FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 22, Nº 2, 2024, pp. 119-129
https://doi.org/10.22190/FULP240709011S

Original scientific paper

CONSTITUTIONAL PRECEDENT IN THE US SUPREME COURT REASONING*

UDC 340.142:342.565.2(73)
347.953

David Schultz

Hamline University, Saint Paul, Minnesota, USA

ORCID iD: David Schultz https://orcid.org/0000-0001-7863-8694

Abstract. *Precedent or stare decisis is a central feature of common law systems, such as in the United States. Precedent in the United States is employed as an interpretive tool to guide judicial interpretations of legal texts, but it is considered part of the law and binding not only on the parties to the case but also on other courts and governmental bodies. This article examines the role of constitutional precedent in the US Supreme Court reasoning. It describes what precedent is, its justification, and how it operates as a part of the law to constrain or bind judicial decision making. The article also examines situations when constitutional precedent has been rejected and why, and how that pattern of rejection has changed over time. Overall, the purpose of the article is to familiarize students and scholars with the role the constitutional precedent occupies in the US legal reasoning and law.*

Key words: *Common law, precedent, stare decisis, United States, Constitutional Law*.

1. INTRODUCTION

Respect for judicial precedent is central to common law systems, such as the United States (Breyer, 2024: 181-182; McHugh, 2002: 16-17; Schultz, 2022). Unlike civil law systems, where the law is mostly about statutes and ascertaining their intent in rendering a decision, in common law systems judicial decisions are also part of the law. The task of a judge is, of course, to first start with the text of the constitution or statute and try to ascertain its meaning (McHugh, 2002: 16-17; Breyer, 2024: 117-123). But precedent or previous judicial decisions also becomes an important way of understanding what the law or what the Constitution means.

Received July 9th, 2024/Accepted July 31st, 2024
Corresponding author: David Schultz, Distinguished University Professor of Political Science and Legal Studies, Winston Folkers Endowed Distinguished Faculty Chair, Hamline University, Department of Political Science, Department of Legal Studies, Department of Environmental Studies, Saint Paul, Minnesota, USA; e-mail: dschultz@hamline.edu
* This article was originally presented as a lecture at the Faculty of Law, University of Niš, Serbia, on 27 May 2024.

This article examines the role of constitutional precedent in the US Supreme Court reasoning. More specifically, this article will draw a contrast between constitutional adjudication in civil law systems, such as in Serbia or much of Europe, and adjudication in the United States. It examines the nature of judicial precedent, or what is known as judge-made law in the United States. It focuses not only on what precedent is but also on two other points: one, the role of precedent in legal reasoning and argumentation; two, conditions under which constitutional precedent is rejected or overturned by the US Supreme Court.

2. Legal Education and Precedent

Legal education in the United States is unique for many reasons compared to Serbia and Europe. For one, entrance to law school comes after one has already completed a baccalaureate degree. Two, much of law school is spent reading case law or judicial opinions in addition to statutes and constitutional texts. Three, central to American legal education is teaching students how to "Think like lawyers" and use legal precedents as authority for the arguments they wish to make (Schlag & Griffin, 2020).

Legal education or thinking in the US revolves around the use of precedent and analogies (Levi, 1949: 7). For the purposes of this article, precedent shall refer to significant or binding decisions by the US Supreme Court that lower courts must also follow. A fuller description of precedent shall come below. The use of analogies refers to the use or manipulation of precedents to support or oppose specific legal arguments. In the US, one of the most difficult things for law students to master is how to recognize a precedent and use, oppose, or distinguish it depending on the legal arguments one is making.

Generally, while precedent is an important American legal concept, it does not usually attract much attention among non-lawyers. However, that changed back in 2022 when the US Supreme Court overturned *Roe v. Wade*, 410 US 113 (1973) with its decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), and ruled that its Constitution did not guarantee that women had a right to an abortion or to terminate a pregnancy. The decision, of course, raised concerns about the political rights of women in the US, and perhaps around the world. During the last fifty or so years, when countries around the world were generally easing restrictions on abortion, the US seemed an outlier, especially given that it was supposed to be a major democracy committed to human and women's rights (Boyle, Kim, Longhofer, 2015). The *Dobbs* opinion, for example, led to France enshrining abortion rights in its constitution.

