Citizens United (2010) & Justice Jackson (1944) on Fidelity to Precedent

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On January 21, 2010, the Supreme Court of the United States decided in *Citizens United v. Federal Election Commission* that a corporation's political electioneering expenditures are protected by the First Amendment.[1] The Court thus invalidated federal statutory limits on such expenditures and explicitly overruled two earlier decisions that had declared that such laws were constitutional.[2]

Because a foundational principle of sound judging is *stare decisis* (fidelity to precedent), the Supreme Court endeavored in *Citizens United* to explain its rejections of its prior decisions. Justice Anthony Kennedy, writing for the Court, described the principal prior decision as, for various reasons, not sufficiently long-lived, well-reasoned, workable or a source of reliance interests that should be respected. He, joined by four other justices, thus concluded that it should be overruled.[3] (Justice John Paul Stevens, writing in dissent for himself and three other justices, responded powerfully to each of Justice Kennedy's claims.[4])

Chief Justice John G. Roberts, Jr., who joined Justice Kennedy's opinion, also wrote his own concurring opinion. With regard to *stare decisis*, Roberts explained that any judicial decision to follow a past decision even though it now appears to be wrong is a policy determination. According to the Chief Justice,

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[1] *See Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010).

[2] *See id*., Slip Op. at 50 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and overruling in part *McConnell v. Federal Election Commission*, 540 U.S. 93, 203-09 (2003)).

[3] *See id*., Slip Op. at 47-50.

[4] *See id*., Slip Op. at 6-7 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting).

> [w]hen considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of the practical effects of one against the other." Jackson, Decisional Law and *Stare Decisis*, 30 A.B.A.J. 334 (1944).[5]

The Chief Justice then identified the "greatest purpose" of *stare decisis* as service to "a constitutional ideal—the rule of law. It follows," he asserted,

> that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.[6]

With regard to the principal prior decision being reconsidered in *Citizens United*, the Chief Justice argued that it does such damage and thus should be reversed.[7]

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Chief Justice Robert's argument that judges should strike the balance against *stare decisis* and reject precedents they regard as harmful to "the rule of law" is a vague statement asserting broad power. In future cases, it might be used to justify many reversals of past precedents.

The possibility of judicial zeal for such developments is quite contrary to the perspective that Justice Jackson expressed in the 1944 speech that Chief Justice Roberts quoted briefly in *Citizens United*. In that speech, Jackson—who was focusing in the speech on common law, as opposed to constitutional, adjudication—deplored what he described as *stare decisis*'s "anemic condition."[8] (Controversies over *stare decisis* are

[5] *Id*., Slip Op. at 6-7 (Roberts, C.J., joined by Alito, J., concurring) (emphasis in original).
[6] *Id*., Slip Op. at 7.
[7] *See id*., Slip Op. at 8-14.
[8] Robert H. Jackson, *Decisional Law & Stare Decisis*, 30 ABA J. 334 (1944).

nothing new—they are, by definition, almost as old as courts themselves.) Jackson, in the passage that preceded immediately the line that Chief Justice Roberts quoted, stated his general position—his inclination toward precedent—quite plainly and powerfully:

> I cannot believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of *stare decisis*. Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common law process would become the most intolerable kind of *ex post facto* judicial law-making. Moderation in change is all that makes judicial participation in the evolution of the law tolerable. Either judges must be fettered to mere application of a legislative code with a minimum of discretion, as in continental systems, or they must formulate and adhere to some voluntary principles that will impart stability and predictability to judicial discretion. To overrule an important precedent is serious business.[9]

Justice Stevens might well have drawn, in his *Citizens United* dissenting opinion, on Justice Jackson's reflections. His full speech, which addressed *stare decisis* and other topics, is below.

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Robert H. Jackson
Associate Justice, Supreme Court of the United States

Speech to the Annual Meeting of the American Law Institute
Bellevue-Stratford Hotel
Philadelphia, Pennsylvania
May 9, 1944

The American Law Institute is a recognition that the practicing lawyer, as well as the legislator and the judge, shares responsibility for the state of the law. In fact, our system of public justice presupposes the private

[9] *Id.*

law office. We speak of people's going to court. But first they go to a law office. The law that they get there is the only law to many of them. If he does not become too submerged in his client's interests or too preoccupied with immediate professional tasks, the practicing lawyer is one of the first to detect defects of the law and the injustices they perpetrate or shelter. He sees the concrete effects of conflict, confusion, error or innovation in the law more clearly, perhaps, than the judge, the legislator, or the law-school man.

I suppose that the undertaking to restate decisional law is in itself an evidence of discontent, not only with its disorderly form in the books, but also with conflicts and uncertainties in its substance. Complaint about "that wilderness of single instances"[10] is, of course, as old as our profession. But the fact that you are troubled about the general state of decisional law gives me courage to say a few words about the doctrine of *stare decisis.* It is not that I can contribute anything new on the subject, but *stare decisis* is an old friend of the common lawyer, who is now much concerned about its anemic condition.

I supposed we would not much disagree about the theoretical significance of the doctrine of *stare decisis*, however sharply we might divide about applying it to specific cases. I never have, and I think few lawyers ever have, regarded that rule as an absolute. There is no infallibility about the makers of precedents. We cannot deny to the judicial process capacity for improvement, adaption and alteration unless we are prepared to leave all evolution and progress in the law to legislative process.

