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## **Stable, Predictable, and Faithful to Precedent: The Value of Precedent in Uncertain Times**

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## Stable, Predictable, and Faithful to Precedent: The Value of Precedent in Uncertain Times

Stare decisis is a bedrock principle of American law. At its simplest, stare decisis means that judges will decide current and future cases in accordance with prior cases—the term stare decisis comes from the Latin phrase *stare decisis et non quieta movere*, meaning “stand by the thing decided and do not disturb the calm.”<sup>1</sup> At a more philosophical level, the decision to abide by earlier precedent has been described as a means of deferring to the expertise of judges who have gone before; through the application of stare decisis, courts share power across time.<sup>2</sup>

This paper explores some of the implications of judicial power sharing through stare decisis. First, it describes the application of stare decisis by courts both as part of a judicial hierarchy and individually, and it examines the benefits of both. Second, it examines the debate surrounding courts’ ethical obligations to adhere to prior precedent and their ethical obligations to rule independently. Third, it reviews some of the middle-ground positions that various judges have adopted in an effort to reconcile the tension between the application of stare decisis and judicial independence. Finally, it examines the role of stare decisis in Texas jurisprudence.

### Vertical vs. Horizontal Stare Decisis

Vertical stare decisis applies to courts of different ranks; it “requires that courts adhere to precedents set by courts of higher hierarchical rank within the same judicial system.”<sup>3</sup> Thus, trial courts must generally follow the precedents set by both intermediate appellate courts and by high courts, and intermediate courts must follow the precedents set by high courts. Vertical stare decisis is binding; even if lower-court judges vehemently disagree with the higher courts’ precedent, they must follow it.<sup>4</sup> In fact, some courts have even held that there is an ethical obligation for a lower court to follow the law as announced by the higher court until the higher court chooses to overrule it.<sup>5</sup>

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<sup>1</sup> Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 274 (2001); see BLACK’S LAW DICTIONARY 1406 (6th ed. 1990) (“To adhere to precedents, and not to unsettle things which are established.”); *Sattiewhite v. State*, 600 S.W.2d 277, 280 (Tex. Crim. App. 1980) (op. on reh’g) (“During more than one hundred years of its tenure this Court, like every conscientious appellate court, has endeavored to follow the ancient doctrine of ‘stare decisis et non quieta movere’ to adhere to precedents, and not to unsettle things which are established . . .”).

<sup>2</sup> Hon. D. Arthur Kelsey, *The Architecture of Judicial Power: Appellate Review and Stare Decisis*, JUDGES’ JOURNAL, Spring 2006, at 9-10. The authors would like to thank Judge Kelsey of the Court of Appeals of Virginia for his thoughtful commentary, which originally inspired an author’s interest in this topic.

<sup>3</sup> Paul W. Werner, Comment, *The Straits of Stare Decisis and the Utah Court Of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 B.Y.U. L. REV. 633, 647 (1994); see John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 125 (Spring 2006) (“Vertical stare decisis demands, today as in the past, that lower courts give binding effect to the applicable precedents of higher courts.”).

<sup>4</sup> See Werner, *supra* note 3, at 647.

<sup>5</sup> See, e.g., *In re Hague*, 315 N.W.2d 524, 531-33 (Mich. 1982) (concluding that a judge violated his oath of office and the state’s judicial canons by not being “faithful to the law” and refusing to follow higher court decisions); *Krause v. State*, 285 N.E.2d 736, 746 (Ohio 1972) (Corrigan, J., concurring) (concluding that an intermediate court’s failure to follow precedent from the state’s supreme court constituted a violation of the state’s canons of judicial ethics).

Practitioners familiar with Texas and federal practice are used to the idea that trial courts will follow the decisions of the intermediate courts in their own geographic region,<sup>6</sup> and that the intermediate courts will follow high-court precedent. Some other jurisdictions, however, apply vertical stare decisis with some interesting differences. For example, Oklahoma follows a “weak model” of vertical stare decisis in civil cases.<sup>7</sup> Decisions from Oklahoma’s intermediate court of civil appeals are not considered binding on any of its trial courts, unless the opinions are explicitly approved by the Oklahoma Supreme Court.<sup>8</sup> California, Florida, and New York, on the other hand, follow a “strong model” of stare decisis.<sup>9</sup> While the intermediate courts in these states hear appeals only from a limited geographic region, “the decision of any intermediate appellate district binds all of the state’s trial courts.”<sup>10</sup>

Regardless of the model adopted, vertical stare decisis offers two important benefits.<sup>11</sup> First, it protects appellate courts’ workloads by ensuring that cases are not continually appealed; once an appellate court has settled an issue, lower courts are bound to apply it and the appellate courts need not re-tread the same ground continually.<sup>12</sup> Second, vertical stare decisis “preserves a superior court’s role as final arbiter of the law.”<sup>13</sup> In many jurisdictions, including Texas and the United States, the courts’ hierarchy is established constitutionally,<sup>14</sup> and adherence to that constitution may require that lower courts defer to the precedents established by higher courts.<sup>15</sup>

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<sup>6</sup> See TEX. GOV’T CODE § 22.201 (dividing Texas counties into 14 court of appeals districts); TEX. GOV’T CODE § 22.220(a) (“Each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction . . .”).

