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Lewis F. Powell, Jr.

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STARE DECISIS AND JUDICIAL RESTRAINT

REMARKS OF LEWIS F. POWELL, JR.*
ASSOCIATE JUSTICE (RETIRED)
SUPREME COURT OF THE UNITED STATES

It is a privilege to give the inaugural Leslie H. Arps Lecture. I knew Les fairly well as a young lawyer with Root, Clark, Buckner and Ballantine in the 1930's. Les became an associate for that firm in 1931 upon his graduation from the Harvard Law School. I took an LL.M. degree at the Law School in 1932 and had a number of friends among the third year students, including two who joined Les at Root, Clark on graduation—Everett Willis and Frank Dewey. Everett and Frank shared an apartment with Les in 1934, and when Frank married my sister Eleanor in Richmond, Virginia, in August 1934, Les and Everett were ushers at the wedding.

One of the younger partners at Root, Clark at that time was John Harlan. He did considerable work with Les and knew his abilities. In World War II, on the recommendation of then Colonel W. Barton Leach of the Harvard Law School, Harlan was selected to organize and head the Operation Research Section of the 8th Air Force, headquartered in England. Harlan asked that Leslie Arps be appointed to his staff with the rank of Major. At that time, Les had been drafted and was a sergeant in the Army.

The research of this Section was important for strategic Air Force operations against Germany. I became Chief of Operational Intelligence on General Spaatz's staff and was familiar with the work product of the Section. John Harlan became a Colonel and Les Arps a Lieutenant Colonel. Both were decorated.

Although I rarely saw Les after World War II, I knew that he was a founding partner in the Skadden, Arps firm—a firm that has enjoyed

* Leslie H. Arps Lecture, The Association of the Bar of the City of New York, October 17, 1989. Mr. Justice Powell's remarks also have been published in 44 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 813 (1989).

unprecedented growth both in terms of the firm's size and the quality and importance of its practice.

The Skadden, Arps firm also has been a leader in emphasizing the duty of lawyers and law firms to engage in *pro bono* activities, particularly the providing of counsel for legal services programs for the poor.

In remarks that I made at the Georgetown University Law Center in 1988, I quoted Whitney North Seymour, Sr., a former president of this Association, who, in his 1968 Cardozo Lecture, spoke of the duty of a lawyer "to contribute at least some of his talents to the public good." I have expressed the same view a number of times and have regretted the emphasis on billable hours that now exists in many law firms.

The Skadden, Arps public service fellowship program may be unique in its scope. My understanding is that the firm will fund up to fifty young lawyers each year to work in offices that provide legal assistance to the poor. This program is consistent with Les Arps' view of the duties of lawyers. I hardly need add that throughout his career he was a quality lawyer who represented clients, large and small, with great skill and fidelity.

I have read with approval the moving tributes paid to Les Arps at his Memorial Service. I quote one sentence from what John D. Feerick said: "The world is a better place for Les' having been here, and his departure leaves us all feeling a great loss."

* * *

I turn now to the Leslie H. Arps Memorial Lecture. The subject generally is *stare decisis*. I have a manuscript that will be available, but it is a bit too long for oral delivery at an evening meeting.

I. STARE DECISIS AND JUDICIAL RESTRAINT

The beginning of October Term 1989 marks an appropriate occasion to address again the subject of *stare decisis*. At the close of the 1988 Term, commentators who agreed on little else unanimously proclaimed a "shift in direction" on the Court. They described the 1988 Term as a watershed and predicted reexamination of numerous areas of the law "previously thought to be settled." You will not be surprised to learn that I take these pronouncements, like many that have preceded them in past years, with a grain of salt. In the era of "sound bites" and instant opinion polls, it is dangerous to apply broad labels to a single Term of the Court. I emphasize at the outset that in intellect and experience this is a strong Court.

The past Term presented an array of unusually difficult cases. This in turn resulted not only in five to four decisions but in splintered rulings without majority opinions. Unhappily, some opinions—on both sides of issues—included language that in time the authors may regret. I was concerned about the tone of some dissents when I was nominated for the Court in 1971. But I was reassured when it became evident that what one Justice may say about another's opinion rarely should be viewed as personal criticism. I considered each of the Justices with whom I was privileged to serve as a personal friend, as well as a lawyer whose qualifications to serve

on the high Court I never questioned. Justice Kennedy also has high qualifications.