But because one should avoid Scylla is no reason for crashing into Charybdis. I cannot believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the

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[10] Alfred Tennyson, *Aylmer's Field* (1793), *available at* classiclit.about.com/library/bl-etexts/atennyson/bl-aten-aylmer.htm. The phrase "wilderness of single instances" occurs in this passage:

> So Leolin went; and as we task ourselves
> To learn a language known but smatteringly
> In phrases here and there at random, toil'd
> Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances,
> Thro' which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame.

rule of *stare decisis*. Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning our common law process would become the most intolerable kind of *ex post facto* judicial law-making. Moderation in change is all that makes judicial participation in the evolution of the law tolerable. Either judges must be fettered to mere application of a legislative code with a minimum of discretion, as in continental systems, or they must formulate and adhere to some voluntary principles that will impart stability and predictability to judicial discretion. To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of the practical effects of one against the other.

We may also agree, I am sure, that our times have witnessed considerable relaxation in the authority of the precedent. While the Supreme Court furnishes perhaps the most dramatic and publicized examples, men of the profession know that it is not alone in following a trend, the direction of which is unmistakable. Nowhere today is the precedent so decisive of litigation as it is supposed to have been in the eighteenth and nineteenth centuries. Careful examination will show that the reputation of the law for almost perfect stability during such periods is exaggerated. But certain it is that no lawyer today feels such assurance that a pat case will bring him victory or defeat as lawyers once felt. Even those distinguished among their contemporaries for being strongest in that faith are now milder in their expressions of devotion to *stare decisis.*

The depreciation of the precedent is too general to be due merely to personal attitudes of judges and is traceable, in my opinion, to more impersonal forces.

The present low estate of the precedent cannot be dissociated from the enormous multiplication of precedents. I need not recite increase during the past century in numbers of courts of last resort and of intermediate courts of appeal and of various tribunals for legal specialties. Nor need I remind you how each has increased the pace of decision and the output of opinions. I should like to keep abreast, indeed I think it is my duty to keep abreast, of legal developments of the country. But frankly I cannot absorb the output. I am vaguely aware of a great cloud of current decision of importance, both judicial and quasi-judicial, that I do not have time to read, much less digest. And the total accumulation of judicial utterances is even more formidable. I know that in this great mass of opinions by men of

different temperaments and qualifications and viewpoints, writing at different times and under varying local influences, some printed judicial word may be found to support almost any plausible proposition.

The influence of precedents depends on two factors: some have a fiat value because of the high authority by which they are issued; some have intrinsic value based on individual quality. The two may have no relation, but when they concur we have the precedent at its zenith. The multiplication of precedents is apt to affect both elements of their value.

Legal opinions seem subject to the same natural law that affects currency: inflation of the volume decreases the value of each unit. When so many issues of opinion compete for acceptance, they inevitably suffer a discount.

But the increased volume of opinion affects the intrinsic value of many precedents as well. They are made of baser metals when the pace is fast and the volume large. No one knows better than you that except for scientific writings, no type of composition requires greater deliberation, detachment, and exactness than an opinion in a leading case. You know that legal writing has no kinship with journalism, that any appearance of easy writing is misleading. You know that it is slow writing, that the best of it needs clarification by the candid and critical collaboration of several minds.

The first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle. That means such individual study of its background and antecedents, its draftsmanship and effects that at least when it is announced it represents not a mere acquiescence but a conviction of those who support it. When that thoroughness and conviction are lacking, a new case, presenting a different aspect or throwing new light, results in overruling or in some other escape from it that is equally unsettling to the law. All of these things take time, and the lack of it results in opinions that are loosely expressed and shortly to be abandoned or qualified. If I am right in thinking that the inflation and consequent debasement of the judicial precedent is the chief underlying cause of depreciation in its value, remedies are hard to devise.

Haste and pressure are too ingrained in our modern lives to think courts can be free of them. Mass production is so much a premise of American thinking that to question its benefits in any field is thought reactionary. Clearly we cannot depend on the profession to resist pressures

to load appellate courts. I know from experience that the combination of professional pride, wounded by a defeat, and a belligerent and solvent client was enough to convince me that the welfare of the law required an appeal in my case. We once thought that substitution of discretionary in place of mandatory jurisdiction would cure overloading. It has helped greatly. But the burden of passing on petitions invoking discretion is considerable, and the temptation to judges is great to take hold of any result that strikes them as wrong or any question that is interesting, even if not of general importance. The fact is that neither the judges nor the profession have wholeheartedly and consistently accepted the implications of discretionary jurisdiction in courts of last resort.

No doubt restatement of the law in difficult fields assists and guides the work of courts and judges that are hospitable to such help and aid to make work more solid and dependable. The distillation of principles from cases is perhaps the first and most important step in their use, and this Institute is doing that and, so far as my judgment goes, doing it admirably. A good deal of the rest of the fate of judicial decisions as precedents rests with the courts themselves, particularly with those that have discretionary jurisdiction.

I am glad for the opportunity to commend and, so far as words of mine will do so, to encourage the work of the Institute and to hope that judges and lawyers will better learn to know and appreciate the treasury of legal principles and supporting authority you are creating. For we are all under trusteeship responsibility for the precious but never finished body of the law.