<sup>7</sup> Andrew T. Solomon, *A Simple Prescription for Texas’s Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY’S L.J. 417, 426 (2006). The situation is different in criminal cases, as criminal cases are appealed directly from the district court to the Oklahoma Court of Criminal Appeals, which is the highest court for criminal cases. Consequently, there is no intermediate level in criminal cases. See <http://www.okbar.org/public/judges/supremect.htm> (last visited April 19, 2007).

<sup>8</sup> See *In re Assessments for Year 2005 of Certain Real Property Owned by Askins Props., L.L.C.*, No. 102,887, 2007 WL 1196567, at \*4 n.7 (Okla. Apr. 24, 2007); *Taylor v. Chubb Group of Ins. Cos.*, 874 P.2d 806, 809 n.5 (Okla. 1994) (quoting OKLA. STAT. ANN. tit. 20, § 30.5 (“No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter.”)).

<sup>9</sup> See Solomon, *supra* note 7, at 427.

<sup>10</sup> See Solomon, *supra* note 7, at 427-28.

<sup>11</sup> Of course, the benefits of vertical stare decisis are dependent on a good faith application of the doctrine by lower courts. Unfortunately, lower courts that disagree with existing precedent “often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court. As Justice O’Connor put it, judges ‘know how to mouth the correct legal rules with ironic solemnity while avoiding those rules’ logical consequences.” Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 819 (1994) (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 500 (1993) (O’Connor, J., dissenting)).

<sup>12</sup> See Werner, *supra* note 3, at 648.

<sup>13</sup> See *id.*; Solomon, *supra* note 7, at 426.

<sup>14</sup> See, e.g., U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); TEX. CONST. art. V, § 1; *id.* art. V, § 3(a) (“The Supreme Court shall exercise the judicial power of the state . . . Its appellate jurisdiction shall be final and shall extend to all cases except in criminal matters . . .”); *id.* art. V, § 6(a) (“Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction.”).

<sup>15</sup> See Caminker, *supra* note 11, at 834 & n. 87 (discussing Georgia and South Carolina as examples of states with constitutional provisions requiring adherence to higher court precedent).

While vertical stare decisis relates to the hierarchy of courts, horizontal stare decisis refers to a single court following its own precedent.<sup>16</sup> As with vertical stare decisis, there are both strong and weak models of horizontal stare decisis. In the weak model, a high court gives little deference to its own prior decisions, choosing instead to overrule precedent when it disagrees with an earlier decision.<sup>17</sup> In an intermediate model, a court may give a “strong presumption in favor of established law,” overruling a case only “when a timeworn rule no longer serves the needs of society” or otherwise becomes unworkable.<sup>18</sup> Finally, in a strong model, courts will refuse to overrule precedent at all, resulting in a perceived “refusal to correct errors.”<sup>19</sup>

Horizontal stare decisis offers a number of benefits. First, it offers stability in the law.<sup>20</sup> Lawyers can advise their clients without fear that the law is unsettled or changing, and clients can conduct business under a stable system. Without this stability, clients would remain perpetually unsure of their rights and responsibilities. Businesses would hesitate to enter into contracts, and family law clients would worry that custody and divorce proceedings would be subject to unforeseen changes in the law. Through adherence to earlier precedent, courts offer the public a measure of stability and predictability against which to compare their behavior.<sup>21</sup> This stability reduces the costs of the entire judicial system: “In many contexts, the more predictable the legal norms are, the less likely that individuals will transgress (or appear to transgress) them, making resort to civil . . . proceedings less frequent. And even when norms are transgressed, the more predictable they are the more likely that such proceedings will be terminated quickly or even avoided altogether by voluntary settlement.”<sup>22</sup>

This stability also fosters respect for the judicial system.<sup>23</sup> When courts follow precedent and parties are treated equally under the law, the public is reassured that judges are not merely ruling according to whim.<sup>24</sup> Stare decisis also ensures that this perception is likely to be a reality; it “prevents judges from exercising partiality or prejudice,” and “minimizes the possibility that an inexperienced judge will fall into errors of injustice.”<sup>25</sup> The legitimacy of the court system as a whole depends in large part on the public’s belief that the courts are not composed of “judges free to write their policy views into law.”<sup>26</sup>

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<sup>16</sup> See Werner, *supra* note 3, at 648-49; Solomon, *supra* note 7, at 429-30.