But, the *Dobbs* opinion raised additional questions. For one, how and under what conditions could a precedent once decided be overturned? Even more so, as *Dobbs* was a constitutional precedent, should it not enjoy special support, such as being especially difficult to overturn? Finally, what did *Dobbs* tell us about the security of human rights being entrenched in a constitution, especially in a democracy? Was this not a troubling example of backsliding? All of these and perhaps others were questions raised by *Dobbs*. But certainly the most fundamental question was "What is precedent and where does it fit into a legal system such as the United States?"

3. COMMON LAW V. CIVIL LAW SYSTEMS

Let's do a simple contrast. Our simple contrast here is between, for the most part, two basic legal systems in the world. We have clearly others but, for our purposes here, it's good enough for us to concentrate on civil law systems and on common law systems. Let me start first with our discussion of a civil law system.

In a civil law or a code-based system, the law is based solely on text or on statute (Soriano, 1998; Apple & Deyling, 1995). The task of the judge, for example, is to hear the facts of the case, apply them to the law, and then render a decision. In the case of a criminal law, for example, that deals with homicide or murder, the task of the judge is to determine if the facts of the case constitute the legal requires that constitute a violation of the applicable law. If so, then a defendant is guilty. This is the task of a civil law judge and that is a job very similar to what happens in common law systems.

But when we think about a civil law system, the judicial decisions are binding only on the parties of the dispute. Again, technically, that's also the case with a common law system. But. what happens in a civil law system is that, once a judge has rendered the opinion in that case, that decision does not have the force of legal precedent in that the decision is not binding on anyone else beyond the parties to the case. Additionally, in rendering that opinion or hearing that case, the judge is also not guided by previous decisions addressing the statute or cases with similar fact patterns. Decisions are based on the text of the law and the facts of the case. Each decision is render *ab initio* or on its own. Moreover, the decision in a civil law system is legally binding but it is neither *per se* part of the law nor it does not become incorporated into the legal system as a form of law on parallel authority to a legal text such as statue, code, or constitutional provision. Previous decisions by courts are not binding on subsequent courts and a current opinion or decision is not legally binding on a future court. Cases may be persuasive or provide guidance but they are not law.

Examples of civil law systems may be found in much of continental Europe. For the most part, international law is a civil law system. Although that's starting to evolve a little bit, even in international law, one may occasionally see some references to previous decisions. But, technically, they are not legally binding. They're just referred to, let us say, for illustrative purposes or for clarification, but not in the sense of being binding. The International Court of Justice, the European Court of Human Rights, as well as the European Court of Justice are predominantly civil code systems. But, they too are starting to feel some of the influx in terms of common law or precedent being applied.

Now, let us turn to common law systems. Common law originates in medieval England but common law systems have developed in England, Canada, Australia, New Zealand, as well as the United States. In the States, law starts off still based upon a text or the statute. Good adjudication and lawyering still begins with a legal text (Farber, 2006). For example, what does the First Amendment say about freedom of speech or free exercise of religion? For some, the plain language or text is both the starting and the final point when it comes to understanding the law; ascertain the text’s meaning and apply the facts to it, and that is adjudication.

But, if the text is not clear, what next? For some, the next step would be to seek the original intent of the authors of the document (McHugh, 2002: 16-17; Breyer, 2024: 117-123). In the case of the United States Constitution, it would seek to ascertain the intent of its framers (Breyer, 2024). Such an approach requires a historical recovering of its writers, which is difficult for many reasons. There were many drafters of the Constitution. There

are questions regarding who should count as a drafter and a framer, and there are problems reconciling plural intent (Breyer, 2024). There are also questions regarding whether original intent can be ascertained and whether it should in fact be sought. Similar problems exist with statutes. Another simple question is whether the meaning of a text should be fixed by its framers (Breyer, 2024).

