuality. As a practical matter, p would always take on some

[19]The situation can be cast in the form of a Prisoner=s Dilemma. Justices benefit from having other Justices cooperate by respecting precedent. They enhance their own outcome by defecting, through overturning previous precedent to establish their own. I am indebted to an anonymous referee for this observation. For the analogy to hold with my model, however, it is essential to recognize that the payoff to defection is increasing over time as the law becomes more settled. For Justices serving once the law is well settled, the outcome of mutual cooperation (respect for precedent) may not be Pareto superior to mutual defection (overturning precedent) as it would be in a classic Prisoner=s dilemma.

intermediate value. Furthermore, there is really no means to calculate p with any accuracy. It seems reasonable, though, that as a body of law develops, p would move in the direction from 0 to 1. For the

effect I describe to hold, all that is necessary is that the benefits of respecting precedents $R(p)$ and those of overturning precedents $O(p)$ both be functions of the degree of development of the law, p, such that $R= < 0$ and $O= > 0$, and at some point in time, those functions cross, that is, $O(p)$ becomes larger than $R(p)$. When that occurs, we should see Justices begin to overturn settled law.

If Justices do, in fact, seek to optimize their precedent setting behavior, we should see more respect for *stare decisis* in the earlier opinions. When the law is new, opportunities to make one=s mark are plentiful. One has little to gain and much to lose by signaling that precedents will not necessarily be adhered to. As the body of established law increases, it becomes increasingly difficult for Justices to establish their own precedents without overturning someone else=s. Even though they realize a cost by undermining the respect of all precedents, including their own, that cost is diffused across Justices generally. The benefit of getting a precedent they have authored on the books, however, is exclusively their own. As the law becomes more settled, deciding cases becomes more a matter of applying previous opinions. Justices are constantly reminded of the greatness of their antecedents, but, through no fault of their own, the opportunity for their own greatness to be revealed does not arise. Their personal interest in the preservation of *stare decisis* wanes. In fact, it may only be by overturning established precedent that they can create an opportunity to make their own lasting contribution to the law. Therefore, the incentive for any Justice to respect existing precedent should decrease as the law becomes more developed. If this model is correct, a definite pattern should emerge in Supreme Court jurisprudence. Early decisions should show strong respect for *stare decisis*, but a point should be reached in the development of the law where *stare decisis* breaks down and precedents begin to be overturned. This is precisely what has occurred in the Court=s taking jurisprudence.

Conclusion

The demise of *stare decisis* in the Supreme Court=s taking jurisprudence is consistent with an understanding of the incentives of Supreme Court Justices.

Although the abandonment of *stare decisis* may provide benefits to some of the principals in specific litigation (winning litigants, as well as Justices), it imposes profound costs on society at large. The resulting uncertainty seriously impairs the ability of citizens to make reliable plans for the future. If the law is dynamic, the risks involved are unknowable and difficult, if not impossible, to insure

against. The relative benefits of investing in the underground, rather than the formal economy are enhanced. Resources that could be applied productively are diverted to defensive applications, such as converting wealth into forms that are easily transported or hidden. The demise of *stare decisis* imposes an enormous negative externality on the public as a whole, because the costs associated with a shifting and uncertain legal framework are not borne directly by the principals of the legal system.

The demise of *stare decisis* imposes enormous costs on society. Nowhere is this truer than with regard to the constitutional protection of private property codified in the Fifth Amendment. There is a reasonable expectation that whatever constitutional interpretation the Supreme Court grants today to the Fifth Amendment protections of private property will likely be overturned tomorrow. As a result, property rights will remain inherently insecure. Given the incentives faced by those in a position to reinforce or undermine adherence to precedence, however, the abandonment of *stare decisis,* in this, as in every area of jurisprudence, is entirely predictable.

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