

Client Alert

April 2020

Supreme Court Justices Spar Over Precedent

When can Supreme Court precedent be overruled? Two recent decisions carry on a recent and lively debate among the Justices over the concept of “stare decisis,” and provide significant guidance on how Justices Thomas and Kavanaugh approach the question.

Over the last two Terms, the Supreme Court has been writing more frequently and explicitly on the binding nature of its own precedents. See *Franchise Tax. Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting); *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting). In just the past several weeks, Justice Thomas and Justice Kavanaugh have written separately to explain the conditions in which they are willing to revisit prior decisions of the Court.

The stare decisis doctrine—which provides that courts should adhere to precedent—seeks to promote predictability and even-handed application of the law. However, it can also constrain litigants with precedents that reflect outmoded attitudes and conditions or were based on weak legal grounds. How the Supreme Court goes about deciding whether to abrogate its own precedent is an important issue for litigants not only in cases involving constitutional issues, but also those focusing on statutory construction. Understanding the possible limits to stare decisis can help litigants devise case strategies that preserve possible challenges for appeal.

Justice Thomas’ concurrence in *Allen v. Cooper*, 140 S. Ct. 994 (Mar. 23, 2020), questioned the sanctity of stare decisis in cases raising constitutional questions. In *Allen*, the petitioner challenged the Fourth Circuit’s finding that the Copyright Remedy Clarification Act, which purported to abrogate the States’ sovereign immunity from copyright infringement suits, was an unconstitutional use of Article I powers. A previous Supreme Court decision had found that a “basically identical” act eliminating States’ immunity from patent infringement suits was unconstitutional. The majority opinion invoked stare decisis in affirming the Fourth Circuit’s decision, explaining that reversing a prior decision requires “special justification” beyond the assertion “that the precedent was wrongly decided.” In his concurrence, Justice Thomas took issue with the Court’s reference to “special justification,” which he explained did not comport with the Court’s duty under Article III. Justice Thomas’s opinion suggests that stare decisis must give way when the prior decision is “demonstrably erroneous,” which is more than simply being “incorrect.”

Three weeks later, in *Ramos v. Louisiana*, 2020 WL 1906545 (Apr. 20, 2020), the Court ruled that a state jury cannot constitutionally convict a criminal defendant based on a non-unanimous verdict. In reaching its conclusion, the Court revisited several prior decisions that featured a “badly fractured set of opinions.” *Ramos*, like *Allen*, involved constitutional issues, and presented another opportunity for the Court to consider the proper application of *stare decisis*. As Justice Gorsuch wrote for the majority, “Stare decisis isn’t supposed to be the art of methodically ignoring what everyone knows to be true.”

Justice Thomas wrote separately again, stressing his view that precedents should only be overturned when they are “demonstrably erroneous.” That means a precedent should be followed if it is “not outside the realm of permissible interpretation.” *Ramos v. Louisiana*, No. 18-5924, ___ S. Ct. ___, 2020 WL 1906545 (Apr. 20, 2020) (Thomas, J., concurring in judgment).

The bulk of Justice Kavanaugh's concurring opinion explores the factors he believes the Court should consider in applying stare decisis where a constitutional issue is posed. These include: (i) the quality of the precedent's reasoning; (ii) the precedent's consistency and coherence with previous or subsequent decisions; (iii) changes in law since the prior decision; (iv) changes in facts since the prior decision; (v) the workability of precedent; (vi) the reliance interests of those who have relied on the precedent; and (vii) the age of the precedent. Conceding that these factors create a "muddle," Justice Kavanaugh noted that these factors broadly address three considerations. First, consistent with Justice Thomas's concern, is the prior decision not just wrong, but "grievously" or "egregiously" wrong? Second, has the precedent caused significant negative jurisprudential or real-world consequences? And third, would overruling the prior decision "unduly upset reliance interests"? In this discussion, Justice Kavanaugh appears to be working toward an articulable test for when stare decisis should give way in cases involving constitutional issues.

In framing this analysis, Justice Kavanaugh also touched on how the doctrine should be applied in cases involving statutory construction. He first recognized that in such cases there is even less leeway for overturning an incorrect precedent than when a constitutional provision is at issue. As he explained, "[i]n statutory cases, stare decisis is comparatively strict That is because Congress and the President can alter a statutory precedent by enacting new legislation." Noting the difficult hurdles involved in enacting legislation, he concluded that, nonetheless, "the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process." "The principle that 'it is more important that the applicable rule of law be settled than that it be settled right' is 'commonly true even where the error is a matter of serious concern, *provided correction can be had by legislation.*' " *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting) (emphasis in concurrence)).

At first blush, this discussion seems to set an impossibly high bar for overcoming precedent in a case where there is no constitutional issue but only a question of statutory construction. However, Justice Kavanaugh's last proviso, coupled with the Court's recognition that stare decisis is not absolute, may be the proverbial camel's nose under the tent when it comes to precedents interpreting federal statutes. It suggests that complaints about congressional deadlock or the slowness of the legislative process are not enough to overcome application of stare decisis, nor are complaints that a prior decision relied on a faulty reading of congressional intent. But there may be certain fact patterns that give the Court reason to revisit precedent in future cases involving statutory construction. For example, if overlapping precedential case law contain statements of law that arguably conflict in their application, it could be an invitation for the Court to deviate from a prior ruling under the guise of clarification. Another example may be where Congress has in fact acted in response to a Court ruling, only for a subsequent Court decision to interpret the legislation in a way that undermines Congress's purpose. In such a case, undoing a judicial misstep may be more equitable and expeditious than expecting Congress to pass yet another round of legislation.

If a litigant is faced with an unfavorable precedent, whether involving constitutional or statutory interpretation, it should not be deterred from challenging the correctness of the unfavorable decision. By making the argument—in pleadings and in briefing in the district court—that the precedent was wrongly decided, a litigant can preserve the possibility of mounting an appellate challenge to it. In those circumstances, the litigant may wish to explain to the trial court that it is making the argument for preservation purposes, and understands that it may be foreclosed by precedent. In that way, a litigant can keep its appellate options open while forgoing the need to develop a broadside attack on precedent at the trial court level.

Justices Kavanaugh and Thomas have continued the Court's recently reinvigorated conversation about what a successful challenge to precedent might look like. Indeed, these two recent concurrences may be setting the stage for the Court's conservative wing to carve out clear exceptions to the stare decisis doctrine. In the meantime, by taking care to preserve challenges to unfavorable precedents while they are still in district court, litigants can maximize their potential arguments for when this day may come.

Contacts

Elbert Lin

elin@HuntonAK.com

Matthew R. McGuire

mmcguire@HuntonAK.com

Michael J. Mueller

mmueller@HuntonAK.com

Evangeline C. Paschal

epaschal@HuntonAK.com

© 2020 Hunton Andrews Kurth LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.