To remedy these problems, this is where precedent enters (Garner, 2016). The correct term for precedent is the Latin phrase *stare decisis* which translates as "let the decision stand" (Duxbury, 2008). Precedent performs several functions. One, it is an important interpretive tool (Markman, 2011). Two, it is part of the law in a common law system, such as the United States. When seeking to decide a case, a judge must apply the facts at hand to the text and determine if the facts are covered or addressed by the legal language. But, if the language is not clear, then the judge can use previous decisions to help guide or determine an answer. A judge may look into appropriate decisions that were factually similar to the case at hand and use them as a guide in interpreting the cases at hand.

The use of past decisions as interpretive tools is important in common law (Strauss, 1997). The idea is that a previous decision involving the same text and similar facts should be a guide to how a current case should be decided. Embedded in western thought, perhaps going back to Aristotle, is the idea that two things that are similar should be treated the same. This is a concept of basic justice — equals should be treated equally or the same.

But law also includes past decisions. It is the task of the judge to apply the facts to the statute, while also being guided by previous decisions. What becomes critical to legal reasoning, what becomes critical to a judge's decision is to say yes; the First Amendment says this, or the tax code says this or whatever it may be, but part of the task of the judge is also to look at past decisions because rulings by courts, especially at the appellate level, are not just guides for interpretation but are also seen as part of the law. The task of the judge is to apply the facts to the statute, while also being guided by previous court decisions in terms of helping frame the understanding and analysis of the law.

In some cases, judicial decisions are law and, as such, they are binding on future parties. There is a pretty big contrast here between a civil and a common law system. What this means is that decisions by the US Supreme Court, by other courts, and judicial opinions are law. Law is not simply official pronouncements adopted by legislative bodies; what courts do when they issue opinions is also law; it is judge-made law, as it is called in the United States. Thus, a court decision is also binding in terms of law. It is of course binding on the parties to the case, but it is often binding on others in terms of the precedent or rule it sets. This is what the US Supreme Court essentially said, in cases such as *Marbury vs. Madison,* 5 U.S. 137 (1803), where it declares that it is "emphatically the province of the court to say what the Constitution means."

There are a series of cases over time where the US Supreme Court has reminded us that because of the Supremacy Clause, because of the Constitution, their decisions are binding upon lower courts, and binding upon other branches of government. Therefore, decisions of the US Supreme Court are in many ways binding on other parties and they are part of the law. Hence, in common law systems, such as the United States, the law is text plus court opinions. Think of the law as a chain novel, which is a concept offered by legal philosopher Ronald Dworkin.

Ronald Dworkin was one of the most influential British-American jurists of the last half century. In his book *Law's Empire,* he describes American law as a chain novel. Law is a chain novel with consecutive authors (Dworkin, 1986). Think of the US Constitution

as a chain novel; the constitutional framers were the first authors in the novel. They wrote the opening words "We the People", they drafted out and crafted the US Constitution. This is the first chapter of the constitutional novel which they turned over to others to write subsequent chapters, each building upon the previous chapters already written.

Think of subsequent interpretations and decisions of the Constitution as new chapters or lines in the chain novel. Think of subsequent interpretations by later courts. Over time, the Supreme Court has been writing the next chapters of a chain novel (Dworkin, 1986: 229). If chapter one of the novel called American constitutional law was written by James Madison and other constitutional framers, they finished chapter one, and then they turned the first chapter over to the Supreme Court. In this case, it would be the early Supreme Court, under Chief Justice Rutledge and eventually under John Marshall, and so forth to subsequent Supreme Court Chief Justices and their Associate Justices.

For the purposes of this paper, we may look into the workings of John Marshall Court (1801-1835). The task of the John Marshall court was to read the first chapter and then write the subsequent chapters in the novel by issuing opinions on what they concluded the Constitution meant. In doing so, they would apply the facts to the Constitution to reach a decision. Yet, their decision became part of the law, and when a future Supreme Court or a lower court had to interpret this section of the law, the legal text plus the Supreme Court's opinion provided both interpretive and legal guidance for the next case.

