Stare Decisis: Will Precedent Survive Scrutiny?

Appellate

The U.S. Supreme Court has been increasingly open to putting aside the *stare decisis* doctrine—that is, the idea that it should respect prior precedent of the Court—and more frequently overturning its own precedents. The question is, how far will this trend go?

"With the Court's new conservative majority, we've seen a debate in the Court over how much weight to give to *stare decisis*, and how reluctant the Court should be to overturning long-standing precedents based purely on the fact that the current Court disagrees with the precedent set by a previous Court," says Tom Lorenzen, a partner in the Appellate Practice at Crowell & Moring and vice-chair of the firm's Environment & Natural Resources Group. Traditionally, the Court has developed careful justifications when overturning precedents.

That debate played out in several recent cases at the Court. The first of these, *Franchise Tax Board of California v. Hyatt* (May 2019), involved a long-running tax dispute between Gilbert Hyatt and California. In a 5-4 decision, the Court ruled in favor of the tax board, saying that states have sovereign immunity from private lawsuits filed against them in the courts of other states. This overruled the precedent set in *Nevada v. Hall*, a 1979 Supreme Court case that said states did not have such immunity. In a dissenting opinion in *Hyatt*, Justice Stephen Breyer wrote that "today's decision can only cause one to wonder which cases the Court will overrule next."

Shortly after that, the Court ruled in *Knick v. Township of Scott, Pennsylvania* (June 2019). In this case, Mary Rose Knick challenged a township ordinance, saying that it violated the Takings Clause of the Fifth Amendment, which requires compensation to be paid for private property taken for public use. A federal district court dismissed Knick's lawsuit, based on the Supreme Court's 1985 ruling in *Williamson County Regional Planning Commission v. Hamilton Bank,* which said that plaintiffs had to exhaust all state court remedies before taking a claim to federal court. In *Knick*, the Supreme Court overruled *Williamson*, essentially saying that a person can sue a local government in federal court without having to go through the state courts first, and then remanded the case to the lower court. "Here again, the dissenting justices said that the decisions were likely to unsettle long-established expectations about how the law worked," says Lorenzen.

Then, later in June 2019, the Court ruled in *Kisor v. Wilkie*, a case involving the denial of benefits by the U.S. Department of Veterans Affairs, an action based on the department's interpretations of its regulations. The case challenged the *Auer* deference doctrine, which was established in 1997 in *Auer v. Robins*. "The *Auer* doctrine says that unless the interpretation of the law by an agency cannot be squared with the plain language of the regulation, the courts must defer to the agency," says Lorenzen. When the Court decided to hear *Kisor*, he says, "many observers thought it was poised to overturn *Auer*." This time, however, the Court upheld *Auer,* based largely on the *stare decisis* principle. "But it also said that there are clear limitations on when *Auer* may be applied—that the courts should avail themselves of all the possible interpreting tools to determine whether the regulation is clear," he says. "If it's clear, there is no room for interpretation."

These cases, and the writings and comments of the conservative Supreme Court justices, have prompted many observers to wonder whether the doctrine of *stare decisis* is still in full effect at the Court. "People are hearing this debate and asking, how much existing law is this going to unsettle?" Lorenzen says.

That's a fair question, but the answer may ultimately be that this potentially changing view of *stare decisis* will have a

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relatively narrow impact. "The impact may actually end up being somewhat limited because of the way the court system is structured," Lorenzen says.

"As the highest court in the United States, the Supreme Court can revisit prior precedents and declare them wrongly reasoned and abandon them in favor of a new construction," Lorenzen continues. But the lower courts don't have that kind of leeway. District Courts are bound by the decisions of the governing Circuit Court of Appeals—they cannot simply invoke *stare decisis* and overturn the precedent set by the Circuit Court. The same thing applies at the Court of Appeals level, where cases are typically heard by a three-judge panel, which is bound by the decisions of prior panels of that court and the decisions that were issued by the court sitting *en banc*. "The only mechanism for the Courts of Appeals to change their minds about what the law means is the *en banc* review process, and the impact there is limited by the extraordinarily few cases that are heard *en banc* each year," Lorenzen says. "They are far and away the exception rather than the rule."

Overall, he says, "there are several structural impediments to the wholesale abandonment of prior precedent in favor of new judicial doctrine." The Supreme Court's workloads are a limiting factor, as well, he points out: "The Court decides only a relative handful of cases each year—perhaps 70 or so. And most of those cases are on issues of very limited applicability."

Nevertheless, there will be changes. "It's very likely that we will see cases in which the Court does resolve issues in ways that are contrary to prior precedent," Lorenzen says. Several justices have made it clear that they are focused on aspects of administrative law, especially around the doctrines that govern the review of executive agency actions. "The Court appears to be interested in a reallocation of power from the federal executive back to the judiciary—so that is something that we can expect to see more of," he says.

For example, Lorenzen says, the Court is likely to eventually revisit the *Chevron* deference doctrine, in place since 1984, which says that federal courts should defer not just to an agency's interpretation of its own regulations, as with *Auer*, but also to an agency's interpretation of statutes that are unclear. "We're not there yet—the Court has not abandoned or revised *Chevron*," he says. "But it is arguably working its way there."

Deregulation by Appeal?

In 2016, the EPA reaffirmed that the MATS standard regulating power-plant emissions of mercury and other hazardous air pollutants (HAP) was "necessary and appropriate," as required by the Clean Air Act. That assessment was based not only on the direct benefit of reducing HAP emissions but also on the collateral benefit of cutting particulate emissions. Now the EPA plans to reverse the 2016 rule, saying that collateral benefits should not have factored into it. The immediate impact will likely be limited by the D.C. Circuit Court's 2008 decision in *New Jersey v. EPA*, which "said that once a category of sources has been listed for regulation, the agency can't stop regulating it without going through a complicated delisting process," says Crowell & Moring's Tom Lorenzen.

Having largely complied with MATS, much of the utility industry opposes this move. But other parties, such as coal companies, may urge the EPA to go even further. "We can expect challenges to the EPA's decision reversing the appropriate-and-necessary finding without also rescinding the MATS standard itself," says Lorenzen. Those challengers would do so knowing they will lose under the *New Jersey* decision, at least at the panel level. Their goal, however, would be to create an appeals path to the Supreme Court, where the majority is more likely to be open to overturning *New Jersey* to further reduce environmental regulations.

This focus on administrative law and agency decision-making powers will be especially important to business. "These cases are likely to have far-reaching consequences for regulated industries, and they may give those regulated communities more power to successfully question the agencies' policy choices," Lorenzen says.

Meanwhile, the Supreme Court's actions on that front will, as always, play out in various federal courts. For example, while the *Kisor* decision left the *Auer* doctrine in place, it also seems to have narrowed it by more closely defining when it can be applied and clearly requiring courts to use "all the traditional tools of statutory construction" before allowing *Auer* deference. "How much the doctrine has been narrowed probably depends on whom you ask, and there is a lot of debate about whether the doctrine is really viable with those limitations," says Lorenzen. As a result, agencies and regulated businesses can be expected to litigate those questions in court. As Lorenzen says, "Only time will tell what the lower courts will make of *Kisor*—and how *Auer* deference will work in the future. And only time will tell how far from *stare decisis* the Supreme Court will be willing to stray to recraft settled law to fit its own principles of legal construction."