JUSTICE THOMAS AND STARE DECISIS

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Justice Thomas and Stare Decisis

By Gregory E. Maggs[1]

This essay briefly describes and analyzes two aspects of Justice Clarence Thomas's jurisprudence concerning the doctrine of stare decisis. The first aspect is well-known from his judicial opinions: Justice Thomas, unlike his judicial colleagues, believes that the Supreme Court should never follow demonstrably erroneous precedent.[2] The second aspect is less familiar but perhaps equally important: Justice Thomas insists on knowing the full story behind any precedent before deciding whether to follow it, extend it, limit it, distinguish it, or overrule it.[3] Justice Thomas's views on these matters are not widely shared at present, but they may well influence other Justices in the future because Justice Thomas has advanced strong arguments in support of them. In the meantime, litigants before the Supreme Court might use knowledge of these aspects of Justice Thomas's stare decisis jurisprudence to make their arguments more persuasive to him.

I. Erroneous Precedent

The doctrine of stare decisis is a "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."[4] Applying this doctrine, the Supreme Court generally insists on a "special reason over and above the belief that a prior case was wrongly decided" before rejecting it as a binding precedent.[5] When asked to overrule a prior decision, the Supreme Court typically considers several factors, such as: (1) the "workability" of the rule established by the precedent, (2) the "antiquity" of the precedent, (3) the "reliance interests at stake," and (4) "whether the decision was well reasoned."[6] If the first three of these factors support retaining a precedent, then the Court might do so even if the fourth factor favors overruling it. Put another way, in some circumstances, the Supreme Court might decide to follow a precedent even if the Court believes that the precedent misconstrued the Constitution, a statute, or a treaty. And bound by the doctrine of stare decisis as developed by the Supreme Court, lower federal courts (including my own) must follow the same approach.[7]

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[2] *See infra* part I.

[3] *See infra* part II.

[4] *Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[5] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

[6] Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009). See also Payne v. Tennessee, 501 U.S. 808, 828 (1991) (explaining that "considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved" and that "the opposite is true in cases such as the present one involving procedural and evidentiary rules" (citations omitted)).

[7] *See, e.g.*, United States v. Sills, 56 M.J. 239, 241 (C.A.A.F. 2002) (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

Justice Thomas, however, has a decidedly different view about how to handle incorrect precedent. In his recent concurrence in *Gamble v. United States*,[8] Justice Thomas criticized the prevailing multifactor analysis for deciding whether to follow precedent, concisely stating and justifying his contrary position as follows:

> In my view, if the Court encounters a decision that is demonstrably erroneous—i.e., one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent. Federal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law. A demonstrably incorrect judicial decision, by contrast, is tantamount to making law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.[9]

In further support of this position, Justice Thomas reasoned that stare decisis can have little application in our federal system because the doctrine was designed to sustain common law reasoning.[10] Justice Thomas explained that "federal courts primarily interpret and apply three bodies of federal positive law—the Constitution; federal statutes, rules, and regulations; and treaties" and that this reality "removes most (if not all) of the force that stare decisis held in the English common-law system, where judicial precedents were among the only documents" establishing the law.[11]

Other members of the Supreme Court have not adopted Justice Thomas's views on overruling demonstrably incorrect precedent, but they also have not refuted it. Perhaps some of them will find his arguments persuasive in the future. The factors that the Court now applies for deciding whether to overrule precedents do not come from any statute or constitutional provision. Instead, the Justices apparently fashioned these factors based solely on policy considerations. A judge-made multifactor analysis ultimately should not appeal to any Justice who—like Justice Thomas—believes that courts should apply the Constitution and statutes and not invent their own legal tests.

To be sure, departing from the prevailing multifactor stare decisis analysis would require rejecting the reasoning and holdings of many decisions that have employed the multifactor analysis in the past. But only circular reasoning could justify adhering to the prevailing stare decisis doctrine solely on the basis of stare decisis. Justice Thomas evidently has not found such reasoning persuasive. If a precedent requires violating the text of statutes and the original meaning of the Constitution, then it should have no force.

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[8] 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring).
[9] *Id*. at 1984.
[10] *Id.* at 1982–84.
[11] *Id.* at 1984.

II. The Complete Story behind Precedents

A second aspect of Justice Thomas's views on stare decisis is less well known but still both interesting and important. It primarily concerns decisions that a judge must make before reaching the question whether a precedent should be overruled. These decisions concern issues such as what a precedent actually held, whether to read the precedent broadly or narrowly, whether the precedent is on point or distinguishable, whether subsequent cases have limited the precedent, and so forth. Deciding these questions is not always easy. A very old precedent, for example, may have arisen in a factual or legal context that is now unfamiliar. In addition, the litigants also may be arguing for very different interpretations of a precedent. And in most cases, further research is required to understand how the precedent fits in among other decisions.