Thus, each subsequent case or decision builds upon the previous ones. Decisions by the Supreme Court, especially when it comes to constitutional issues, become part of the chain novel that defines or says what the Constitution is. These decisions become or are law. To use a different metaphor, they are a foundation which subsequent Court decisions are built upon. To be a precedent is thus not simply that a decision becomes an interpretive guide but, in many cases, it can become law that is binding on the Court and other parties.

The constitutional framers thus wrote the first draft of the US Constitution. Once the second chapter was written by the Court or other actors, that chapter was handed over to the next court, under the next chief justice. From Chief Justice Marshall, it would go to Chief Justice Roger Taney (1836-1864), and subsequent chief justices up to the current Court under Chief Justice John Roberts. Each Court writes its version of the novel guided both by the original text that is the first chapter and by the second chapter. And if we think about it over time, by the time we get to the Roberts court, we've had multiple chapters of the book being written. Therein, the Supreme Court and eventually the lower courts are guided by all of the chapters; thus, when the Roberts Court now confronts a new case, it confronts that case as if it is writing a next paragraph, the next chapter, or the next scene in terms of the novel.

Notice the interplay between the text and judicial opinion. Those judicial opinions are very much part of the novel, as would be the original chapter. So, the mechanics of common law is like a chain novel, where judicial precedent fits in as part of the chapter writing or novel writing.

4. The Justification for Precedent

Why precedent? What are the justifications or reasons supporting the use of precedent? The first reason is the western concept of justice or equality (Garner, 2016: 21-22). As noted earlier, dating back at least to Aristotle in the West is the idea that similar things should be treated similarly. Precedent appeals to that idea that suggests that factually

similar things should be treated the same (Garner, 2016: 35-44). Determining what counts as factually similar is part of the art of legal reasoning and analysis (Levi, 1949). Attorneys and judges may disagree over which facts are operative, justifying why two situations should be treated the same or distinguished.

Precedent is also rooted in the concept of deference (Schauer, 1987). It is based on the idea that if some court, such as the Supreme Court, has already decided a fact pattern in a certain way, lower courts should do the same thing (Duxbury, 2008: 1).

Judicial economy supports precedent. It is based on the following argument: if there is already a case out there, involving A and B, and a previous court has already resolved the issue and closed the case, why should we have a new judge reinvent the wheel. Judicial economy means that judges do not have to keep going back every time and redoing things from beginning.

Precedent supports the concept of uniformity (Peczenik, 1997). The idea of just having a uniform body of law and applying the same principle in the same way is important.

Adherence to precedent gives a sense of consistency (Peczenik, 1997: 461). If there is a previous case and now one has a similar case, consistency dictates that the two cases should be decided in the same way.

The concept of predictability embodies so much of what law is about. We want to predict the future and plan (Peczenik, 1997). The whole purpose of contracts is to cement the future and make predictions. The predictability of the law is what businesses want to have. They want to know what the law says or how it will be enforced, and predict the future based upon past decisions. In the area of criminal law, we want guidance on what is legal or illegal so that we can guide our behavior. As Chief Justice Rehnquist declared in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), following precedent "promotes the evenhanded, predictable, and consistent development of legal principles".

The concepts of reliance (Kozelm, 2013) and stability (Easterbrook, 1998: 422-23) are correlated to the concept of predictability. They are based on the idea that one should be able to do X or Y, and believe that it is legal, not illegal. I should be able to rely on the law and structure my life with reliance on past interpretations of the law. Reliance too is all about planning. It's all about saying: "I can feel assured about making a contract and making a certain decision about future business transactions or about whether or not I can stand on a street corner in protest without being arrested." I should be able to rely upon past decisions to give me guidance. Stability refers to the idea that law should not abruptly change and that there is some orderly path or way in which it changes.