A. *Stare Decisis in the 1988 Term*

Any talk of change at the Supreme Court prompts consideration of stare decisis. Several of the Court's opinions in the past Term have contained explicit discussions of stare decisis, both in statutory and constitutional cases.

Perhaps the most significant of the statutory cases is *Patterson v. McLean Credit Union*,¹ in which the Court reconsidered the decision in *Runyon v. McCrary*² that applied 42 U.S.C. § 1981 to private contracts. The majority opinion did not hold that *Runyon* was correctly decided. But the Court unanimously agreed that, regardless of its initial correctness, *Runyon* should be reaffirmed on stare decisis grounds.³ Justice Kennedy's Court opinion reviewed a number of the Court's past opinions and stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law."⁴

A constitutional case involving stare decisis was *South Carolina v. Gathers*.⁵ In *Gathers* the Court was urged to reconsider *Booth v. Maryland*,⁶ an opinion I wrote for the Court in my last Term. *Booth* held that the Eighth Amendment limits comment in capital sentencing proceedings on attributes of a murder victim and his family that were unrelated to the commission of a crime. Justice White, who had dissented in the *Booth* case, declined to overrule it. He joined Justice Brennan's opinion for the Court in *Gathers*. The four dissenters in *Gathers* explicitly called for overruling *Booth*. Justice Scalia discussed stare decisis at length. While he acknowledged "some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible," he argued that a Justice must be free to vote to overrule decisions that he or she feels are not supported by the Constitution itself, as opposed to prior precedents.⁷

1. 109 S. Ct. 2363 (1989).

2. 427 U.S. 160 (1976).

3. I joined the majority in *Runyon* for reasons largely attributable to stare decisis. As I stated in my concurring opinion:

If the slate were clean I might well be inclined to agree with Mr. JUSTICE WHITE that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

The applicability of § 1981 to private contracts has been considered maturely and recently, and I do not feel free to disregard these precedents.

Id. at 186 (Powell, J., concurring) (footnote omitted).

4. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (opinion of Powell, J.)).

5. 109 S. Ct. 2207 (1989).

6. 482 U.S. 496 (1987).

7. *Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting).

Of course, a new Justice is less bound by precedent in construing a provision of the Constitution than a Justice who was sitting when a precedent was decided. The Court's decision in *Webster v. Reproductive Health Services*,⁸ perhaps more controversial than the "flag burning" case,⁹ provides an illustration. Justice Scalia and Justice Kennedy declined to follow *Roe v. Wade*¹⁰ in that case. Justice Scalia would have overruled *Roe* explicitly. Justice Kennedy joined the Chief Justice and Justice White in limiting *Roe*. The end result was a badly fractured Court with five separate opinions. As I joined *Roe* and wrote the Court opinion in *Akron v. Akron Center for Reproductive Health, Inc.*,¹¹ there is no secret as to how I would have voted in *Webster*. I do not say this as a criticism of the Court. In its long history, the presence on the Court of even a single new member often brings change.

B. Current Health of Stare Decisis

In light of the past term, it may be of interest to consider broadly the current health of the principle of stare decisis. Some lawyers and academics have suggested that the principle is now ignored or is at least in serious decline.¹² I cannot agree. I am reminded of Mark Twain's often quoted cable from Europe to the Associated Press: "The reports of my death are greatly exaggerated." In my view, Justice Stevens' 1983 assessment in his *New York University Law Review* article¹³ remains correct today. Overrulings occur with some frequency, but when considered in light of the business of the Court as a whole, they are rare. As Justice Stevens pointed out: "Two or three overrulings each Term are, indeed, significant."¹⁴ But the Court, in the exercise of certiorari jurisdiction, considers thousands of cases a year. The vast majority involve nothing more than application of previously decided cases. This is stare decisis.

A review of the Burger and Warren Courts illustrates my view of stare decisis as a rule of stability, but not inflexibility. The Burger and Warren Courts spanned a roughly equal number of years: Chief Justice Warren presided for the sixteen-year period between 1953 and 1969; Chief Justice Burger for seventeen years between 1969 and 1986. Counting the overruled decisions of each era reveals that during Warren's tenure the Court overruled sixty-three cases. The Burger Court, of which I was a member, overruled some sixty-one cases. Of course, the precise numbers can vary depending on the method of counting. I have chosen to rely primarily on explicit overrulings. In any event, the point is plain. On a rough average, the Court

8. 109 S. Ct. 3040 (1989).

