WHY PRECEDENT?

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In ordinary life, we try not to repeat our mistakes. In law, things are different. According to the common law doctrine of precedent or *stare decisis* (to stand by things decided), courts are required to follow the decisions of courts in earlier cases, even if those cases were wrongly decided. Why should courts be condemned to repeat their mistakes? What, if anything, justifies the doctrine of precedent?

I begin with some clarifications and terminology. Consider a court faced with a case unregulated by existing law. To decide the case, the court creates and applies a rule, according to which certain facts in the case suffice for some legal result (see Raz 1979: 183-92; Schauer 1991: 174-87). Call the court the *precedent court* and the case the *precedent*. The court in the current case must "follow precedent", that is, follow the rule laid down in the precedent. There are two exceptions. First, the court in the current case may amend the rule laid in the precedent if the amended rule would both justify the result in the precedent case and leave the current court free to reach a different result. To exercise this power is to *distinguish* the precedent. Second, some courts have the power to *overrule* a precedent by depriving the rule laid down in that case of legal effect. This power is *not* available merely if the current court thinks that the precedent was wrongly decided, in that there was a better rule available to the precedent court which it did not make. It is available only if there are "special circumstances", for example, the precedent is "plainly" wrong.

Here is how I proceed. I describe an example from the United States Supreme Court to motivate the discussion (§1). I set out the three orthodox arguments for the doctrine of precedent (§2). We should be sceptical of these arguments because they are too general: they suggest – wrongly – that not only judges but also legislatures and executive officials should be subject to a doctrine of precedent. According to my alternative argument, precedent is an instance of *status quo* bias. *Status quo* bias is justified under some conditions (§3). These are also the conditions under which courts make decisions (§4). But they are not, to the same degree, the conditions under which legislative and executive bodies make decisions (§5).

1. Abortion cases

In 2013, Texas enacted a statute requiring doctors to hold 'active admitting privileges at a hospital' within 30 miles of where they performed abortions. Three years later, a majority of the Supreme Court of the United States held that the law was unconstitutional in *Whole Woman's Health v Hellerstedt* ("*Hellerstedt*"). The law placed a 'substantial obstacle' in the path of women seeking an abortion in Texas without furthering any relevant interest. It imposed an 'undue burden' on abortion as a result. Four of the nine justices dissented – including Chief Justice Roberts.

Several years later, the Supreme Court heard *June Medical Services LLC v Russo* ("*June*"). At issue was the constitutionality of a Louisiana statute almost identical to the Texas statute

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struck down in *Hellerstedt*. The deciding vote lay with Chief Justice Roberts. The Chief Justice wrote that he had 'joined the dissent in [*Hellerstedt*] and continue[d] to believe that the case was wrongly decided' (2). Yet precedent requires the Court to follow its previous decisions in indistinguishable cases. The requirement is not absolute; it can be overridden in 'special circumstances (2). But 'for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly' (3). The Louisiana case was indistinguishable from the Texas case. There were no special circumstances to justify departing from *Hellerstedt*. So, the Chief Justice said, 'Louisana's law cannot stand under our precedents'.

We can reframe our question in terms of the Court's alternatives in *June*. Suppose that *Hellerstedt* and *June* are indistinguishable. Suppose there were no special circumstances in favour of departing from *Hellerstedt*. Finally, suppose *Hellerstedt* was wrongly decided. Then the question is: why must the Court in *June* follow *Hellerstedt*? Why not empower the Court to correct its earlier mistake and substitute the rule it should have made?

2. Existing arguments

There are three orthodox arguments for precedent. One argument claims that precedent promotes *equality* by treating like cases alike. The Court in *June* should follow *Hellerstedt* because, otherwise, the parties in *June* would be treated differently than the similarly-situated parties in *Hellerstedt*. Another argument concerns *reliance*. The law's subjects expect courts to follow the rules in previous cases and they change their positions as a result. Perhaps abortion providers in Louisiana expanded their services, relying on *Hellerstedt*. The Court in *June* would wrong-foot them unless it keeps to precedent. Finally, it might be argued that a doctrine of precedent serves *predictability*, which facilitates planning and coordination.