<sup>17</sup> See Solomon, *supra* note 7, at 432.

<sup>18</sup> *Id.* at 430 (quoting *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979)).

<sup>19</sup> *Id.* at 429-30 (quoting RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 82 (1990)).

<sup>20</sup> See Solomon, *supra* note 7, at 425; Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 505 (1947).

<sup>21</sup> See Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. Sup. Ct. History \_\_\_, available at [http://www.supremecourthistory.org/04\\_library/subs\\_volumes/04\\_c09\\_g.html](http://www.supremecourthistory.org/04_library/subs_volumes/04_c09_g.html).; *cf. Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000); *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995).

<sup>22</sup> Caminker, *supra* note 11, at 851.

<sup>23</sup> *Id.* at 852-54; *cf. Weiner*, 900 S.W.2d at 320.

<sup>24</sup> See Caminker, *supra* note 11, at 853 (“Frequent or immediate overrulings, especially when prompted by a change in personnel, cast into doubt courts’ commitment to making decisions free from politics and personal whim.”).

<sup>25</sup> See Sprecher, *supra* note 20, at 505; Kelsey, *supra* note 2, at 10.

<sup>26</sup> See Powell, *supra* note 21.

Finally, horizontal stare decisis, like vertical stare decisis, supports judicial efficiency. Once a case has been decided, the court can move on to new issues and need not keep debating the same points again and again. Justice Cardozo noted that because “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case,” judges must sometimes “stand by the errors of our brethren the week before, whether we relish them or not.”<sup>27</sup> Stare decisis thus protects the court’s time and resources.

### **The Ethical Basis of Stare Decisis: Diffusion of Judicial Power**

The strictness with which courts apply stare decisis can profoundly shape the nature of judicial power as a whole. Alexander Hamilton’s statement in Federalist 78 that the judiciary is the “least dangerous” branch of government was premised on the idea that judicial power was limited by “strict rules and precedents.”<sup>28</sup> A relaxation of stare decisis aggregates judicial power in the judges currently serving and creates a potential “subterfuge for politicizing the judicial process.”<sup>29</sup>

As a result, some commentators see an ethical dimension to sharing power through the tradition of stare decisis. In Judge Kelsey’s article on stare decisis, he applied G.K. Chesterton’s definition of tradition to the judicial practice of stare decisis. Chesterton wrote: “Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking around.”<sup>30</sup> Kelsey concluded that stare decisis is likewise a means of sharing power with the judges who have served before; it “reserves an empty seat for those many minds.”<sup>31</sup>

Judge Kelsey concludes that sharing power with earlier generations of judges through stare decisis lends a democratizing influence to the judiciary, which has traditionally been the least democratic branch of government.<sup>32</sup> He cautions that relaxing the doctrine of stare decisis too far can aggregate too much power in the present—and in the future, as the new precedents set today can be easily swept away in the future when new judges take the bench. Thus, he concludes, respect for the past and a strong attachment to stare decisis may actually be the best way to ensure that today’s decisions remain vital into the future.<sup>33</sup>

### **The Ethical Basis for Overruling Cases: A Contrary View**

While some judges have urged a strict adherence to stare decisis, others have pressed for greater flexibility to overrule cases. United States Supreme Court Justice William O. Douglas was one the foremost proponents of judicial flexibility; he argued that the “search for static

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<sup>27</sup> See Kelsey, *supra* note 2, at 9-10 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)); Powell, *supra* note 21.

<sup>28</sup> See Kelsey, *supra* note 2, at 10 (quoting *THE FEDERALIST* No. 78 (Alexander Hamilton)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (quoting G.K. CHESTERTON, *ORTHODOXY* 85 (1909)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

security” is “misguided” as “security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts.”<sup>34</sup>

Justice Douglas also viewed stare decisis through an ethical lens, but did not agree that judicial power should be significantly shared with prior judges. Instead, he asserted that a judge has a responsibility to provide independent reasoning, “remember[ing] above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors many have put on it.”<sup>35</sup> He concluded that that a judge should not let “men long dead and unaware of the problems of the age in which he lives do his thinking for him.”<sup>36</sup>

Justice Douglas also believed that too strong an attachment to stare decisis leads to dishonesty, as judges give lip service to stare decisis by refusing to explicitly overrule cases even while they make inconsistent rulings. He wrote that judges would “proclaim that no change is under way” even as they shifted position in new cases, “distinguish[ing]” and “qualifying out of existence” prior precedents in an effort to provide “the outward appearance of stability.”<sup>37</sup> He found such a practice to be dishonest, concluding that a “principle of full disclosure” leads to a “more blunt, open, and direct course” that is “truer to democratic traditions.”<sup>38</sup>

## **Finding a Middle Ground**

Judges have struggled to find a middle ground between sticking with discredited reasoning and cavalierly overruling precedent. While different judges have adopted different rationales for overruling precedent, many of their considerations fall into relatively well-defined categories.<sup>39</sup>

### *1. Has the precedent become settled law?*

In *Planned Parenthood v. Casey*, Justice Scalia stated his view that stare decisis should yield if the relevant precedent has not produced a settled body of law: “Justices should do what is legally right by asking two questions: (1) Was [the precedent] correctly decided? (2) Has [the precedent] succeeded in producing a settled body of law? If the answer to both questions is no, [the precedent] should undoubtedly be overruled.”<sup>40</sup> Judges who give great weight to the question of “settled law” tend to look at three factors in particular:

#### a. The age of the precedent;

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<sup>34</sup> Justice William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 754.