9. *Texas v. Johnson*, 109 S.Ct. 2533 (1989).

10. 410 U.S. 113 (1973).

11. 462 U.S. 416 (1983).

12. See, e.g., Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467.

13. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983).

14. *Id.* at 4.

has overruled less than four cases per term. Thus, it has overruled a significant and fairly constant number of prior decisions over time. But when the totality of cases is considered, the general rule of stare decisis remains a fundamental component of our judicial system.

Of course, the importance of cases overruled also is relevant. It can be said fairly that the overruling of major decisions was infrequent under both Chief Justices. I mention briefly some of the more celebrated overrulings of the Warren and Burger Courts.

By far, the most important of the Warren Court cases is *Brown v. Board of Education*.¹⁵ *Brown* explicitly overruled the 1899 case of *Cumming v. Board of Education*,¹⁶ the 1927 case of *Gong Lum v. Rice*,¹⁷ and, of course, rejected *Plessy v. Ferguson*.¹⁸ The Warren Court overruled a number of criminal procedure decisions in a series of cases that "incorporated" the Bill of Rights through the fourteenth amendment.¹⁹ In its overall effect on the structure of constitutional judicial review, the incorporation cases are perhaps of unique significance. In other areas, *Baker v. Carr*²⁰ overruled *Colegrove v. Green*²¹ and brought legislative apportionment controversies under judicial review. And *Brandenburg v. Ohio*²² overruled *Whitney v. California*,²³ finally making the "clear and present danger" standard the law.

The Burger Court also had its share of important overrulings. In *Miller v. California*²⁴ the Court overruled the *Memoirs* case²⁵ and established a new standard for obscenity. In *Gregg v. Georgia*²⁶ the Court overruled *McGautha v. California*²⁷ and began the present course of eighth amendment scrutiny of capital punishment. Several cases broke new ground in expanding the rights of women. For example, *Taylor v. Louisiana*²⁸ invalidated restrictions on jury service by women, overruling a case decided in 1961.²⁹ And in *Batson v. Kentucky*,³⁰ an opinion I wrote in 1986, the Court overruled *Swain v. Alabama*,³¹ easing the evidentiary burden of defendants who claim racial discrimination in the jury selection process.

15. 347 U.S. 483 (1954).

16. 175 U.S. 528 (1899).

17. 275 U.S. 78 (1927).

18. 163 U.S. 537 (1896).

19. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), and applying the fourth amendment's exclusionary rule to state criminal trials).

20. 369 U.S. 186 (1962).

21. 328 U.S. 549 (1946).

22. 395 U.S. 444 (1969).

23. 274 U.S. 357 (1927).

24. 413 U.S. 15 (1973).

25. *Memoirs v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966).

26. 428 U.S. 153 (1976).

27. 402 U.S. 183 (1971).

28. 419 U.S. 522 (1975).

29. *Hoyt v. Florida*, 368 U.S. 57 (1961).

30. 476 U.S. 79 (1986).

31. 380 U.S. 202 (1965).

C. *Proper Role of Stare Decisis*

The records of the Burger and Warren Courts are consistent with the traditional role of stare decisis that I have described. For example, the Burger Court demonstrated a greater sensitivity to the public interest in law enforcement than that reflected in some of the decisions of the Warren Court. Yet it did not overrule those Warren Court decisions, such as *Mapp v. Ohio*,³² *Massiah v. United States*,³³ and *Miranda v. Arizona*,³⁴ that announced broad principles protecting the rights of criminal defendants. Rather, the Burger Court, with due regard for stare decisis, set about the difficult task of clarifying the scope of these sweeping decisions.³⁵

Fortunately, there is no absolute rule against overruling prior decisions. *Brown* itself stands as a testament to the fact that we have a living Constitution. And where it becomes clear that a wrongly decided case does damage to the coherence of the law, overruling is proper. But I repeat that the general rule of adherence to prior decisions is a proper one. This is true both for statutory and constitutional cases. Justice Frankfurter aptly noted the critical importance of stare decisis when he described it as the principle "by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us."³⁶ The specific merits of stare decisis are familiar; I comment on them briefly.

