



# STARE DECISIS

By Burt Weston, President, AFT Washington Retiree Chapter

Stare Decisis is a legal concept that means "to stand by things decided". It is the principle that requires courts to follow precedents established by previous courts provide consistency and predictability in the administration of justice. If future Courts routinely overturn prior decisions, the law has no stability. Without stability, judges, lawyers, defendants, and the general public would not have confidence in judicial systems.

The confirmation of Justice Barrett changed the Supreme Court from a 5 to 4 conservative advantage, which allowed Justice Roberts to form a swing vote coalition with the 4 liberal Justices, to a 6 to 3 conservative advantage. I believe this super majority court may try to overturn the Roe v. Wade precedent and/or the precedent regarding same sex marriage. If those challenges come to pass, an idea of how strongly the 2020 Court justices believe in stare decisis would be helpful.

The Supreme Court established four criteria for correcting prior decisions: the prior precedent's rules and standards are too difficult to apply; the precedent departs from the Court's other decisions on similar constitutional questions; the precedent is based on outdated assumptions; the precedent is based on faulty reasoning. The first three seem reasonable but the fourth may bestow some pseudo-legal basis for a future court to overturn a previous court's ruling because they disagree with it. The fourth criteria was introduced by Justice Alito in Janus v. American Federation of State, County, and Municipal Employees.

Apparently, Justice Alito holds that his personal belief trumps stare decisis. In Gamble v. United States, Justice Thomas wrote that stare decisis deserves but a minor place in Supreme Court jurisprudence. Justice Barrett describes stare decisis as a soft rule for the Court. In a 2013 law review she discussed super precedents like Brown v. Board of Education but did not include Roe in that class. Super precedents are those constitutional decisions in which public institutions have heavily invested in, repeatedly relied on, and consistently supported over a significant period of time, for which stare decisis requires they never be overturned.

In 2019, the Supreme Court agreed to hear a constitutional challenge to a State of Louisiana constitutional provision replacing jury unanimity with one that said a vote of 9 out of 12 jurors was enough to convict (see Ramos v. Louisiana). In

1898, the Supreme Court had ruled that states could not exclude black people from juries. In response, a Louisiana constitutional convention adopted the non-unanimity provision to establish the supremacy of the white race in the state. In 1930, the KKK succeeded in getting Oregon to also adopt non-unanimous verdicts.

It should have been a slam dunk to overturn such verdicts, a mere housekeeping matter. The Supreme Court has long held that non-unanimous verdicts are forbidden in federal criminal trials under the Sixth Amendment. While the Bill of Rights originally restricted the power of only the federal government, the Supreme Court has held that the protections also apply to the states under the Fourteenth Amendment. It should have been a small step to conclude that the Sixth and Fourteenth Amendments bar non-unanimous verdicts in state criminal trials. But the case become muddled due the precedent of the same exact challenge in 1972 (see Apodaca v. Oregon). That court (in a 5 to 4 decision) upheld the constitutionality of non-unanimous jury verdicts for state courts along mostly ideological leanings. Four justices voted to uphold such verdicts. Four justices voted to overturn such verdicts. Justice Powell, a conservative justice, cast the deciding vote saying they were required in federal court but state courts could be treated differently.

Of the 2019 Supreme Court justices, five were conservative and four were liberal. Three of the four liberal justices have a track record of being pro defendant so their tendency should have been to overturn the verdict. Three of the five conservative justices have a track record of being anti defendant and the two newest justices are described online as being no friend of defendants so their tendency should have been to uphold the verdict. Given the racist roots of the non-unanimous jury verdict origins, one would expect all four liberal justices should have been in favor of overturning the verdict. Given that all five of the conservative justices are strongly in favor of state's rights one would expect them to be in favor of upholding the state's right to establish state judicial procedures free from federal intervention. That should have resulted in a (5 to 4 decision) to uphold such verdicts. The actual vote was (6 to 3) to overturn.

By expanding the rights of criminals and violating states' rights Justices Gorsuch and Kavanaugh's votes were counter to form. A liberal publication, The Online Independent, suggests (Continued on back)

their real motive was to weaken the validity of *stare decisis* to establish a position in preparation to overturning precedents like *Roe v. Wade* and/or same sex marriage.

