



THE FUSS OVER “*STARE DECISIS*”: FOUR OCTOBER TERM 2018 RULINGS OPEN WINDOW TO JUSTICES’ CURRENT THINKING

by Lawrence S. Ebner

Late last term, the U.S. Supreme Court issued several decisions that reveal, in a variety of contexts, the justices’ current thinking on the role and application of *stare decisis*. That “let the decision stand” doctrine is a fundamental precept of American jurisprudence. The Court has explained 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). But does it? Or in reality, has *stare decisis* become an expedient for justices and litigants who, for whatever reason, want the Court to hang onto deeply flawed precedents?

Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019)

In a 5 to 4 decision, the Court overruled *Nevada v. Hall*, 440 U.S. 410 (1979), which “held that the Constitution does not bar private suits against a State in the Courts of another State.” According to Justice Thomas’s majority opinion, *Hall* “is contrary to our Constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution.” *Hyatt*, 139 S. Ct. at 1492.

The petitioner, who filed a Nevada state-court tort suit against California’s tax collection agency, defended *Hall* on the basis of *stare decisis*. The majority opinion explains, however, that “*stare decisis* is not an inexorable command [and] is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment.” *Id.* at 1499. Citing “the Court’s precedents” on *stare decisis*, the majority relied on three factors in “deciding whether *Nevada v. Hall* should be overruled”: “the quality of the decision’s reasoning; its consistency with related decisions; [and] legal developments since the decision.” *Id.* On the first factor, the majority opinion discusses at length why *Hall* “misreads the historical record” concerning interstate sovereign immunity. *Id.* at 1492.

Justice Breyer dissented because he could “find no good reason to overrule *Hall*.” *Id.* at 1500 (Breyer, J. dissenting). He argued that “*stare decisis* requires us to follow *Hall* [because] [o]verruling a case always requires ‘special justification’ [and] [t]he majority does not find one,” including as to “the relevant history” on interstate sovereign immunity. *Id.* at 1505. Justice Breyer asserted that “an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping precedent.” *Id.* The “very fact [that] *Hall* is not obviously wrong [shows] that [the] majority is obviously wrong to overrule it.” *Id.* Justice Breyer expressed concern that it is “dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question.” *Id.* at 1506. He openly wondered “which cases the Court will overrule next.” *Id.*

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Gamble v. United States, 139 S. Ct. 1960 (2019)

The Court declined to overturn “170 years of precedent” concerning the “dual-sovereignty doctrine,” an interpretation of the Constitution’s Double Jeopardy Clause. *Gamble*, 139 S. Ct. at 1964. Under that doctrine, “two offenses are not ‘the same offence’ for double jeopardy purposes if prosecuted by different sovereigns.” *Id.* (quoting *Heath v. Alabama*, 474 U.S. 82, 92 (1985)).

Justice Alito’s 7 to 2 majority opinion explains that under the dual-sovereignty doctrine, “a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.” *Id.* Or as in *Gamble*, “the reverse may happen.” *Id.* *Gamble* pleaded guilty to an Alabama felon-in-possession-of-a-firearm offense. Later, he pleaded guilty to a federal offense arising out of the same instance of firearms possession, but preserved his right to challenge the denial of his motion to dismiss the federal indictment on double-jeopardy grounds. Citing the dual-sovereignty doctrine, the Eleventh Circuit affirmed denial of *Gamble*’s motion to dismiss.

Gamble asked the Supreme Court “to overrule the dual-sovereignty doctrine.” He contended that “the Double Jeopardy Clause must forbid successive prosecutions by different sovereigns because that is what the founding-era common law did.” *Id.* at 1964-65. The majority opinion concludes, however, that *Gamble* “failed to meet [his] particular burden under *stare decisis*,” in part because “the historical evidence [he] assembled” on the Double Jeopardy Clause “is feeble.” *Id.* at 1965.