(i) The first is one of special interest to judges: it makes our work easier. As Justice Cardozo put it: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."³⁷ Few cases that reach the Supreme Court are easy. Most involve hours of study and reflection; the conscientious judge must make many close calls. It cannot be suggested seriously that every case brought to the Court should require reexamination on the merits of every relevant precedent.

(ii) Stare decisis also enhances stability in the law. This is especially important in cases involving property rights and commercial transactions. Even in the area of personal rights, stare decisis is necessary to have a predictable set of rules on which citizens may rely in shaping their behavior.

(iii) Perhaps the most important and familiar argument for stare decisis is one of public legitimacy. The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy

32. 367 U.S. 643 (1961).

33. 377 U.S. 201 (1964).

34. 384 U.S. 436 (1966).

35. See Remarks of Lewis F. Powell, Jr., A.B.A. Litigation Section Meeting (Aug. 12, 1986).

36. *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

37. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

views into law. Rather, the Court is a body vested with the duty to exercise the *judicial power* prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions.

D. *Recent Threats to Traditional Stare Decisis*

Though the doctrine of stare decisis as I have described it remains strong, challenges to the traditional conception of stare decisis have appeared recently in two areas.

The first of these challenges concerns stare decisis in statutory cases. The idea has long been advanced that stare decisis should operate with special vigor in statutory cases because Congress has the power to pass new legislation correcting any statutory decision by the Court that Congress deems erroneous. Thus, if Congress fails to respond to a statutory decision, the courts can assume that Congress believes that the statutory interpretation was correct.

I am in general agreement with this view. But it can be taken to extremes. Three Justices last Term joined with Justice Stevens in suggesting that where a significant time has passed without action by Congress, the Supreme Court's prior statutory decisions become as binding on the Supreme Court itself as on lower courts.³⁸

In my view, the Court should hesitate to adopt such a categorical rule. It reflects an unrealistic view of the political process and Congress' ability to finetune statutes. Correction of erroneous statutory interpretations in some cases may be vital to the effective administration of justice and the coherence of the law. But correction may have little political constituency in Congress. The Court, therefore, has a responsibility to ensure that its statutory interpretations follow the intent of the drafting Congress as well as to ensure that erroneous interpretations do not damage the fabric of the law. Some statutes—I mention "RICO"³⁹—are a mishmash of ambiguities. Indeed, some "statutory" law consists of an open-ended statute that has been left almost entirely to "common law" development in the courts. Federal antitrust law is an example.

A second recent challenge to traditional stare decisis is the renewal of calls for a relaxation or even outright elimination of stare decisis in constitutional cases. Some Court opinions hint at this.⁴⁰ And the argument has

38. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1922-23 (1989) (Stevens, J., dissenting).

39. The RICO statute, short for "Racketeer Influenced and Corrupt Organizations Act," is codified at 18 U.S.C. § 1961 *et seq.* I continue to believe that Congress never intended the private civil actions it created in RICO to be used to file ordinary fraud and breach of contract claims against respected, legitimate businesses. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 523-30 (1985) (Powell, J., dissenting).

40. *See, e.g., South Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting). Justice Douglas expressed similar views in a 1949 article in the *Columbia Law Review*. He asserted that a Justice must remember "above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 *COLUM. L. REV.* 735, 736 (1949).

been made directly by a former Assistant Attorney General in the *Cornell Law Review*.⁴¹ This view of stare decisis also has little to commend it.

Those who would eliminate stare decisis in constitutional cases argue that the doctrine is simply one of convenience.⁴² These critics say stare decisis is useful only to judges who would defend their own erroneous decisions against shifting majorities on the Court. It is true that stare decisis, as applied, can be based on subjective standards that are unprincipled. It is also true that stare decisis is cited far more often by dissenters when a case has been overruled than by a Justice who relies on stare decisis to uphold a case even though he or she thinks that the case was wrongly decided. But the elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law.