Overturning prior decisions can have unexpected consequences confirming the wisdom of *stare decisis*. Justice Alito was motivated to uphold the verdict based on this concept, writing that overturning it would lead to a potential tsunami of litigation as in Oregon alone more than 1,000 defendants with pending appeals would be able to challenge their convictions. Apparently, here Justice Alito seems to favor *stare decisis*.

If a challenge to *Roe v. Wade* or same-sex marriage comes before the Court, Justices Barrett, Gorsuch, Kavanaugh, and Thomas will ignore *stare decisis* and vote to overturn. Justices Breyer, Kagan, and Sotomayor will vote to uphold. That leaves Justice Alito, who because he has relied on *stare decisis* sometimes might be convinced to uphold and Justice Roberts, who because he has joined the liberal Justices as a swing vote on many controversial issues might be convinced to do so again.

In their Senate confirmation hearings, both of those justices cast themselves as being committed to the principle of *stare decisis*. Justice Roberts affirmed that “the founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, and integrity in the judicial process” and stressed that overturning prior decisions should be reserved for exceptional circumstances. Regarding *Roe v. Wade*, Justice Roberts said, “there’s nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully.” Justice Alito said, “there must be a strong presumption that courts are going to follow prior precedents.” Their confirmation statements provide ammunition to convince them to form a swing vote coalition to uphold prior liberal decisions.

In reality, only one of them should be able to form a swing vote coalition to uphold. In 2016, Mitch McConnell and the GOP-controlled Senate shunned their constitutional reasonability by ignoring President Obama’s Supreme Court nominee, claiming they could do so because 2016 was an election year (**8 months** before the election). Then in 2020, Mitch McConnell and the GOP-controlled Senate confirmed President Trump’s nominee, Justice Barrett, **8 weeks** before the election. If the GOP Senate had acted consistently by either **confirming** both or **ignoring** both, the Court would have wound up 5 to 4 conservative advantage instead of 6 to 3 conservative advantage.

For all Trump’s delusional claims that the election was stolen from him, by not being consistent or honorable and by display-

ing partisanship in place of character. Mitch McConnell and the GOP-controlled Senate are the ones who did the stealing. They stole a 6th seat on the Supreme Court. The present Court should be called the Stolen Court.

Once the runoff election in Georgia flipped control of the Senate to the Democrats, the Democrats took control of the Executive and the Legislative branches of the Federal Government. The only branch left for the Republicans to set roadblocks to President Biden’s agenda is the Judicial. I predict they will take advantage of this avenue often, especially since they blatantly packed the Supreme Court with a conservative super majority by stealing that 6th seat. Any 5 to 4 conservative decision (Justice Roberts as a swing) would have been 5 to 4 liberal decision were it not for that 6th stolen seat.

We are going to rue the day Hillary Clinton lost the 2016 election for many years. She told us Trump was unfit and did not have the temperament to be the president and by god was she right.

### The Annual Meeting is In May!

Whether you are a member of the Retiree Chapter or not, you are invited to the May Annual Meeting. The Annual Meeting is a time to get business done for the good of the Chapter, and to reconnect with all our retired sisters and brothers.

Due to the pandemic, this year’s AFT Washington convention is taking place virtually, so the Retiree Chapter Annual Meeting will not take place the same weekend. Instead, the Annual Meeting will also be virtual, and it will be held Friday, May 21st, 2021. We’ll have more information to come, including an agenda.

This meeting is where we will consider resolutions and elect a new Board. If you are interested in submitting a resolution or running for office in the Chapter, please contact Cortney Marabetta at [cmarabetta@aftwa.org](mailto:cmarabetta@aftwa.org) or (206) 499-4826. The Board consists of a President, Vice President, Secretary, Treasurer, and 5 Director positions with responsibilities determined by the newly-elected Board.

### Keep In Touch

AFT Washington is still in the process of updating its database to a system called Connect, and it’s a great time to update your information! Please contact Christine Landon ([clandon@aftwa.org](mailto:clandon@aftwa.org) or 206-432-8075) to start the process.

Want to stay in touch with the Retiree Chapter? Contact Cortney Marabetta at [cmarabetta@aftwa.org](mailto:cmarabetta@aftwa.org) or 206-499-4826.