Significantly, Justice Thomas concurred that the dual-sovereignty doctrine should be preserved, but authored a lengthy separate opinion “to address the proper role of the doctrine of *stare decisis*.” *Id.* at 1981 (Thomas, J. concurring). He observed that “[t]he Court currently views *stare decisis* as a principle of policy that balances several factors to decide whether the scales tip in favor of overruling precedent.” *Id.* In Justice Thomas’s view, however, the Court’s “multifactor approach to *stare decisis* invites conflict with [the Court’s] constitutional duty” because “it elevates demonstrably erroneous decisions . . . over the text of the Constitution and other duly enacted federal law.” *Id.* at 1988. Justice Thomas asserted that “we should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous.” *Id.* at 1989. He explained that “[w]hen faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.” *Id.* at 1984. According to Justice Thomas, “[t]he true irony of our modern *stare decisis* doctrine lies in the fact that proponents of *stare decisis* tend to invoke it most fervently when the precedent at issue is least defensible.” *Id.* at 1988.

Justices Ginsburg and Gorsuch each filed dissenting opinions. The latter dissent argues that although the *stare decisis* doctrine “has many virtues . . . blind obedience to *stare decisis* would leave this Court still abiding grotesque errors.” *Id.* at 2005 (Gorsuch, J. dissenting). Along the same lines, in *Gundy v. United States*, 139 S. Ct. 2116 (2019) (holding that a statutory delegation to the Attorney General in connection with sex offender registration is constitutional), Justice Gorsuch argued in a dissenting opinion that an earlier relevant precedent “would make a difference only if it bound us as a matter of *stare decisis* to adopt an interpretation inconsistent with the statute’s terms. And, of course, it does no such thing.” *Id.* at 2148 (Gorsuch, J. dissenting).

Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162 (2019)

In another 5 to 4 decision, this one authored by Chief Justice Roberts, the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Williamson* held that a “takings plaintiff” must unsuccessfully seek just compensation under state law in state court in order to have a ripe federal takings claim that can be filed in federal court. But a subsequent case, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), held that a state court’s resolution

of a state-law claim for just compensation generally has a preclusive effect in any subsequent federal court action. The Court “granted certiorari to reconsider the holding of *Williamson*.” *Knick*, 139 S. Ct. at 2169.

The majority opinion in *Knick* indicates that this “*San Remo* preclusion trap”—a “Catch-22”—“should tip us off that the [*Williamson*] state-litigation requirement rests on a mistaken view of the Fifth Amendment.” *Id.* at 2167. The opinion discusses at length why *stare decisis* does *not* “counsel[] in favor of adhering to the [*Williamson*] decision, despite its error.” *Id.* at 2177. Applying three well-established *stare decisis* factors to the question of whether *Williamson* should be overruled, the Court explained that (i) the decision’s “reasoning was exceptionally ill-founded” and “has come in for repeated criticism” by justices and scholars, (ii) its state-litigation requirement “has proved to be unworkable in practice,” and (iii) “there are no reliance interests on the state-litigation requirement.” *Id.* at 2178.

Justice Kagan wrote a dissenting opinion, which the majority opinion characterizes as presenting “extreme assertions regarding our application of the principle of *stare decisis*.” *Id.* at 2179. Her dissent argues that “*Williamson* should stay on the books because of *stare decisis*.” *Id.* at 2189 (Kagan, J. dissenting). Citing *stare decisis* case law, she explains that “[a]dherence to precedent is a foundation stone of the rule of law.” *Id.* According to Justice Kagan, “it is not enough that five Justices believe a precedent wrong. Reversing course demands a special justification [and] [t]he majority offers no reason that qualifies.” *Id.* In particular, she contended that “evolution in a way that a decision is described has never been a ground for abandoning *stare decisis*.” *Id.* at 2190. “What is left is simply the majority’s view that *Williamson County* was wrong.” *Id.*

***Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)**

The Court unanimously declined to overrule “*Auer* deference” (sometimes referred to as “*Seminole Rock* deference”), a prudential doctrine which “defer[s] to agencies’ reasonable readings of [their own] genuinely ambiguous regulations.” *Kisor*, 139 S. Ct. at 2408; see *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Justice Kagan’s lead opinion indicates that “*Auer* deference retains an important role in construing agency regulations,” but has “its limits.” Justice Kagan continued, “*Auer* deference is sometimes appropriate, and sometimes not [and] [w]hether to apply it depends on a range of considerations.” *Id.*