Adherence to precedent is also about finality (Cardozo, 1969: 149-151). The idea of finality is the idea of saying that, once an issue has been resolved or decided, it may be better to have resolved the issue than constantly relitigate it. Finality bring closure to a dispute, fostering predictability, consistency and all the other attributes noted above.

The virtue of finality in precedent refers to settling a legal question. In reference to the Supreme Court, there is a famous quote by Justice Robert Jackson in *Brown v. Allen*, 344 U.S. 443, 540 (1953), where he declared: "We are not final because we are infallible, but infallible only because we are final". In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court declared that it gets the final interpretation on what the Constitution says. It gets to define finality because of the concept of judicial supremacy located in the US Constitution (Blackman, 2019:1135).

4.1. Types of precedent

There are several different types of precedent or ways to think about precedent.

First, there is vertical precedent, where the lower courts are guided by a higher court (Garner, 2016: 27-35). For example, a US District Court is bound by the precedence of the Court of Appeals within its circuit, and eventually by the US Supreme Court. This is the whole concept of the Supremacy Clause.[1] The Supremacy Clause basically declares that the Constitution, the Bill of Rights, and treaties made thereof are the supreme law of the land; then, the other part of that section of the Constitution requires lower courts and judges to be bound by the Constitution, and by decisions rendered higher up. That is the concept of vertical precedent: the Supreme Court decides something, sets a precedent, and lower courts are supposed to follow it.

Moreover, precedent can or should be self-binging (Breyer, 2024: 181-182). A court should follow its own precedent. So, if a district court has decided a case, it is expected to decide similar cases in a similar fashion. But, the US Supreme Court should follow its own past precedents (Powell, 1990). In general, it is supposed to defer to what it has said in a similarly situated case in the past. So, think of precedent as being vertical and self-binding (Schlag & Griffin, 2020: 23)

Additionally, there is horizontal precedent, where a parallel authority court in the same jurisdiction should follow a precedent. For example, different district courts within the same circuit should generally decide cases in a similar manner. Across the United States, Courts of Appeal in different circuits often follow what other circuits have done. Horizontal precedent exists when courts in parallel authority follow one another's precedents. Yet, courts of parallel authority but different jurisdictions are not required to follow decisions of same-instance courts but their decisions may be referred to for persuasive authority purposes. So, the first circuit court does not have to follow decisions of the third circuit court, or vice versa, but reference to another court's decision is used as a persuasive authority. Thus, in some cases, horizontal precedent is mandatory and sometimes persuasive.

Another example of horizontal persuasive precedent in the US may be found in state courts. The US is a federal system where each of the fifty states has its own constitution and state courts. The presumption is that the highest court in each state is the final arbiter of what its constitution means. In deciding a case, a state court may turn to a parallel state court in another jurisdiction that has already decided a similar case, and it may cite that case (adjudicated in another state) in its decision. In this situation, the cited case is not used by the citing court as precedent but simply as a persuasive authority. It helps provide support but it is not mandatory.

4.2. Precedent as an interpreative tool

As noted, precedent is an important interpretive tool (Duxbury, 2008; Jackson, 1944) but, in some cases, it stands in contrast to two other interpretive techniques: textualism and originalism.

Textualism always seeks to go back to what the original words meant (Breyer, 2024). It is often facilitated by dictionaries to ascertain meaning. Originalism seeks to ascertain the intent of the framers or the drafters (Breyer, 2024). Sometimes textualism and originalism overlap. Precedent looks to text subsequent past interpretations of the law or text as precedent or guides to determine what the text or words have come to mean over time. There is a tension and we

[1] U.S. Constitution, Art. VI, Sec. 2.

are seeing this in the current US Supreme Court (Breyer, 2024). It is a tension between the role of precedent versus textualism and originalism, where the latter two seem to ignore that precedent or case law is actually part of constitutional law (Breyer, 2024).

Precedent rejects the idea that law is discovered or frozen back at the time when text was written. In his book *The Common Law*, the Supreme Court Justice Oliver Wendell Holmes Jr. declares:

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics (Holmes, 1881: 1).

