

Stare Non Determininus

by Scott T. Whiteman, Esq

Okay, the title is made up, and it would “more properly” read *non stare decicis*, or “do not stand by the decision.” The point is, there are occasions when old precedent is not only non-binding, but to follow it would be stupid, illegal and unconstitutional, and just plain un-Godly. With all that banter about regarding the strict following of the decisions of the higher courts coming from both the left and the right, aren't you suspicious that you are not getting the whole story on *Stare Decisis*? Do you really believe that our Founders would have shackled themselves to such foolishness? Do you *really* believe that the Common Law and American Political Tradition require an unwavering obedience to faulty human interpretations of law? Do you really believe that the absolute, immutable God and His Law are bound and restrained by such silly human doctrines?



SIR WILLIAM BLACKSTONE (1723-1780): The Law and the opinion of the judge, are not always incontrovertible terms

First, let's define the term. According to Black's Law Dictionary, Sixth Edition, *Stare Decisis* is the “policy of courts to stand by precedent and not to disturb settled point. ... Doctrine that, when court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same ... Doctrine is one of policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed,” at 1406. It is a policy and a doctrine of the Courts, essentially, to follow precedent for the sake of stability of law and society, and it is a doctrine to be honoured and respected.

So, if asked, “Do you support the doctrine of *Stare Decisis*,” might I recommend you answer in the same way we were instructed to answer nearly every question in law school: “It depends.” As an abstract, *Stare Decisis* is neither friend nor foe. As a fallen and depraved human invention, and at that an invention of the Courts, we need to know some particulars to be able to truthfully claim support or opposition to it.

Here's a hypothetical fact pattern. In the case of White v. Black, The Highest Court of the land has ruled that a white man intentionally beating to death a black man was permissible, because that black man was the mere chattel property of the white man. So you are an inferior judge who is presiding over a case brought to you by the State's District Attorney claiming that another white man has murdered a black man who was his slave. Do you a.) rule that White v. Black is determinative, settled-law of the land and for the sake of security and certainty of law, even though you personally disagree with the outcome, dismiss the case or acquit the white man, or b.) do you rule that no man can be the

mere chattel property of another, and that no man may lawfully take the life of another without adequate justification, provocation or excuse, try the case, and if the facts warrant it, find him guilty of murder? *But Stare Decisis*, we are told, requires that the inferior judge put aside his “personal or religious” opinions about black personhood and rule pursuant to White v. Black, and either dismiss the case or acquit all subsequent white men who murder black men.

So, making the case less hypothetical. In 1973, the Highest Court of the Land determined that a woman has a substantive right to privacy that carried so deeply that it included the “private” determination to take another human being’s life provided the person whose life that was domiciled in her womb. Now, you are an inferior judge who has a State’s Attorney General who has brought a woman and doctor before your bench for conspiracy to commit murder of an unborn child by potion – What do you do? What do you do if you are a Christian judge? Rule that Roe v. Wade is determinative? Or do you rule that no man can lawfully take the life of another man without adequate justification, provocation or excuse, and if finding that the doctor and woman in that instance lacked the adequate justification, provocation or excuse, find each the doctor and the woman guilty of murder and conspiracy to commit murder?

The question really is, to whom does the Judge owe allegiance and responsibility for his determinations? Is it mere man, or does his obligation run higher? If higher than man, then to what or whom? Some abstract principle of the liberty or the “brotherhood of man.” Or is the obligation of a judge immediate and tethered to the Supreme Law-giver? Or, is a judge bound to pure earthly, mundane and depraved human doctrines of law?



REV. SAMUEL RUTHERFORD (1600-1661): Being once made a judge, he is as essentially a judge immediately subjected to God

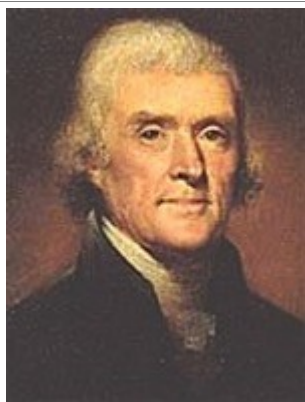
First, in the pure horizontal, we believe in the independent judiciary and the liberty of conscience. Even though every federal judge took his office by to the appointment of the President and retains it at the discretion of the Congress, do we not believe that the individual judge is not beholden to the President and the Congress? “[J]udging is an act of conscience, as one man’s conscience cannot properly be deputy for another man’s conscience, so neither can an inferior judge, as a judge, be deputy for a king,” and/or a Congress as the case might be. Samuel Rutherford, Lex, Rex, Printed for John Field (1644), Reprinted by Sprinkle Publications, Harrisonburg, Virginia (1982) at 88.

