

Rejecting Precedent: What Cases About Abortion Rights and the Sixth Amendment Teach Us About Preserving Objections to Existing Case Law

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As the Supreme Court has been debating judicial adherence to the doctrine of stare decisis recently, it bears remembering that litigants seeking a change in the law applicable to their case should make sure to preserve that argument in the lower courts. Otherwise, you might end up with the same painful outcome experienced by the litigants in *Maiz v. Virani* — unable to enjoy the fruits of a change in the case law.

The defendants in *Maiz* appealed an \$18 million judgment in a civil RICO action. Among other things, the defendants argued that the district court had given an incorrect jury instruction on when the applicable statute of limitations begins to run. Based on a Supreme Court decision announced just before the filing of their brief, the defendants argued that the plaintiffs' claims were barred under the statute of limitations or, alternatively, that the court should remand for a new trial with instructions reflecting the new law.

The Eleventh Circuit declined to reverse. Applying the stringent plain error standard, the court held that the defendants had invited the error because they not only did not object to the incorrect instruction given at trial, they requested it. The court further held that the invited error rule applied even when there was an intervening change in the law because the defendants had "reasonable grounds" to not propose and at least state an objection to the incorrect instruction. The court noted that although an Eleventh Circuit panel had endorsed the view set forth in the defendants' requested instruction at trial, other circuits had taken a contrary position. At a minimum, then, the defendants could have left it to the plaintiffs or the district court to propose the instruction, and then in good faith asserted an objection with the intention of arguing for a more favorable standard on en banc review by the Eleventh Circuit or before the Supreme Court.

This reminder to properly preserve such arguments is particularly important given the current Supreme Court's view of stare decisis and demonstrated willingness, under certain circumstances, to recede from prior precedent. While the issue of stare decisis has been raised in numerous decisions over the past few years, it has featured prominently in two recent Supreme Court cases, which both struck down Louisiana laws; with different results regarding stare decisis, these decisions offer important pointers for preservation of the issue for review.

In *Ramos v. Louisiana*, the justices were divided with regard to what constitutes precedent and the circumstances under which it can be overruled. The court voted 6-3 to overturn its prior opinion in *Apodaca v. Oregon*, which held that the Sixth Amendment required unanimous jury verdicts for convictions for serious crimes in federal criminal trials, but not state criminal trials. In keeping with *Apodaca*, Oregon and Louisiana law did not require a unanimous jury verdict, even when the resulting sentence would be life in prison.

Justice Gorsuch, writing for the majority, first acknowledged the racist origins of Louisiana and Oregon's laws. He then observed that *Apodaca* was, in fact, no governing precedent, but rather a "badly fractured set of opinions" with a four-justice plurality and a concurrence by Justice Powell, which itself had declined to follow earlier precedent. Justice Gorsuch concluded that, even if considered a precedent, overruling *Apodaca* was supported by the factors traditionally considered in revisiting precedent, including "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." Stare decisis, he wrote, "isn't supposed to be the art of methodically ignoring what everyone knows to be true."

Justice Thomas wrote separately, stressing that he believed earlier decisions should be overturned where "demonstrably erroneous." Justice Sotomayor noted that the court had not merely set aside precedent because the majority of the court now disagrees with it, but that *Apodaca* was "on shaky ground from the start" and the "force of *stare decisis* is at its nadir in cases concerning criminal procedure rules that implicate fundamental constitutional protections." Justice Kavanaugh added that three broad considerations guide whether to overrule a prior constitutional decision: (1) is the prior decision "grievously or egregiously wrong?"; (2) has the decision "caused significant negative jurisprudential or real-world consequences?"; and (3) would overruling the decision "unduly upset reliance interests?" Justice Alito, joined by Chief Justice Roberts and Justice Kagan in part, dissented, writing that *stare decisis* "gets rough treatment in today's decision" and accusing "a badly fractured" majority of "[l]owering the bar for overruling our precedents" while casting aside *Apodaca* "with little regard for the enormous reliance the decision has engendered."

Stare decisis got more respect in last week's decision in *June Medical Services LLC v. Russo*. There, the Supreme Court struck down a Louisiana law imposing a hospital admitting-privileges requirement on abortion providers as an unconstitutional burden on a woman's right to an abortion. The law was "almost word-for-word identical" to a Texas law stricken in *Whole Woman's Health v. Hellerstedt*. Chief Justice Roberts, the key vote, concurred in the outcome, writing that the Louisiana law imposed "a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons," and therefore "cannot stand under our precedents." The chief justice emphasized that the court, before overruling precedent, must consider factors beyond the correctness of the decision, such as "its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered." For their part, the dissenting justices advocated, among other things, for distinguishing this precedent, urging that the facts on the ground differ from state to state. The chief justice disagreed, writing, "I cannot view the record here as in any pertinent respect sufficiently different from that in *Whole Woman's Health* to warrant a different outcome."

In light of the increased possibility of obtaining changes in the law from courts, litigants will, in all likelihood, increasingly be advocating a change in the law when faced with unfavorable precedent. In order to properly preserve such an argument for an appellate challenge, however, litigants must understand the circumstances under which exceptions to the doctrine of *stare decisis* apply, and know the grounds they will raise for why existing precedents should be overturned. Litigants should make those arguments throughout the proceedings, acknowledging that they are made for preservation purposes as the court is likely bound by the existing precedent, and be prepared to proffer any evidence that would provide a basis for overturning existing precedent or that shows the precedent should not apply under the circumstances of the case at issue.

Tips:

- Know the grounds you will raise for why a court should not apply *stare decisis*.
- Make it clear on the record that you believe existing precedent should not apply in your case, or should be overturned, and explain why. Proffer any evidence that would give a basis for overturning existing precedent and cite any intervening law that is inconsistent with existing precedent.
- Ask for a standing objection to proceeding under existing precedent, and ask the court for a ruling whether it is abiding by existing precedent.
- Raise the issue early and often, including at the directed verdict stage and the jury instruction stage, as well as post-trial.