Law is alive. It is a living organism or body, at least for Holmes. In terms of the common law, Holmes hints at this tension, originalism versus textualism.

4.3. Rejecting Precedent

Precedent should generally be followed (Summers & Eng,1997). But, are there times when precedents should be rejected? Justice Benjamin Cardozo, who was both on the highest court in New York and eventually on the US Supreme Court, wrote an important book in the 1920s called *The Nature of Judicial Process*, where he states:

> "I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." (Cardozo 1969: 149-151).

Yet, there are times when precedent should also be rejected.

> "But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment." (Cardozo 1969: 149-151).

What Cardozo talks about is when a precedent can be overturned. First, he argues that, if the precedent has proved to be just unworkable over time, and we have tried and tried to try to keep applying it but it is still unworkable, it should be overturned. It is okay to overturn it or abandon it if the empirical conditions under which that precedent were decided have so significantly been eroded that it can no longer be applied or applicable. That would be a classic textbook example in terms of when to overturn a precedent.

The Court has also distinguished constitutional versus statutory precedent (Monaghan, 1988; Levi, 1949: 7).[2] It has argued that constitutional precedent should be less secure because

[2] See also: *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Burnet v. Coronado Oil & Gas, Co*, 285 U.S. 393, 406-408 (1932) (J. Brandeis dissenting) "***Error! Main Document Only.****Stare decisi*s is usually the wise policy,

of the limited ability of the Congress to overturn it except by constitutional amendment (Levi, 1949: 58-59). This sounds counterintuitive; one would think constitutional precedent should be respected more. But, what the Court has said is that if they decide a case on constitutional grounds, they should be less charitable towards that precedent because the only way Congress can overturn it is by constitutional amendment (Garner, 2016:352), and that is so onerous. Instead, the Supreme Court has said statutory precedent should be afforded more deference because, if we get it wrong, Congress has an easier ability to overturn it (Garner, 2016: 352).

This distinction makes sense. In *Ashwander v. TVA*, 297 U.S. 288 (1936), Justice Brandeis (concurring) lists what are still classic rules for constitutional adjudication. Most importantly, the Court will try to avoid passing upon a constitutional question (although properly presented by the record) if there is also some other grounds upon which a case may be disposed. This rule has found most varied application in terms of what Brandeis would say. But what he is really telling us here is: if the Court can avoid constitutional questions, it will do so.

The first time the US Supreme Court overturned a constitutional precedent was in 1851 in the *Propeller Genesee Chief*, 53 U.S. 443 (1851). Very few constitutional precedents were overturned until the 1920s. Over time, there was a cluster of famous cases where constitutional precedents were overturned. For example, *Plessy v. Ferguson*, 163 U S 537 (1896), which enunciated the separate but equal doctrine for racial segregation, was overturned in *Brown v. Board of Education*, 347 US. 582 (1954). This may be the most famous reversal ever. *Minersville School District v Gobitis* 310 U.S. 586 (1940) and *West Virginia v. Barnette*, 319 U.S. 624 (1944) are another famous pair. The former case upholds mandatory flag saluting, the latter overturns it.

Other notable constitutional precedent reversals include *Baker v. Nelson*, 409 U.S. 810 (1972), where the Court held that same sex couples could not marry, but it was overturned by *Obergefell v Hodges*, 576 U.S. 644 (2015). *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court ruled that it was not a violation of the First Amendment to prevent corporations from being able to expend money from their corporate treasuries to influence a political campaign, was overturned by *Citizens United v Federal Election Commission*, 558 U.S. 310 (2010). *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which limited congressional power to regulate child labor, was overturned in *Darby v. United States*, 312 U.S. 100 (1941). Finally, as noted above, *Roe v Wade* (1973), which ruled that the US Constitution protects abortion rights, was overturned by *Dobbs v. Jackson Women Health Organization* (2022).