<sup>38</sup> *Id.*

<sup>39</sup> R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing With Precedents in Constitutional Cases*, 62 BROOKLYN L. REV. 973, 990 (1996).

<sup>40</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., dissenting).

- b. Whether the prior case “was itself a departure from prior precedents and gave little weight to established traditions”; and
- c. Whether the precedent is “susceptible of principled application.”<sup>41</sup>

2. *Has the precedent been relied upon?*

Justice Holmes and Chief Justice Rehnquist both gave strong consideration to the extent to which an earlier precedent had been relied upon.<sup>42</sup> Reliance is an especially important consideration in contract and property-rights cases, as people are likely to make “serious financial, business, employment, or other similar kinds of important commitments” based on these precedents.<sup>43</sup> Procedural or evidentiary rulings, on the other hand, are less likely to shape people’s behavior and therefore less likely to induce reliance (and consequently less worthy of protection as binding precedent under the doctrine of stare decisis).<sup>44</sup>

3. *Are there special circumstances that justify overruling a case?*

While some judges are willing to overrule a case they believe was wrongly decided as long as it has not become part of a body of settled law or been otherwise relied upon, other judges are reluctant to overrule cases even if those cases “do not represent settled law and there has been no substantial reliance upon them.”<sup>45</sup> Justice O’Connor exemplified this approach, as she believed that it was appropriate to follow even wrongly decided cases unless there were special circumstances that made it necessary to overrule a case.<sup>46</sup> Judges following this approach identified a number of factors that could undermine an earlier precedent and justify overturning it. These factors include:

- a. the precedent is unworkable in practice;
- b. the precedent creates an inconsistency or incoherence in the law;<sup>47</sup>
- c. a changed understanding of facts has undermined the factual basis of the precedent;
- d. the precedent represents a substantially wrong or substantially unjust interpretation of the Constitution; or

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<sup>41</sup> See Kelso & Kelso, *supra* note 39, at 990-91.

<sup>42</sup> *Id.* at 994.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 995.

<sup>46</sup> *Id.* at 996.

<sup>47</sup> See also Powell, *supra* note 21 (“And where it becomes clear that a wrongly decided case does damages to the coherence of the law, overruling is proper.”).

- e. the precedent raises concerns about a commitment to the “Rule of Law.”<sup>48</sup>

Given the differing perspectives on when a case should be overruled, it is not surprising that judges positions on stare decisis will sometimes conflict. Turnover on a court can bring these different perspectives into sharp relief, as new judges must decide whether to follow cases decided by former judges. This controversy is not new; well over a century ago, the United States Supreme Court caused great controversy when new judges joined the Court and overruled a recently decided controversial case. In 1869, a short four years after the end of the Civil War, the Court had held that creditors were not required to accept United States notes as tender if their contract was signed before Congress declared the notes to be legal tender.<sup>49</sup> The case was decided by a 4-3 vote.<sup>50</sup> The very next year, President Grant appointed Justices Strong and Bradley to fill two vacancies on the Court. The new court reconsidered its earlier opinion and overruled it less than a year later.<sup>51</sup>

The decision to overrule the case was controversial: “Feeling of the day ran high. . . . There was bitter argument by the public. Charges of court-packing reverberated through the country.”<sup>52</sup> Even though the initial decision had not been on the books long enough to become settled law or to induce significant reliance, many people felt that it was nevertheless wrong to overrule the case merely because of a change in personnel on the Court. As a result, “[m]any who opposed the first decision likewise opposed the second.”<sup>53</sup> The decision did not sit well with the public. According to Justice Hughes, “From the standpoint of the effect on public opinion, there can be no doubt that the reopening of the case was a serious mistake and the overruling in such a short time, and by one vote, of the previous decision shook popular respect for the Court.”<sup>54</sup>

Although the decision was controversial, Justice Douglas, writing years later, concluded that it was right.<sup>55</sup> He wrote that the “judges then as now spoke their minds” and followed their “strong convictions.”<sup>56</sup> He also believed that it was important, especially in cases of presenting constitutional questions, for the decision to, “where possible . . . reflect the views of the full court.”<sup>57</sup> Given the differing views of judges who gave significant thought to the ethics of stare decisis, it is clear that there is room for reasonable people to differ.