There are well-known objections to each of these arguments (Alexander 1989; Postema 1991; Lamond 2007). Here is an objection good against any of them. Let us grant that the value of equality, reliance, and predictability are reasons for courts to follow even incorrect decisions in previous cases. These are, of course, *pro tanto* reasons. And there are competing reasons. Most obviously, precedent may come at the price of worse decisions. Following *Hellerstedt*, for example, means foregoing the chance to substitute a better rule. The doctrine also constrains courts' freedom to experiment and innovate. So, the proponent of any of the orthodox arguments must assume that the reason they identify outweighs these competing considerations.

But the assumption is implausible as a general matter. Courts are not the only ones who make legal rules; legislatures and executive officials do, too. The orthodox arguments apply to these other bodies, just as they do to courts. If the legislature changes a statute, it introduces an equality: a case arising before the rule is changed is treated differently than a case arising after, even if they both satisfy the rule's antecedent (Brand-Ballard 2010: 258-260). The change in the rule will frustrate people's reliance on it. Further, were the legislature required not to change the rules it previously made, it would enhance the law's predictability. We could say the same of executive decisions. So, a doctrine of precedent in the legislative or executive sphere would improve equality, protect reliance, and increase predictability – just as we are supposing it does in the judicial sphere.

Nonetheless, there is no doctrine of precedent in the legislative or executive sphere. If the legislature thinks it made a rule it should not have, then it can repeal or amend it as it sees fit. The president can do the same. And this is as it should be. No one claims that the legislature

or senior officials should be stuck with the choices their predecessors made. The reason is obvious: accuracy, responsiveness, innovation, and so on are too high a price to pay. In these contexts, equality, reliance, and predictability are outweighed. I treat that as evidence that, when these same sets of reasons compete in the judicial context, equality, reliance, and predictability are again outweighed.

This is not a knock-down objection, of course. Perhaps equality, reliance, and predictability are especially strong reasons in the judicial sphere. Perhaps the reasons which compete with these reasons are especially strong in other spheres. But I see no motivation to resolve these questions one way or the other. That means it is an open question whether any of the orthodox arguments succeed. To make progress we need an argument that applies with greater force in the judicial context than in other governmental contexts.

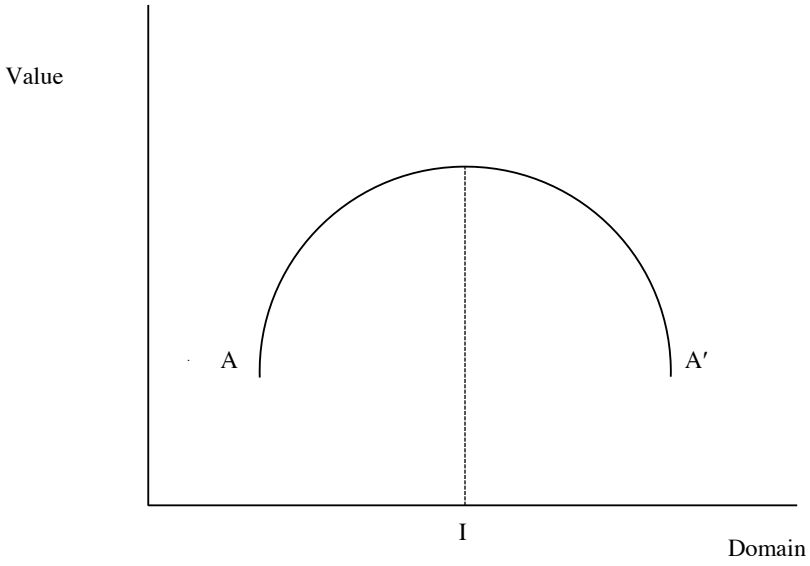
3. *Status quo* bias

My argument proceeds from *status quo* bias to precedent. The argument for *status quo* bias, which I set out in this section, is from Brennan and Hamlin (2004). What is original is the extension of this argument to precedent in §§4-5.