Over time, in the period from 1788 to 2020, the Supreme Court reversed 145 of its constitutional precedents (Murrill, 2018; Schultz, 2022: 22). The Supreme Court issued 26,544 judgments and opinions that were orally argued (Washington University Law, 2020). Given the number of opinions issued, this points to how few constitutional precedents have been overruled. Some courts have overturned more precedents than others. Until the Taft Court in 1930, a total of 10 constitutional precedents were reversed. The Taft Court (1921-1930) reversed three, the Hughes Court (1930-1941) reversed twelve, and the Stone Court (1941-1946) reversed seven precedents (Schultz, 2022: 23). These courts eventually addressed President Roosevelt's New Deal programs. The Warren Court (1953-

---

because, in most matters, it is more important that the applicable rule of law be settled than that it be settled right...This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions."

1969) reversed 32 previous constitutional precedents, the largest number of cases overturned by any court. What is fascinating about the Burger Court (1969-1986) is that many of the overturned precedents were its own earlier precedents (Schultz, 2022: 23). The early Burger Court was still dominated by many Warren Court liberal holdovers but, over time, Nixon and Ford, and eventually Reagan, were able to replace many of those Warren people. Thus, the later Burger Court reversed some of its own earlier precedents (Schultz, 2022: 93). The Rehnquist Court (1986-2005) reversed 15 constitutional precedents (Schultz, 2022: 127). But, in *Paine v. Tennessee* (1991), the Court begins to reject constitutional precedent by offering a theory of when it can be rejected. In its opinion, the US Supreme Court stated that

> "*Stare decisis* is the preferred course because it 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. Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules (*Paine v. Tennessee,* 501 U.S. 808, 827 (1991).

For the Rehnquist Court, adherence to precedent is a principle of policy and not a mechanical formula. The Rehnquist Court repeatedly referenced this statement in its constitutional reversals. The Roberts Court (2005- present) has also referred to this statement in its overturned precedent (Schultz, 2022: 150).

5. Conclusion

What does this article tell us about the role of constitutional precedent in the US Supreme Court reasoning?

Precedent is important in American constitutional law. On the whole, very few precedents have actually been reversed. Historically, the grounds for overturning precedents have been narrow but, under both Chief Justice Rehnquist and now Roberts, the conservative majority appointed by Republican presidents have been more willing to abandon precedent. Their preferred interpretive approaches - textualism and originalism - place them in conflict with Dworkin's vision of American constitutional law that depicts text and court opinion as part of a chain novel.

References

Apple, James G., & Deyling, Robert P. (1995). A Primer on the Civil-Law System. Washington, D.C.: Federal Judicial Center.

Bankowski, Zenon; MacCormick, Neil D.; Morawski, Lech; & Miguel, Alfonso Ruiz (1997). "Rationales for Precedent." In Neil D. MacCormick, & Robert S Summers (eds). *Interpreting Precedents*. New York: Routledge, 481-501.

Blackman, Josh (2019). The Irrepressible Myth of Cooper v. Aaron. *The Georgetown Law Journal*, 107, 1135-1204.