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<sup>48</sup> *Id.*

<sup>49</sup> Justice William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 740 (1949) (citing *Hepburn v. Griswold*, 8 Wall. 603 (U.S. 1869)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (citing *The Legal Tender Cases*, 12 Wall. 457, 562 (1870)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 52 (1928)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

## The View From Texas<sup>58</sup>

Not surprisingly, the Texas Supreme Court expects intermediate and trial courts to follow its decisions regardless of the lower courts' view of their correctness: "It is not the function of a court of appeals to abrogate or modify established precedent. . . . That function lies solely with this Court."<sup>59</sup> But overall, the Texas model of stare decisis for civil cases is surprisingly weak.

The Texas Supreme Court reviews the orders and decisions of 14 intermediate courts of appeals and thousands of trial courts.<sup>60</sup> Geography usually determines the path of appellate review—*i.e.*, after a trial court exercises its original jurisdiction over a case, a losing litigant may then seek review as a matter of right from the court of appeals with appellate jurisdiction over the geographic region in which the trial court resides.<sup>61</sup> A losing party may then seek final, albeit discretionary, review from the Texas Supreme Court.<sup>62</sup>

A court's duty to follow precedent tracks this geographic path as well. For example, a civil district court in Dallas is duty bound to follow the decisions of the Texas Supreme Court and the Fifth Court of Appeals in Dallas;<sup>63</sup> the district court is not, however, bound to follow the decisions of any of the other 13 courts of appeals.<sup>64</sup> The civil district court is also not required to follow the decisions of any other district courts—not even other Dallas County district courts. Similarly, no court of appeals is obligated to follow the decisions of any of the other 13 courts of appeals.<sup>65</sup> Obviously, Texas follows a rather weak model of horizontal stare decisis (with courts of appeals free to disregard the other's decisions) and a rather weak model of vertical stare decisis (with district courts free to disregard the decisions of 13 of the 14 courts of appeals and all its sister district courts).<sup>66</sup>

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<sup>58</sup> Author Cassandra Burke Robertson is currently a staff attorney at the Texas Supreme Court and did not contribute to *The View from Texas* section of this paper.

<sup>59</sup> *Lubbock County v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002).

<sup>60</sup> See <http://www.courts.state.tx.us>.

<sup>61</sup> See TEX. GOV'T CODE § 22.201 (dividing Texas counties into 14 courts of appeals districts); TEX. GOV'T CODE § 22.220(a) ("Each court of appeals has appellate jurisdiction of all civil cases within its district . . .").

<sup>62</sup> See TEX. CONST. art. V, § 3(a).

<sup>63</sup> See *Hicks v. Baylor Univ. Med. Ctr.*, 789 S.W.2d 299, 304 (Tex. App.—Dallas 1990, writ denied); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied) ("An intermediate court is duty-bound to follow the Texas Supreme Court's authoritative expressions of the law . . .").

<sup>64</sup> A trial court in Houston is bound by the decisions of both the First and Fourteenth Courts of Appeals.

<sup>65</sup> See, e.g., *Lambert v. Affiliated Foods, Inc.*, 20 S.W.3d 1, 8 (Tex. App.—Amarillo 1999), *aff'd sub. nom. Lawrence v. C.D.B. Servs., Inc.*, 44 S.W.3d 544 (Tex. 2001); *Mitchell v. John Wiesner, Inc.*, 923 S.W.2d 262, 264 (Tex. App.—Beaumont 1996, no writ).

<sup>66</sup> And Texas courts are not bound by the decisions of any federal courts of appeals or federal district courts. See, e.g., *Landry's Seafood Restaurants, Inc. v. Waterfront Cafe, Inc.*, 49 S.W.3d 544, 549 n.2 (Tex. App.—Austin 2001, pet. dismissed) ("We note that although we may consider the decisions of federal courts of appeals, we are not bound by them."); *Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 92 (Tex. App.—Fort Worth 2000, pet. denied) ("[W]e are not bound by the pronouncements of the Fifth Circuit, we are obliged only to follow federal law decisions of the United States Supreme Court and the Texas Supreme Court."); *cf. Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); Caminker, *supra* note 11, at 825 ("Thus a state court need not follow the holdings of any inferior federal court, including the court of appeals in whose geographic region the state court sits.").