Brennan and Hamlin's argument begins with value functions. A value function pairs off objects of evaluation (e.g., rules, policies) with unique values. Assume that the relevant objects of evaluation can be presented along a single dimension. Assume that value can be measured on a cardinal scale. Then one possibility is a value function with a concave shape, where value increases at a decreasing rate the closer we move to the ideal outcome.

Figure 1 illustrates. If we start from a non-ideal point along AA′ and move towards the ideal point I, then there is an increase in value. Moving an equal distance away from the ideal leads to a greater decrease in value. Other things being equal, avoiding making things worse is more important than making them better.

Figure 1: Concave value functions



What justifies a concave value function? There is a straightforward answer within a rational choice framework. Assume that satisfying individual preferences is of value. Assume that individual preferences exhibit diminishing marginal utility, such that bringing an individual closer to his or her ideal consumption bundle increases utility at a decreasing rate. These assumptions tell us that the welfare gains from moving individuals closer to their ideal consumption bundles will be more than offset by the welfare losses from moving them further away, other things being equal. The result will be a value function like AA′. If you are sympathetic to rational choice theory, that may be enough for you. What if the relevant value is not individual preference satisfaction? Brennan and Hamlin conjecture that many other values – for example, equality of material resources – also have concave functions. Some philosophers go further and claim that contributions to value generally show diminishing returns (see Carter 2011). These are not debates I can contribute to here, so I will proceed on the assumption that the relevant value functions are concave.

Concavity does not on its own favour a status quo bias. If it is *certain* that changing a rule will improve things, then that change ought to be adopted. But often rule-makers act under uncertainty. Society is complicated. It is hard to predict how individuals will respond to new rules. It is hard to predict the aggregate effects of their individual reactions. As a result, the reforms a rule-maker believes will lead to good consequences may result in bad ones and vice versa. The lesson is that 'it is unreasonable to be confident about the consequences of particular policies and/or institutional reforms' (Brennan and Hamlin 2004: 683). (Brennan and Hamlin mean this observation to apply to rule-makers generally, and so it does. But it applies especially to courts, as I explain in §5.)

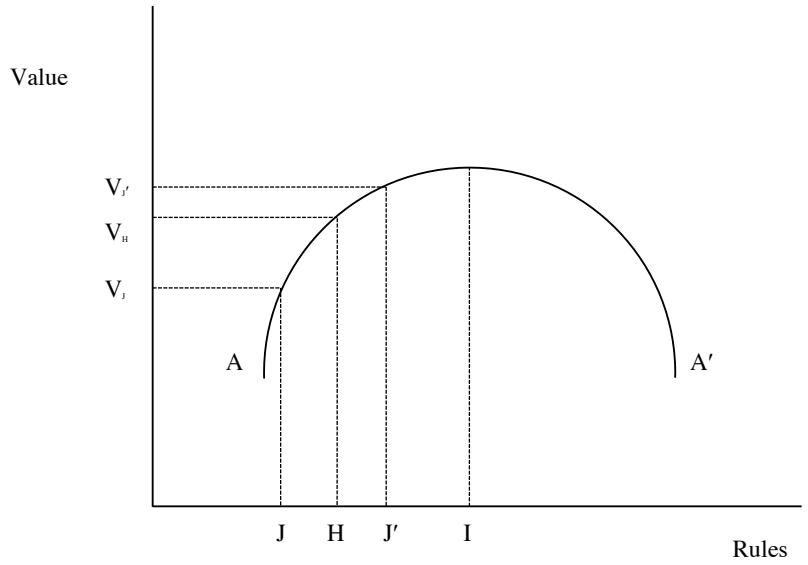
Given sufficient uncertainty, *status quo* bias is justified. Suppose that a change in policy will move us along AA′ either towards the ideal point or away from it, by the same distance. Suppose that the probability of moving in either direction is 0.5. The expected downside is greater than the expected upside. It is therefore rational not to change the policy, that is, to retain the *status quo*.

4. The argument from *status quo* bias

We can apply this case for *status quo* bias to the law. Let us say that a *case type* supervenes on the facts of a case that are legally relevant to its treatment. The relevant objects of evaluation are rules applicable to cases of a given case type. One of these cases is the precedent. The court's decision in that case creates a rule. It is not the rule the court should have made. In this sense, the precedent was wrongly decided. Nor is it the worst rule the court could have made. Given a concave value function and sufficient uncertainty, it follows that a court in a later case ought to accept the *status quo* – that is, it ought to follow the existing rule, rather than revoking or modifying it.

