Written by **Selwyn Duke** on May 25, 2019

Taming the Bench: MAGA Means Ending the Precedent of Judicial Precedent

"It is a maxim among these lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly." So said Anglo-Irish essayist Jonathan Swift in *Gulliver's Travels* in 1726. Unfortunately, something has changed almost three centuries later:

The decisions have perhaps become even more iniquitous.

Swift was rightly mocking the notion of "judicial precedent." Yet it's even more preposterous in our time and place, for at least 18th-century British judges didn't have a constitution to violate. How is the principle even remotely defensible, however, in a nation with our Constitution, the "supreme law of the land"?

One justice who apparently understands this is Clarence Thomas, who just wrote the majority opinion in a recent decision (*Franchise Tax Board of California v. Hyatt*) overturning a 1979 precedent. He was the ideal candidate for the task, as it has been noted that he's not a "Court conservative" as much as an originalist. A conservative, after all, would hew to the status quo, which here means honoring precedent. In contrast, as *SCOTUSblog* pointed out in 2007, Thomas "believes that precedent *qua* precedent concerning constitutional law has no value at all; he does not give *stare decisis* [the notion that judicial decisions should not be undone] any weight."

This is why I've long said that Thomas is *by far* the best SCOTUS justice of recent decades (yes, that includes Scalia). Moreover, it is certainly right to distinguish between Thomas' originalism and being merely a "Court conservative," which more and more is seeming akin to a court jester.

Why this is so was encapsulated well by British philosopher G.K. Chesterton when he wrote, "The business of Progressives is to go on making mistakes. The business of Conservatives is to prevent mistakes from being corrected. Even when the revolutionist might himself repent of his revolution, the traditionalist is already defending it as part of his tradition."

Stare decisis' folly should be obvious. In what other field would anyone assert that once a decision is made, it stays made? Since it's a statistical certainty that not all decisions will be good ones, this standard only ensures the permanency of error.

Yet to fully grasp *stare decisis*' outrageousness, an analogy is useful. Chief Justice John Roberts once correctly said that a judge's role is only to call "balls and strikes" (this was before he decided that a ball could be a strike when striking a blow for statism). Expanding on this, judges are in fact like baseball

umpires, whereas the players are akin to the people, the sport's ruling body is a sort of legislature and the rulebook is essentially its constitution.

Now, it goes without saying that if an umpire "ruled" contrary to the rulebook — let's say, refusing to call a player out after three strikes because he believed they were too few — we wouldn't flatter his falsity and legitimize his legerdemain by calling him a "pragmatist" with a "living document" philosophy. We'd recognize him as a bad umpire derelict in his duty, and he'd be fired.

To the point, however, what would you say about someone who not only accepted his judgment, but viewed it as unchangeable "precedent"?

This notion is just as ridiculous when applied to judges — only far more dangerous. It should in fact disqualify someone from the bench, for justices take an oath to uphold the Constitution.

They do not take an oath to uphold other judges.

Imagine the reaction if we applied this *stare decisis* philosophy to President Trump's determinations. Imagine we said that not only can he "change" the law on the basis that it's "living," but that his decisions should then be binding on all future presidents. How would that go over?

No, the analogy isn't invalid because he's not a black-robed lawyer. All these office-holders take an oath to uphold the Constitution — and none of them is supposed to be above that supreme law of the land.

Many want to be, though. Power is an aphrodisiac, and this brings us to why judges' love affair with precedent reflects nothing noble. As Thomas Jefferson explained in an 1820 letter in which he warned about judicial supremacy, "Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privileges of their corps."

This was perhaps reflected in liberal Justice Stephen Breyer's reaction to the recently overturned precedent. "Today's decision can only cause one to wonder which cases the court will overrule next," he complained. A good justice would be concerned only with what unconstitutional precedent would *not* be overturned next.

But why is Breyer upset? Is it because he wants to maintain the power of his corps and its privilege of being above the law?

Stare decisis is just a euphemistic way of saying that judges' decisions — "precedent" — should take precedence over the Constitution. This perverts our system. It undermines the republic. We're supposed to be a government of the people, by the people, and for the people. The Constitution reflects the people's will in that it was ratified by the states and because Americans tacitly approve it to this day it by allowing it to stand; after all, they can amend it through their representatives.

Yet when judges place their own opinions above the Constitution, such as when elevating precedent, they establish themselves as an oligarchy. We then don't have the rule of law but the rule of lawyers, a government of, by and for those who've arrogated to themselves the power and privilege to manipulate the law according to their own will.

Note, too, that hard and fast respect for precedent actually has no precedent, as our history's *more than 100* overturned SCOTUS decisions attest. So why do leftists now act as if it's sacrosanct?

Because after more than a century of moving the courts "left," there's now a large body of unconstitutional, leftist precedents that serve their agenda. *Stare decisis* is not for these people principle but ploy, a convenient value of the moment.

Thus, when going through the Senate confirmation process, the norm now is for more "conservative" judges to be asked if they'll abide by certain precedents (i.e., *Roe v. Wade*). Translated, this is a demand to conserve yesterday's progressives' mistakes.

In reality, judicial nominees should be asked if they'll respect precedent — and then be roundly rejected upon answering yes. For we can't MAGA unless we MAJJA: Make American Judges Judges Again. For tolerating oligarchs in black robes ensures a dark future.

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