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PERSPECTIVE

Stare decisis lite in the U.S. Supreme Court

By Leonard L. Gumport

True or false: The U.S. Supreme Court gives more respect to its precedents interpreting the U.S. Constitution than to other precedents? The counter-intuitive answer to this question appears in a legal treatise titled "The Law of Judicial Precedent." Published in 2016, its authors include Neil M. Gorsuch, Brett M. Kavanaugh, 10 other prominent judges, and Bryan A. Garner, a professor and author of more than 20 law-related books, including "Reading Law: The Interpretation of Legal Texts" (with Justice Antonin Scalia).

If you are a lawyer dealing with a case seemingly controlled by constitutional precedent of the Supreme Court, or if you are a senator voting to confirm the next justice to the court, then you should read the relevant (and relatively short) portions of "The Law of Judicial Precedent," although the treatise in its entirety consists of more than 800 pages. "It makes an excellent doorstop," co-author Gorsuch too modestly stated during his confirmation hearings before the Senate Judiciary Committee in March 2017.

"The Law of Judicial Precedent" describes the "three-tiered" approach that the Supreme Court applies to its precedent. The treatise states: "The U.S. Supreme Court gives strong effect to statutory precedents, medium effect to common-law precedents, and weaker effect to constitutional precedents" (pp. 334-35). The treatise also states: "Although the idea may seem counterintuitive, constitutional precedents are somewhat more protean and mutable than others" (p. 352). The treatise explains: "The doctrine of stare decisis applies less rigidly in constitutional cases than it does in statutory cases because the correction of an erroneous constitutional decision by the legislature is well-nigh impossible. Yet stare decisis should and does play a significant role in constitutional adjudication" (p. 352).

New York Times

Judge Neil Gorsuch, a Supreme Court nominee, on Capitol Hill in Washington, Feb. 1, 2017.

What does "The Law of Judicial Precedent" mean when it states that constitutional precedents, while having a "weaker effect," still play a "significant role"? The treatise states: "If at least five members of the Court are sufficiently convinced that the law has gone gravely wrong, then the Court will exercise its prerogative to overrule the earlier case and put things aright" (p. 353).

The doctrine that the Supreme Court's constitutional precedents have comparatively weak binding effect on that court was on display this year. In *Janus v. American Federation of State, County, and Municipal Employees*, 2018 DJDAR 6308 (June 27, 2018), a 5-4 divided court interpreted the First Amendment of the U.S. Constitution as applied to a challenge to the assessment of agency fees by a public union against an objecting public employee (who was represented by, but was not a member of, the public union).

The *Janus* majority held that the agency fees assessed by the public union against the objecting employee violated his First Amendment rights. To arrive at that result, the Court overruled a 41-year-old First Amendment precedent, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The majority opinion discussed the factors that justified overruling *Abood*. Among those factors were: (1) the poor quality of the reasoning in *Abood*, (2) the lack of workability of *Abood*'s rule, (3) *Abood*'s inconsistency with other related precedent, (4) developments since *Abood*, both legal and factual, that undermined it, and (5) the lack of reliance on *Abood*. The *Janus* majority opinion prefaced its analysis of those factors by stating that stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."

When did the Supreme Court adopt or discover the doctrine that its constitutional precedents have comparatively weak stare decisis effect? In a 1988 law review article about the relatively weak stare decisis force of constitutional precedent, Professor Henry Monaghan characterized a 1932 dissent by Supreme Court Justice Louis Brandeis as the "canonical reference." Justice Brandeis, in his 1932 dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932), stated: "But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." In 1933, only one year after Brandeis commented upon the difficulty of constitutional change, the Constitution's 21st Amendment was ratified, repealing prohibition.

In 1992, the Supreme Court divided on the issue of whether stare decisis justified overruling *Roe v. Wade*, decided in 1973. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), five justices declined to overrule *Roe*, in part on stare decisis grounds. Joined by Justices Byron White, Antonin Scalia and Clarence Thomas, Chief Justice William Rehnquist dissented. Invoking Brandeis's 1932 dissent in *Burnet* and cases following it, the chief justice argued that principles of stare decisis as applied to constitutional precedent obligated the court to revisit the merits of *Roe*. 505 U.S. at 954-55. "The Law of Judicial Precedent" concisely discusses Casey, without stating whether it was correctly decided (pp. 360-61).

On March 21, 2017, during Judge Gorsuch's confirmation hearing before the Senate Judiciary Committee, Chairman Charles E. Grassley asked Gorsuch about *Roe v. Wade*. Gorsuch replied: "It is a precedent of the U.S. Supreme Court. It was reaffirmed in Casey in 1992 and in several other cases. So a good judge will consider it as precedent of the U.S. Supreme Court worthy [of] treatment [as] precedent like any other."

Fourteen months later, acting consistently with the views stated in "The Law of Judicial Precedent," Justice Gorsuch voted with the majority in *Janus* to overrule a 41-year-old constitutional precedent, in part because, as all justices appear to agree, the doctrine of stare decisis is at its weakest in constitutional cases in the Supreme Court.

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