Figure 2 illustrates with respect to the abortion cases. H represents the decision in *Hellerstedt*. That case was wrongly decided because H is not the ideal point. There was a better rule available to the court which it did not create. Overruling that case in *June* will move us to J or to J′.

Figure 2: *June*



The loss in value from moving to J – that is, $V_H – V_J$ – is greater than the gain in value from moving to J′ - that is, $V_{J'} – V_H$. Given enough uncertainty, it is better to stay at H than to risk a move to J. For example, if the probability of a move to either J or J′ is 0.5, then expected value is maximised by accepting the *status quo*. More generally, where p is the probability that overruling *Hellerstedt* will move things to J′, the Chief Justice should not vote to overrule that case unless $(1– p)(V_H – V_J) > p(V_{J'} – V_H)$.

The point is not that Chief Justice Roberts was right that the Court should follow *Hellerstedt*. What matters is that he *could* have been right, even if *Hellerstedt* was wrongly decided. Indeed, he could have been right even if, probably, overruling that case would have resulted in a better rule.

The argument for precedent is therefore an argument for judicial modesty. Judge-made law is imperfect, but it does not follow that judges should try to perfect it. That is partly because it is more important not to make the law worse than to make it better. It is also because judges are themselves imperfect: they may end up making the law worse while trying to make it better.

5. Courts and other officials

Is the argument from *status quo* bias vulnerable to the same objection I made against the orthodox arguments? Courts, legislatures, and other officials face value functions with the same shape. They all labour under uncertainty. It might seem that *status quo* bias favours a doctrine of precedent in the legislative or executive context as much as it does in the judicial context. In that event, my argument fares no better than the ones I rejected.

The response is that courts create rules under conditions of greater uncertainty than other branches of government. Courts are well-suited to determine 'adjudicative facts': who did what, where, when, how, and with what motive or intent (Davis 1955: 952). But they are ill-suited to determining 'legislative facts', namely, the social consequences of the rules they create.

Consider four epistemic limits that courts face. First, in common law systems, judges are appointed from the ranks of practising lawyers. They know doctrine and procedure. But they are ignorant of many of the areas of complex social life which their rules impact on: medical services, monetary policy, migration, child welfare, aviation, etc. Second, judges lack experience and training in scientific and technical matters, and frequently err when they rely on their own judgments of them (Kaye 1983). Third, judges have few means of remedying their ignorance. As Justice Scalia said: 'We can't call witnesses and see what the real problems are … [W]e have only lawyers before us, we have no witnesses, we have no cross-examination, we have no investigative staff' (*Rasul v Bush* 2004: 46). Judges are forced to rely on the parties and their lawyers. However, fourth, the parties and their lawyers often lack the resources or ability to canvass all relevant considerations. They lack the necessary incentives to present whatever third-party interests are at stake. To be clear, these points do not suggest any failing by courts. They are what we would expect to find in an institution designed primarily to apply law created elsewhere (Yowell 2018: 63-72).

The other branches of government do not face the same constraints to the same degree. Individual legislators and executive officials may be novices in the fields in which they make policy. Unlike the judiciary, though, they are supported by a vast, technocratic civil service. They can consult with the public, hold inquiries, commission research, talk with experts, and so on. By being 'connected to constituents', legislators and other elected representatives learn 'about the factual components and causal consequences' of their rule-making (Vermeule 2008: 87).

I do not minimise the possibility of error in legislative and executive decision-making. My claim is comparative: judges *in particular* should not be confident about the consequences of their decisions. Judges, to their credit, sometimes recognise this. They recognise, as one English judge put it, that substituting an old rule for a better one may demand 'a far greater range of advice and a far more generally based knowledge than is available to a court of law' (*Miliangos v Frank (Textiles) Ltd* 1975: 481). In other words: 'Law is too serious a matter to be left exclusively to judges' (481).

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