Furthermore, the individual judge takes an Oath, not to the wishes of the President or the policy of the Congress, nor even to the dictates of the Supreme Court, but to the United States Constitution. The Judicial Oath reads, “I, (name), do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as (office) *under the Constitution and laws of the United States*. So help me God.” 28 U.S.C. § 453 (2005). *Emphasis added*.

Any judge violates his Oath of Office if he follows *Stare Decisis* when it runs contrary to the Constitution. A judge is “bound by oath to decide according to the law of the land,” William Blackstone, Commentaries on the Laws of England, William Carey Jones, Editor, Bancroft-Whitney Company (1915) at 116, which in our land is the United States Constitution. U.S. Const., Art. IV, c.ii.

Blackstone notes that “it is an established rule to abide by former precedents,” that the scales of justice be kept steady and “not liable to waver with every new judge’s opinion.” It is a good thing, to achieve that end, the judge is “sworn to determine not according to his own private judgment, but according to the known laws and customs of the land.” Blackstone at 117. It seems that Blackstone is a supporter of *Stare Decisis*, but the good Jurist, like the law student, answers “it depends” when pressed.

Why answer, “It depends?” Because *Stare Decisis* is not absolute. Blackstone wrote, “[T]his rule admits of exception, where the former determination is most evidently contrary to reason” Blackstone at 118. In such instances, it is incumbent on the inferior judge to decide pursuant to his Oath, and not to the faulty and irrational opinions of men.



THOMAS JEFFERSON (1743-1826): A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest

A common objection raised against the lower courts deciding contrary to the determinations of Higher Courts, is that wouldn’t the lower courts be “making law,” and “we” strict constructionists are against that? First, let me invoke Jefferson, a strict constructionist of the highest sort, for a moment: “A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.” Thomas Jefferson Letter to John B. Colvin, September 20, 1810. *Emphasis* in text. We ought not be “bound” to human inventions of “strict constructionism,” *Stare Decisis* and the like when fidelity to those doctrines means treason against God and the principles upon which this once great America was established.

Furthermore, ruling pursuant to your Oath and in compliance with the actual Supreme Law of the Land is not making new law: it is “vindicat[ion] of 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*.” Blackstone at 118.

Now, moving out of the mundane horizontal. To whom does the Judge take an Oath? To *what*, the Constitution – the Supreme Law of the Land – we answered. To *whom* is a wholly new and different question. First, and this is the lesser argument, let us look again at the Oath Congress has proscribed to Federal Judges noting the last sentence, “So help me God.” 28 U.S.C. §453. By these words, whether

or not he means it, each Federal judge is imploring God for aid in the performance of that Oath *and* calling onto himself divine wrath for his failure to abide by the Oath. If the judge invokes the Name of God through rote repetition, he has profaned His name, *The LORD will not hold him guiltless that taketh his name in vain.* Deut. 5:11.

In conclusion, and most importantly, *Stare Decisis* is not a legal absolute. Why? Not because American and Common Law tradition says so, but because God says so. *Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's.* Although quite similar to the United States Code for judicial oaths, that is God's Word as found in Deut. 1:17. In judging God's way, there is no swearing to unconditionally follow the dictates of men. As Jehoshaphat the king of Judah said to the judges he appointed, *Take heed what ye do: for ye judge not for man, but for the LORD, who is with you in the judgment.* 2 Chron. 19:6. Emphasis mine. Judges judge for God, not for men. Judges must fear God, not men, and especially not the doctrines of men as they are invoked to keep this once free and Godly nation chained to precedents that have committed us to non-prosecution of 4,000 murders of the unborn that occur each day.

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