Historically, the Supreme Court has taken a middle-of-the-road approach to reviewing its own prior decisions, according a presumption that settled law should stand, but exhibiting a willingness to overrule cases when “a timeworn rule no longer serves the needs of society”:

[T]he doctrine of stare decisis does not stand as an insurmountable bar to overruling precedent. Stare decisis prevents change for the sake of change; it does not prevent any change at all. It creates a strong presumption in favor of the established law; it does not render that law immutable. Indeed, the genius of the common law rests in its ability to change, to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly.<sup>67</sup>

Although the Texas Supreme Court has not set forth particular factors to be considered when deciding whether to overrule prior precedent, the Texas Court of Criminal Appeals has:

1. the original decision was flawed from the outset, due to flawed reasoning, lack of authority, or misplaced reliance upon cited authorities;
2. the decision conflicts with other precedent;
3. the decision has been undercut by the passage of time;
4. the decision produces inconsistency and confusion in the law; and
5. the decision consistently creates unjust results or places unnecessary burdens upon the system.<sup>68</sup>

These factors are also discussed by the Texas Supreme Court as justification for overruling their prior decisions.<sup>69</sup>

In addition, for more than a century, the Supreme Court has recognized that the rule of stare decisis has differing force—*i.e.*, prior decisions are afforded differing levels of deference by the Court—depending on the subject matter. For example, the Supreme Court has recognized that “stare decisis is never stronger than in protecting land titles, as to which there is great virtue

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<sup>67</sup> Justice Wallace Jefferson, *Stare Decisis*, 8 TEX. REV. L. & POL. 271, 274 (Spring 2004) (quoting *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979)); *see id.* at 274-75 (“But now, as a justice on the court, I apply the principle of stare decisis to extend the law in a logical fashion, in a way that promotes stability and predictability of the development of the law. . . . Yet prior precedent should be reconsidered when blind adherence to ‘settled’ law binds the judiciary, and those who rely on its judgment, to doctrines that can no longer be justified in the current day and age.”); *see also Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999) (“We do not shy away from change when it is appropriate. We continue to believe that ‘the genius of the common law rests in its ability to change, to recognize the needs of society, and to modify the rule accordingly.’” (quoting *Gutierrez*, 583 S.W.2d at 317)).

<sup>68</sup> *See Hammock v. State*, 46 S.W.3d 889, 892-93 (Tex. Crim. App. 2001).

<sup>69</sup> *See, e.g., Tooke v. City of Mexia*, 197 S.W.3d 325, 338, 342 (Tex. 2006) (overruling prior precedent because it was based on “a position we have since rejected,” it is inconsistent with, and may disrupt the Legislature’s more recent enactments, and because the original decision was “simply incorrect” and decided “without analysis”); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 203-04 (Tex. 2001) (overruling prior precedent to dispel the “considerable confusion” created by the prior precedent); *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596-98 (Tex. 1998) (overruling prior precedent that was logically “flawed” from the outset and that unfairly burdened the judicial system and citizens of Texas).

in certainty.”<sup>70</sup> The Court has afforded the same level of respect to prior precedent “in the area of statutory construction,” where the doctrine has the “greatest force”<sup>71</sup> because “any errors may be corrected by statutory amendments.”<sup>72</sup> Similarly, cases involving the interpretation of the terms of mandatory insurance policy forms receive almost the same level of respect as statutory construction cases because insurance regulators are free to change the terms of the policies to correct any perceived errors in the high court’s interpretation.<sup>73</sup> In contrast, *stare decisis* has much less force in cases involving constitutional issues because the Supreme Court is essentially the only body empowered to correct errors in the interpretation of the Texas Constitution.<sup>74</sup>

As discussed above, judges often have differing views regarding the application of *stare decisis*, and turnover on a court can bring those differing views into stark relief. Turnover on the Texas Supreme Court has resulted in two recent decisions that—to the appellate bar and business community—may smack of the controversy presented long ago in the *Legal Tender Cases*.

The first is *F.F.P. Operating Partners, L.P. v. Duenez*. In this case, a convenience store employee sold a 12-pack of beer to a person who had already consumed a case and a half of beer that day; after purchasing the beer, the person drove back onto the highway, swerved across the center line, and struck head-on the car driven by the Duenezes.<sup>75</sup> The Duenezes sued the driver and the convenience store under the Dram Shop Act.<sup>76</sup> The convenience store filed a cross-action against the driver, naming him as a responsible third party and a contribution defendant. The trial court refused to submit a question to the jury regarding the driver’s percentage of responsibility, finding that the proportionate responsibility statute did not apply in Dram Shop cases. The court of appeals affirmed.

In April 2002, the Supreme Court was asked to review the case. On September 3, 2004, the Court issued its first opinion. In its 5-4 decision, the Court concluded that the proportionate responsibility statute did apply in Dram Shop cases; however, the majority further explained that “when a customer who has been served in violation of the Dram Shop Act injures an innocent third party, the intoxicated customer’s percentage of responsibility must be apportioned so that the provider [of the alcohol] may seek reimbursement from the customer, but the third party may

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<sup>70</sup> See *John G. & Marie Stella Kenedy Mem’l Found. v. Dewhurst*, 90 S.W.3d 268, 281 (Tex. 2002) (“We would be very reluctant to discard a rule determining seashore boundaries that has served as long and satisfactorily as the rule in *Luttes*, thereby upsetting long-settled expectations, and we could not do so absent far more compelling evidence than can be offered here.”).

