

Op-ed | Why You Need to Know ‘Stare Decisis’ This Summer

by Peter G. Verniero

With the retirement of U.S. Supreme Court Justice Anthony Kennedy and the drive to nominate and confirm his successor, we’re going to be hearing some Latin phrases over the next few weeks and months. One in particular: stare decisis, meaning “to stand by things decided.”

A brief primer is in order. Stare decisis is a principle guiding how courts go about their job of judging. It’s based on the notion that the law should be certain and predictable, instructing courts to uphold their prior decisions. How can we ask the public to rely on judicial pronouncements and respect the rule of law if courts disregard their past rulings?

But there are countervailing principles. A court of last resort such as the federal or a state Supreme Court has a duty to correct its own errors. Only the Supreme Court can adjust its constitutional rulings, unless the people or their representatives amend the constitution to overrule those rulings, which is a long and never-certain process.

Arthur Vanderbilt, the first chief justice of the modern New Jersey Supreme Court, once observed, “The doctrine of stare decisis neither renders the courts impotent to correct their past errors nor requires them to adhere blindly to rules that have lost their reason for being.”

He further explained, “The common law would be sapped of its lifeblood if stare decisis were to become a god instead of a guide. The doctrine when properly applied operates only to control change, not to prevent it.”

Against that backdrop, the question on many minds of court watchers is whether Kennedy’s successor would vote to affirm prior decisions upholding the core principle of *Roe v. Wade*, the abortion rights case, as

well as numerous other cases -- decisions in which Kennedy had cast the deciding vote.

The doctrine of stare decisis would point us to “yes” -- those decisions ought to be affirmed -- unless you believe, in Vanderbilt’s words, the rulings were decided in error or have lost their reason for being.

So the relevant question to ask the next U.S. Supreme Court nominee is not “Do you believe in stare decisis” -- I can’t imagine any nominee rejecting the doctrine out of hand -- but rather “What are the appropriate standards for rethinking a prior ruling?”

If a new justice would have decided an issue differently, is that, standing alone, enough to vote to overrule a past ruling? Should older precedents be given more deference than newer ones? The questions could go on.

One of the best-known decisions employing stare decisis is [Dickerson v. United States](#). In that 2000 case, Chief Justice William Rehnquist wrote the majority opinion upholding the court’s landmark prior ruling from 1966, *Miranda v. Arizona*.

As depicted in countless TV shows and movies, the *Miranda* decision held that police must warn suspects of their constitutional rights before questioning them; otherwise their confessions would be inadmissible in court.

In reaffirming that decades-old holding, Rehnquist noted, “*Miranda* has become imbedded in routine police practice to the point where the warnings have become part of our national culture.”

That the chief justice wrote those words surprised many court observers. For years, both before and after he joined the court, he had expressed criticism for *Miranda*. Some speculated he was patiently waiting for the right time to overturn it.

Still, when Miranda's fate was squarely in his hands, Rehnquist acknowledged, "Whether or not we would agree with Miranda's reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now."

Which brings us back to Kennedy's successor.

My guess is that the soon-to-be-announced nominee will respond adroitly to questions about stare decisis by expressing support for the doctrine without committing to maintain or overrule any particular decision.

If so, senators at the confirmation hearing will have to evaluate the nominee by more familiar factors such as his or her intellect, integrity and demeanor. Which isn't so bad given that those are the essential characteristics of a well-qualified jurist.

Members of the high court, both existing and new, have the capacity to surprise us with their rulings. If they possess the characteristics just mentioned, we have to trust that they will adhere to the court's traditions, including, when appropriate, the doctrine of stare decisis.

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