The petitioner in *Kisor* was a veteran who was denied certain disability benefits by the VA based on its interpretation of one of its own regulations. The lead opinion explains that even if *Kisor* convinced the Court “that *Auer* deference is wrong,” he then “must overcome *stare decisis*—the special care we take to preserve our precedents.” *Id.* at 2418. “[A]ny departure from the [*stare decisis*] doctrine demands ‘special justification’—something more than ‘an argument that the precedent was wrongly decided.’” *Id.* at 2422 (quoting *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 266 (2014)). But according to Justice Kagan’s opinion, “*Kisor* does not offer the kind of special justification need to overrule *Auer*, and *Seminole Rock*, and all our many other decisions deferring to reasonable agency constructions of ambiguous rules.” *Id.* at 2418.

More specifically, Justice Kagan’s opinion declares that “*stare decisis* cuts strongly against *Kisor*’s position.” *Id.* at 2422. “First, *Kisor* asks us to overrule not a single case, but a long line of precedents—each one reaffirming the rest and going back 75 years or more. ... Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law.” *Id.* “Second, because that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules.” *Id.* “And third, even if we are wrong about *Auer*, Congress remains free to alter what we have done.” *Id.* The Court remanded the case back to the court of appeals for further consideration of whether *Auer* deference is warranted as to the VA’s interpretation of the regulation at issue.

Justice Gorsuch filed a lengthy separate opinion, concurring only in the judgment. The opinion is highly critical of *Auer*, and the limitations that a *Kisor* majority placed on its application. It also strongly criticized the Court's reliance on *stare decisis* to avoid overruling the *Auer* doctrine. Justice Gorsuch contended that "today's decision is more of a stay of execution than a pardon. The Court cannot even muster five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*." *Id.* at 2425 (Gorsuch, J. dissenting).

According to Justice Gorsuch, "far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* . . . the doctrine emerges maimed and enfeebled—in truth, zombified." *Id.* "[W]hether we formally overrule *Auer* or merely neuter it, the results in most cases will prove the same. . . . All to what end? So that we may *pretend* to abide by *stare decisis*?" *Id.*

In Justice Gorsuch's view, "[t]here are serious questions about whether *stare decisis* should apply here at all." *Id.* at 2443-44. "While pretending to bow to *stare decisis*, the majority goes about reshaping our precedent in new and experimental ways." *Id.* at 2443. Justice Gorsuch poses the following question: "If *stare decisis* allows us to so freely remodel *Auer*, it's hard to see on what account it might require us to retain it." *Id.* at 2445. He asserted that when the traditional factors for applying *stare decisis* are taken into account, "all of these considerations weigh strongly in favor of bidding farewell to the [*Auer*] doctrine rather than keeping it on life support." *Id.* Justice Gorsuch contended, for example, that "no persuasive rationale supports *Auer*," and that "the explosive growth of the administrative state over the last half-century has exacerbated *Auer*'s potential for mischief." *Id.* at 2446. In response to one of Justice Kagan's reasons for applying *stare decisis*, he suggested that "decisions construing particular regulations might retain *stare decisis* effect even if the Court announced that it would no longer adhere to *Auer*'s interpretive methodology." *Id.* at 2447.

In a final rebuke to retaining *Auer* deference on the ground of *stare decisis*, Justice Gorsuch concluded his separate opinion with a challenge to the Court: "If today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it." *Id.* at 2448.

Conclusion

The foregoing recent cases (including the concurring and/or dissenting opinions that they encompass) provide several justices' insights on what they consider to be the proper role and application of *stare decisis*. Justices Thomas and Gorsuch in particular appear to believe that the Court's reliance on *stare decisis* in deciding cases has strayed too far, at least where the reasoning or holding of a prior case is demonstrably flawed. The extent to which *stare decisis* will continue to be used in the future to preserve precedents whose wisdom is merely disputable, however, remains to be seen.