For these reasons, Justice Thomas insists on knowing the full story of a case before deciding what to do with it. Justice Thomas has explained his practice as follows:

> For some years, I have told my law clerks . . . that we should look at each case like a train car. Before attaching another car to the train of precedents, I am required to know as much as possible about that train. Where is it headed? What is already in the attached cars? Who is the operator? What if it is headed in the wrong direction? Why is it here? If we don't look, we have no idea who is driving it. And for all we know, an orangutan could occupy the driver's seat. No, we are compelled by our oath and our consciences to look.[12]

Most of the effort "to know as much as possible" about a precedent takes place privately in Justice Thomas's judicial chambers and is not necessarily visible in Justice Thomas's opinions. But Justice Thomas has exhibited his approach to uncovering the full story behind a case to generations of law students. In a semester-long seminar that Justice Thomas and I have co-taught at the George Washington University Law School for the past ten years, students read and discuss published accounts of a number of famous constitutional cases, most of which are found in a collection of essays edited by Professor Michael Dorf in a volume called *Constitutional Law Stories*.[13] One of the best of these essays is Judge Michael McConnell's chapter on *Marbury v. Madison*.[14] Judge McConnell explains the entire factual background leading to the famous dispute in the case, with very interesting details about the political situation and the principal actors.[15] He further discusses an array of legal steps that Congress and President Thomas Jefferson had taken to limit the power of the Supreme Court, including canceling a term of the Supreme Court, eliminating judgeships, forcing the Justices to ride circuit, and threatening impeachment.[16] All of this background leads to a fundamental reassessment of Chief Justice Marshall's accomplishment in writing the opinion. Contrary to much received wisdom, Judge McConnell concludes:

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[12] Clarence Thomas, *The Fallibility of Judging*, N.Y. L.J., June 2, 2015.
[13] CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2d ed. 2009).
[14] Michael W. McConnell, *The Story of Marbury v. Madison*, in CONSTITUTIONAL LAW STORIES, *supra* note 13.
[15] *See id.* at 14–19.
[16] *See id.* at 19–22.

"*Marbury* was brilliant . . . not for its effective assertion of judicial power, but for its effective avoidance of judicial humiliation."[17]

While studying case histories like the one written by Professor McConnell, the students in the seminar become authors themselves. Under Justice Thomas's guidance, the students conduct original research and write the complete story of a Supreme Court case of their own choosing. The goal in writing the seminar essays is not to argue about whether a particular case was correctly or incorrectly decided, but instead just to tell the full story of the case. With about 20 students in each class, over the years the students have written, and Justice Thomas and I have now had the privilege of learning, the complete history of more than 200 landmark cases. Demonstrating the high quality of their research and writing, many of our students have published their essays.[18]

One might think that uncovering the complete story of a precedent would increase a judge's confidence in making decisions about whether to apply, extend, limit, distinguish, or overrule it. But the reality is more nuanced. Justice Thomas explains that "[k]nowing more often has the paradoxical, if not counterintuitive effect, of magnifying the sense that one knows less than required or at least too little."[19] Every case contains numerous mysteries and loose strings. The increased feeling of uncertainty, however, has a beneficial effect because it promotes caution and necessitates extended contemplation before making a decision. As Justice Thomas puts it, discovering how little a judicial opinion reveals about what actually occurred in an earlier lawsuit imposes "personal humility and judicial modesty."[20]

Judicial confidentiality prevents outsiders from knowing whether other Justices follow the same approach when confronting precedent. While the effort might seem overly burdensome and impractical to some of them, it seems unlikely that anyone would have a theoretical objection to uncovering more information about precedents before following them. Soon after Justice Thomas and I began teaching the seminar, a very inquisitive student asked why it was important to know the whole story of the case. Justice Thomas answered him with a question of his own: "Why would you want to know less?"

III. Conclusion

As discussed above, the other members of the Supreme Court may or may not decide to follow Justice Thomas's views with respect to incorrect precedent and the study of the complete story of precedents. But these two observations about Justice Thomas's stare decisis jurisprudence should affect how litigants at the Supreme Court write their briefs and make their oral arguments. To

[17] *Id.* at 31.

[18] *See, e.g.*, Andrew J. Smith, *The Supreme Court's About-Face in Greer v. Spock*, 2020-3 ARMY LAW. 54; Sean M. Sherman, *Eckhardt v. Des Moines: The Apex of Student Rights*, 88 Geo. Wash. L. Rev. Arguendo 115 (2020); Christopher E. Bailey, *The Extraterritorial Application of Constitutional Law: United States v. Verdugo-Urquidez*, 36 B.U. INT'L L.J. 119 (2018); Brittany Warren, *The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Civilians and Courts-Martial*, 212 MIL. L. REV. 133 (2012).

[19] Thomas, *supra* note 12.

[20] *Id.*

persuade Justice Thomas with a precedent-based argument, litigants first should place the precedent in context, richly describing the entire background of the decision, so that Justice Thomas knows where it came from and understands the limitations of its holding. And if they want Justice Thomas to follow the precedent, they must convince Justice Thomas that the precedent's construction of a statute or constitutional provision is not "demonstrably incorrect."