IN THE SUPREME COURT OF THE STATE OF UTAH

TERRY MITCHELL, *Petitioner/Plaintiff*, v. RICHARD WARREN ROBERTS, *Defendant*.	Appellate Case No. 20170447-SC

PLAINTIFF TERRY MITCHELL'S PETITION FOR REHEARING

From the United States District Court, District of Utah,
Before Magistrate Judge Evelyn J. Furse
No. 2:16-cv-00843-EJF

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1. Prior Cases of This Court and the Supreme Court of the Territory of Utah Uniformly Held That, as a Matter of Statutory Construction *and* Due Process, If the Legislature Clearly Expresses Its Intent, It May Enact a Statute Impairing or Eliminating "Vested Rights" or "Substantive Rights" If the Statute Is Reasonable and Not Arbitrary 10

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including any prohibition against the legislative revival of *civil* claims previously time-barred. Several state constitutions available to the delegates expressly prohibited the revival of time-barred claims[10] or the retroactive application of statutes.[11] A judicial grafting of such a provision onto the Utah Constitution betrays the decision by delegates to omit it.

STARE DECISIS AND UTAH SUPREME COURT DUE PROCESS PRECEDENT

A. The Prior Decisions Forming This Court's Conclusions Are Not Binding Because *Stare Decisis* Has Its Least Application in Constitutional Cases.

Being *correct* about constitutional questions is of foremost importance, even if it means disregarding prior cases, particularly if those cases are confusing, contradictory, and offer primarily *dicta*—and when they lead to judicial incursion into plenary legislative power.[12]

Eldridge v. Johndrow, 2015 UT 21, 345 P.3d 553, the primary case cited by this Court whenever *stare decisis* is at issue, was a tort case. Although this Court has not made the distinction, courts that have carefully addressed the issue have recognized that *stare decisis* "is at its weakest" in constitutional adjudications "because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton,*

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[10] MISS CONST. of 1890, art. 4, § 97; ALA. CONST. of 1875, art. IV, § 56; OKLA. CONST. art. V, § 52.

[11] *See, e.g.,* COLO. CONST. art. II, § 11; GA. CONST. of 1877, art. I, § III, para. II; IDAHO CONST. art. XI, § 12; MO. CONST. of 1875, art. II, § 15; N.H. CONST. art. 23; OHIO CONST. art. II, § 28; TENN. CONST. art. 1, § 20; TEX. CONST. art. 1, § 16.

[12] Although this Court stated in its Opinion that the Legislature was without power to enact the Revival Statute, to say that the Legislature is *without power* means only one of two things: (1) The power has been fully granted to the Federal Government; or (2) the power exercised by the Legislature is prohibited by the United States or Utah constitutions. *State v. Mason*, 78 P.2d 920, 925 (Utah 1938).

521 U.S. 203, 235 (1997) (citations omitted). As Justices Stone and Cardozo noted, "[t]he doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result). *See also* Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2195–97 (2014).

Application of *stare decisis* is often justified by hearkening to the "rule of law." However, when a court applies prior poorly reasoned or confusing cases on the basis of *stare decisis* in matters involving constitutional principles, it is applying the rule of individuals (*i.e.*, the decisions of those who comprised the court at the time of the earlier decisions), not the rule of law (*i.e.*, the *constitution*). *See* J. Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012) ("[I]t is not hard to see stare decisis as crystallizing and entrenching the rule of men rather than the rule of law.").

Stare decisis is often justified on the basis of reliance interests. *Eldridge*, 2015 UT 21, ¶¶ 35–36. However, where it cannot be pretended that anyone relied on prior decisions in deciding how to conduct oneself (*i.e.*, engaging in child sex abuse), no reliance interest can possibly justify the application of *stare decisis* in reaching a decision that the Revival Statute is unconstitutional.

B. *Stare Decisis* Should Not Be Applied to Poor, Confusing, Unreasoned, Inconsistent Prior Cases—Nor to *Dicta* in Those Cases—That Find No Support in the Utah Constitution or the Original Understanding of It.

The prior cases relied upon by this Court in the Opinion are confusing, inconsistent, poorly reasoned (or not reasoned at all), inapplicable to this case, and, altogether, *not* deserving of precedential effect under the *stare decisis* doctrine.

As the Court observes in the Opinion, its prior cases "have sent mixed signals both about the scope of these principles [of retroactivity] and their relationship to each other." 2020 UT 34, ¶ 20. It also notes the contradictory "principles" in prior cases: "In some cases we have articulated the second principle as an absolute limitation on judicial power. Yet in others, as Mitchell indicates, we have at least implicitly suggested that the legislature may retroactively divest vested rights if it clearly states its intention to do so." *Id.*, ¶ 20.

The Opinion essentially concedes that all of the language from cases relied upon for the notion that the Revival Statute is unconstitutional, except the aberrational *Apotex*[13] case, is mere *dicta,* noting the "complicating" factor that "our decisions have mostly arisen in circumstances in which there is no clear, express statement of legislative intent."[14] The Opinion characterizes the prior decisions as "leaving some question as to whether the vested-rights limitation on legislative power is a freestanding constitutional principle or

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[13] *State v. Apotex Corp.*, 2012 UT 36, 282 P.3d 66.

[14] Hence, those cases are not precedents upon which to rely in the present case. *See, e.g., Steiner Corp. v. Auditing Div. of Utah State Tax Com'n*, 1999 UT 53, ¶ 12, 979 P.2d 367 ("*Stare decisis* means that like facts will receive like treatment in a court of law." (citation omitted) (inside quotation marks omitted)); Bryan A. Garner, et al., *The Law of Judicial Precedent* at 22 (2016) ("'*Black's Law Dictionary* defines' precedent 'as a "decided case that furnishes a basis for determining later cases involving similar facts or issues." ' " (citation omitted)).

Language from *all* of the prior decisions relied upon in the Opinion for support of the notion that the Legislature is unable to revive claims for child sex abuse after they are time-barred by a statute of limitations—except *Apotex* (which engaged in no constitutional analysis whatsoever)—was mere *dicta* (or, as Associate Chief Justice Lee described during oral argument, "overreaching dicta") since *those cases did not involve a legislative intent to apply the subject statutes retroactively. State v. Hummel,* 2017 UT 19, ¶ 38, 393 P.3d 314 ("[T]he principle of *stare decisis* is focused on *holdings* of our prior decisions. Our law has long recognized a significant distinction between holding and dicta." (emphasis in original)); *Spring Canyon Coal Co. v. Indus. Comm'n of Utah*, 277 P. 206, 210 (1929) ("Dictum is not embraced within the rule of stare decisis.").