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**A Doctrine in Crisis: *Stare Decisis***

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## **A Doctrine in Crisis: *Stare Decisis***

**Jessica L. Asbridge**

How should the courts of today treat the decisions of the courts of yesterday? The doctrine of *stare decisis* provides the answer: generally, today's court should stand by the decisions of yesterday's court, even when today's court believes that yesterday's court was wrong. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). Yet, sometimes, today's court must overrule yesterday's court. Indeed, many of the Supreme Court's most important decisions are decisions overruling the Supreme Court of yesterday. But when should the court of today overrule the court of yesterday? How should the court make this determination? These questions are just a few of the many issues surrounding *stare decisis* today.

Unfortunately, the current formulation of the doctrine of *stare decisis* lacks predictability and has caused confusion and inconsistency in its application. This paper explores some of the current issues involving the doctrine of *stare decisis* in the Fifth Circuit and the Supreme Court of the United States. Part I provides a brief overview of the doctrine of *stare decisis*. Part II discusses the Fifth Circuit's "Rule of Orderliness" and the confusions arising from this rule. Part III addresses the issues related to *stare decisis* in the Supreme Court. Part IV addresses the future of the *stare decisis* doctrine in the Supreme Court. Part V provides final thoughts for attorneys litigating *stare decisis* issues.

### **I. *Stare Decisis* Overview**

*Stare decisis* comes from the latin "*stare decisis et non quieta movere*" which means "to stand by the thing decided and not disturb the calm." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring). The Supreme Court has described the doctrine of *stare decisis* as "a foundation stone of the law." *Kimble, LLC*, 576 U.S. at 455. The doctrine dates back to before the creation of the American Judicial System. Blackstone wrote in 1765 that "it is

an established rule to abide by former precedents,” to “keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion.” *Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring). Then, in Federalist Paper number 78, Alexander Hamilton wrote about *stare decisis*: “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” THE FEDERALIST NO. 78 (Alexander Hamilton). Thus, *stare decisis* is a fundamental part of the American judiciary.

But what does this latin phrase mean in practice? The doctrine of *stare decisis* provides that generally, today’s court should adhere to the precedent set by yesterday’s court. *Kimble, LLC*, 576 U.S. at 455. In other words, the court should not overrule precedent simply because today’s Court thinks yesterday’s court was wrong. *Id.* Instead, there must be some “special justification” to overrule the precedent. *Id.* at 456.

Now, why is this important? The Supreme Court often remarks that “*stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, observing *stare decisis* helps preserve the integrity of courts by showing that the court is not a political branch; Justice Jackson stated that the constraint of precedent distinguishes the judicial “method and philosophy from those of the political and legislative process.” Hon. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944). When the Court adheres to the doctrine of *stare decisis* and stands by past decisions—even when the court of today thinks those past decisions are wrong—it demonstrates to society that the Court’s decisions are indeed based on law and objectivity, not the politics or opinions of individual justices. *Id.*

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