E. Important Factors if Stare Decisis is to Work

Looking to the decades ahead, several conditions are important to the future long term health of stare decisis. Speaking broadly, these conditions all involve judicial restraint. This means recognition that the Court's function is to decide cases involving specific issues and particular parties. The Court does not sit to make announcements of abstract principles or to give advisory opinions. Unnecessary resolution of broad questions always raises the stakes. It creates incentives for future attacks on the Court's opinions. In each case the Court should focus specifically on the particular facts of the case and the questions properly presented. Too often, Justices write more broadly than necessary to decide the case before the Court. Law clerks do not make the decisions, but they often add expansive footnotes that a Justice may accept uncritically. In a subsequent case, the footnote will be cited as *the law*.

Related aspects of judicial restraint that promote a modest model of adjudication include attention to the rules of standing. The Court also should hesitate to create new areas of judicial oversight, such as where the Court is asked to infer private rights of action in statutes.⁴³ Deference to

41. See Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988).

42. See *id.* at 402.

43. Whether a particular private actor should have the right to a civil-court remedy for violations of certain statutory rights is likely a matter of importance to many disparate groups in our society. As such, the question should be resolved by our elected representatives, not by "relatively uninformed federal judges who are isolated from the political process." Cannon v. University of Chicago, 441 U.S. 677, 731 (1979) (Powell, J., dissenting). Even if Congress wants to avoid the hard political choices involved in creating a new private right of action by leaving this work to the courts, the judicial branch has a constitutional obligation to avoid making such fundamentally legislative choices. Every time the courts "indulge Congress in its refusal to confront these hard questions," we unwisely and unconstitutionally denigrate the political process and the distinct nature of our tripartite system of government. *Id.* at 743 n.14, 746-47.

bodies that may be more expert in a particular field, such as school boards and the military, is also appropriate.⁴⁴ Intelligent use of certiorari jurisdiction will allow the Court to avoid precipitous judgments in new areas of the law that the Court later may regret.

I also mention the frequency of separate writings and splintered opinions. Last term, the Court decided eighteen cases—over ten percent of its entire merits docket—without an opinion joined by a majority of the Court. Although I have written my share of separate opinions, in hindsight I would urge the Court to look carefully at the effects of this practice on respect for the Court as an institution. Splintered decisions provide insufficient guidance for lower courts. They may promote disrespect for the Court as a whole and more emphasis on “vote counting.” Failure of the Court to settle on a rationale for a decision invites perpetual attack and reexamination. The Justices “have an institutional responsibility not only to respect *stare decisis*, but also to make every reasonable effort to harmonize [their] views on constitutional questions of broad practical application.”⁴⁵

CONCLUSION

It is evident that I consider *stare decisis* essential to the rule of law. This is readily understood with respect to business and economic issues, and to the Court’s interpretation of statutes on which parties rely in planning their conduct. As I have noted, the doctrine applies with less force when new Justices confront the interpretation of the Constitution. Yet, even here, there is a body of constitutional decisions and principles that merits respect. Much of the language of the Constitution, particularly the provisions of the Bill of Rights and the fourteenth amendment, require interpretation. After two centuries of vast change, the original intent of the Founders is difficult to discern or is irrelevant. Indeed, there may be no evidence of intent. The Framers of the Constitution were wise enough to write broadly, using language that must be construed in light of changing conditions that could not be foreseen. Yet the doctrine of *stare decisis* has remained a constant thread in preserving continuity and stability.

I emphasize that the views which I have expressed are not intended as either praise or criticism of particular cases. The point that I hope to make is a broader one. History shows that change is inevitable. The first airplane flew less than four years before I was born. Today spacecrafts are commonplace. Voyager II, launched in 1977, sent back in August 1989 important scientific information about Neptune.⁴⁶ The inevitability of change touches law as it does every aspect of life. But stability and moderation are uniquely important to the law. In the long run, restraint in decisionmaking and

44. See, e.g., *Board of Education v. Pico*, 457 U.S. 853, 893-94 (1982) (Powell, J., dissenting); *Brown v. Glines*, 444 U.S. 348 (1980).

45. *Robbins v. California*, 453 U.S. 420, 436 n.4 (1981) (Powell, J., concurring in judgment).

46. See *Wash. Post*, Aug. 24, 1989, at A3, col. 1.

respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights.

* * *

It is sad that my friend Leslie Arps is not with us here today. Perhaps I presume that he would agree with much if not all of what I have said. His service to the law and the professionalism of the bar was distinguished. I am grateful for the opportunity to make the first Leslie Arps Lecture.

LEWIS F. POWELL, JR.

October 17, 1989