<sup>71</sup> *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968).

<sup>72</sup> See *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000); *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963).

<sup>73</sup> *Fiess v. State Farm Lloyds*, 202 S.W.2d 744, 749 (Tex. 2006).

<sup>74</sup> See *Tex. Ass’n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (“Although our concern for the rule of *stare decisis* makes us hesitant to overrule any case, when constitutional principles are at issue this court as a practical matter is the only government institution with the power and duty to correct such errors.”); *but see* Powell, *supra* note 21 (“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.”).

<sup>75</sup> *F.F.P. Operating Partners, L.P. v. Duenez*, No. 02-0381, 2007 WL 1376357, at \*1 (Tex. May 11, 2007).

<sup>76</sup> See TEX. ALCO. BEV. CODE § 2.02.

recover from the provider [of the alcohol] ‘for the actions of its customer.’”<sup>77</sup> Thus, the Court affirmed the \$35 million jury verdict against the convenience store.

The Court, however, granted petitioner’s motion for rehearing in 2005. By that time, the makeup of the Court had changed—*i.e.*, three of the original five-member majority had left the Court.<sup>78</sup> In November 2006, the Court withdrew its original opinion and, by a vote of 7-2, reached the opposite result, reversing the trial court’s judgment and remanding the case for a new trial. In May 2007, more than five years after the original petition for review was filed, the Court issued a third opinion, confirming the rulings made in the second opinion.

Justice O’Neill, a member of the original majority, dissented and condemned the notion that a change in court personnel should have altered the original decision in this case:

[B]etween the time the Court issued its original decision in this case and the date rehearing was granted, more than seven months passed and three members of the former majority left the Court. [The] motion for rehearing raised no new issues; every point was thoroughly considered by the Court in its prior decision. While [the] motion for rehearing was pending, the Legislature convened without taking any action to alter this Court’s original interpretation. Nevertheless, the Court withdrew the prior opinion, reached the opposite result, and accomplished judicially what the Legislature itself declined to do.<sup>79</sup>

This outcome raises a number of ethical questions for a sitting justice: When is a justice free to second guess, or required to review, the vote of her predecessor in office in recently decided cases (especially difficult 5-4 decisions)? When, if ever, is a justice justified in attempting to delay a final vote in a case if a pending change in court personnel could swing the outcome of a case in favor of her position? Regardless of the answers to these rhetorical questions, it is not difficult to understand how the conflicting positions taken by the Court in *Duenez* as a result of a change in court personnel could undermine the public’s confidence in the judicial process.

The second recent case illustrating how a change in court personnel can directly affect the rule of law is *Excess Underwriters at Lloyd’s v. Frank’s Casing Crew and Rental Tools, Inc.*<sup>80</sup> In 2000, the Supreme Court, by a 7-2 vote, decided *Texas Association of Counties Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000). The Court concluded that an insurer cannot obtain reimbursement from its insured after the insurer pays to settle a claim that is later determined to be excluded from coverage under the insurance contract unless (1) the insurance contract expressly provides for a right of reimbursement, or (2) the insurer obtains the insured’s clear and unequivocal consent to seek reimbursement. In other words, the Court concluded that no extra-contractual right to reimbursement exists under Texas law.

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<sup>77</sup> 2007 WL 1376357, at \*20 (O’Neill, J., dissenting).

<sup>78</sup> See Andy Payne, *Third-Party Dram Shop Liability*, 70 TEX. B.J. 44 (Jan. 2007).

<sup>79</sup> See *F.F.P. Operating Partners, L.P. v. Duenez*, No. 02-0381, 2007 WL 1376357, at \*20 (Tex. May 11, 2007) (O’Neill, J., dissenting).

<sup>80</sup> See *Excess Underwriters at Lloyd’s v. Frank’s Casing Crew & Rental Tools, Inc.*, No. 02-0730, 2005 WL 1252321 (Tex. May 27, 2005).