Boyle, E. H.; Kim, M.; & Longhofer, W. (2015). Abortion liberalization in world society, 1960–2009. *American Journal of Sociology*, *121*(3), 882-913.
Breyer, Stephen (2024). Reading the Constitution: Why I Chose Pragmaticism, Not Textualism. New York, Simon & Schuster.
Cardozo, Benjamin N. (1991). *The Nature of the Judicial Process*. New Haven: Yale University Press. 149.
Duxbury, Neil (2008). *The Nature and Authority of Precedent.* New York: Cambridge.
Dworkin, Ronald (1986). *Law's Empire*. Cambridge: Harvard University Press.
Easterbrook, Frank H. (1998). "Stability and Reliability in Judicial Decisions," 73 *Cornel Law Review*. 422.
Farber, Daniel A. (2006). The Rule of Law and the Law of Precedents, 90 *Minnesota Law Review*. 1173.
Garner, Bryan A. (2016). *The Law of Judicial Precedent*. Saint Paul, MN: Thomson Reuters.
Holmes, Oliver Wendell, Jr. (1881). *The Common Law*. Boston: Little Brown.
Jackson, Robert (1944). *Decisional Law and Stare Decisis*, 30 *A. B. A. Journal*. 334.
Kozel, Randy J. (2013). *Precedent and Reliance*, 62 Emory L.J. 1459.
Levi, Edward H. (1949). *An Introduction to Legal Reasoning*. Chicago: University of Chicago Press.
MacCormick, Neil D., & Summers, Robert S. (1997). *Interpreting Precedents.* New York: Routledge.
Markman, Stephen (2011). Originalism and Stare Decisis. 34 *Harvard Journal of Law and Public Policy*, 111.
McHugh, James, T. (2002). *Comparative Constitutional Traditions*. NY: Peter Lang.
Monaghan, Henry Paul (1988). Stare Decisis and Constitutional Adjudication, 88 *Columbia Law Review*. 723.
Murrill, Brandon J. (2018). The Supreme Court's Overruling of Constitutional Precedent, Congressional Research Service, Washington, D.C.
Peczenik, Aleksander (1997). *The Binding Force of Precedent*, In Neil D. MacCormick & Robert S. Summers (eds.), *Interpreting Precedents*, New York: Routledge, 461.
Powell, Lewis F. Jr. (1990). Stare Decisis And Judicial Restraint. 47 *Washingon & Lee Law Review*. 281.
Schauer, Frederick (1987). Precedent. 39 *Stanford Law Review*. 571.
Schlag, Pierre, & Griffin, Amy J. (2020). *How to Do Things with Legal Doctrine.* Chicago: University of Chicago Press.
Schultz, David (2022). *The Role of Constitutional Precedent in US Supreme Court Reasoning*. Northampton, MA: Edward Elgar
Segel, Jeffrey A., & Spaeth, Harold J. (2002). *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
Soriano, Leonor Moral (1998). The Use of Precedents as Arguments of Authority, Arguments *ab exemplo*, and Arguments of Reason in Civil Law Systems, 11 *Ratio Juris*. 90.
Strauss, David A. (1997). Common Law Constitutional Interpretation, 63 *University of Chicago Law Review*. 877.
Summers, Robert S. & Eng, Svein (1997). Departures from Precedent, In Neil D. MacCormick and Robert S. Summers (eds.). *Interpreting Precedents*. New York: Routledge, 519.
Washington University Law (2020). The Supreme Court Database, available at_http://scdb.wustl.edu/(site last visited on July 7, 2024).

USTAVNI PRECEDENT U RASUĐIVANJU VRHOVNOG SUDA SAD

Precedent (stare decisis) je ključna karakteristika pravnih sistema zasnovanih na običajnom pravu, uključujući i pravni sistem Sjedinjenih Američkih Država (SAD). U SAD-u, precedent je interpretativno sredstvo koje sudovi koriste za autentično tumačenje pravnih tekstova. Precedent je deo pravnog sistema i normativnog okvira, tako da je odluka doneta u precedentnom slučaju obavezujuća ne samo za stranke u konkretnom sporu već i za druge sudove kao i za državne organe. Ovaj članak razmatra ulogu ustavnog precedenta u obrazloženjima Vrhovnog suda SAD-a. Razmatra se pojam presedana, njegovo pravno opravdanje i funkcionisanje kao sastavnog dela zakona kojim se ograničava donošenje sudskih odluka ili one postaju obavezujuće. Članak takođe ispituje situacije u kojima je ustavni precedent odbačen (preinačen) i zbog čega, i kako se taj obrazac menjao tokom vremena u sudskoj praksi Vrhovnog suda SAD-a. Sve u svemu, svrha članka je da upozna studente i naučnike sa ulogom koju ustavni precedent ima u pravosudnom rasuđivanju i normativnom okviru SAD-a.

Ključne reči: *običajno pravo, precedent, stare decisis, ustavno pravo, SAD.*