On May 27, 2005, less than five years after *Matagorda County* was decided, the Court issued its opinion in *Frank's Casing*, concluding that an extra-contractual right to reimbursement does exist under Texas law when the insured makes a *Stowers* demand against the insurer.<sup>81</sup> The Court's about-face was achieved by a 7-0 vote. Although Justice Owen attempted to distinguish *Matagorda County* in her majority opinion, Justice Hecht candidly dismissed her efforts in his concurring opinion:

Since the present case cannot be distinguished from *Matagorda County* on any ground that matters, this case effectively overrules *Matagorda County*, as it should.<sup>82</sup>

Frank's Casing and the business community cried foul in the wake of this decision, recognizing, as Justice Hecht did, that this decision effectively overrules *Matagorda County*. Frank's Casing filed a motion for rehearing, and a number of powerful amici have filed briefs in support of the motion for rehearing. An amicus brief filed by the Texas Civil Justice League discusses many of the concerns that may arise when a court strays from the principles of stare decisis:

Since 1986, the Texas Civil Justice League ("TCJL") has worked on behalf of its thousands of business and individual supporters to attempt to create a fair, efficient, and predictable civil justice system in Texas. TCJL did not undertake and sustain this effort for two decades because it was offended by the runaway verdicts and excessive judgments in civil cases. Those verdicts and judgments were a symptom of the problem, not the cause of the problem. The problem was that the laws passed by the Texas Legislature and the decisions handed down by Texas's courts were creating an unbalanced, unfair, and unpredictable dispute resolution system. As a consequence, Texas's civil justice system was dissuading businesses from moving to Texas or expanding their existing operations in Texas. Therefore, TCJL has been involved in a twenty-year struggle, through legislative and political advocacy, to correct imbalances in the civil justice system so that Texas can sustain and expand its economic base for the benefit of all Texas citizens. TCJL is concerned that the Court's recent decision in [Frank's Casing] takes a step back from predictability in the law related to business transactions in Texas and, therefore, a step back from the continuing effort to attain a fair, efficient, and predictable civil justice system in Texas.<sup>83</sup>

In the wake of this outcry, the Court granted Frank's Casing's motion for rehearing, and reheard oral argument. The Court has not yet issued its final ruling.

Although cases like *Duenez* and *Frank's Casing* may be troubling to the bar and public at large, they are not particular to the Texas Supreme Court or, unfortunately, particularly rare. For example, much attention has been given to whether the United States Supreme Court will review

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<sup>81</sup> See *id.* at \*1.

<sup>82</sup> See *id.* at \*8 (Hecht, J., concurring).

<sup>83</sup> See Amicus Curiae Brief of Texas Civil Justice League in Support of Respondent's Motion for Rehearing, No. 02-0730, available at <http://www.supreme.courts.state.tx.us/ebriefs/02/02073008.pdf>.

earlier 5-4 decisions now that swing-Justice Sandra Day O'Connor has been replaced by Justice Samuel Alito. At bottom, a Texas court's adherence to precedent is a function of the individual judges' attitudes toward their ethical duty to "be faithful to the law" and promote public confidence in "the integrity and independence of the judiciary" as required by the Texas Code of Judicial Conduct.<sup>84</sup>

## Conclusion

Although the concept of stare decisis is fundamental to American law, it is far from simple. Vertical stare decisis does not ordinarily pose too much of a problem, as lower courts generally have little problem in applying the precedents set by higher courts. Horizontal stare decisis, on the other hand, can be much more difficult to apply. Ethical judges are often torn by the need to balance judicial independence with adherence to precedent, and different judges reach different positions on the appropriate balance between those two considerations. Even if judges may ultimately reach different conclusions about when it is appropriate to overrule a case, however, it is nevertheless important to examine the role of stare decisis in the judicial system. Judicial focus on the issue assures that, at a minimum, the importance of stable precedent will be weighed against the need for the law to remain flexible and adapt to changing circumstances.

One final note: Although a judge may choose to ignore prior precedent, Texas attorneys cannot. Texas Rule of Professional Conduct 3.03 provides that a lawyer "shall not knowingly fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."<sup>85</sup> Although this burden is not an onerous one given the limited nature of horizontal stare decisis in Texas, it is one not to be taken lightly.<sup>86</sup>

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<sup>84</sup> See TEX. CODE JUD. CONDUCT, Canons 1, 3(B)(2). The Texas Constitution expressly provides that a judge who willfully violates the Code of Judicial Conduct—including the duty to "be faithful to the law"—may be removed from office. See TEX. CONST. art. V, § 1-a(6); cf. *Oberholzer v. Comm'n on Judicial Performance*, 975 P.2d 663, 680 (Cal. 1999) (concluding that intentional disregard of the law was sufficient to discipline a superior court judge for violations of the California Code of Judicial Ethics). Of course, this constitutional provision does not mean that a judge should be disciplined for his erroneous decisions, but it does set an outside boundary for judicial conduct.

<sup>85</sup> TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03.

<sup>86</sup> See *R.D.W. v. State*, No. 05-00-01416-CV, 2001 WL 1143313, at \*1 (Tex. App.—Dallas Sept. 28, 2001, no pet.) ("This Court hereby notifies [attorney] that we are considering, on our own initiative, sanctioning [attorney] under rule 45 and/or under our inherent authority. [Attorney] is ORDERED to file a response within ten days of the date of this order addressing why sanctions should not be imposed. Specifically, [attorney] should address why he failed to direct this Court to *T.D.H.* See TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(4).").