

LAW & THE COURTS

No, Senator Feinstein, *Roe v. Wade* Is Not a 'Superprecedent'

By DAVID FRENCH | March 21, 2017 6:51 PM



Sen. Feinstein on Capitol Hill, March 7, 2017. (Reuters photo: Aaron P. Bernstein)

There's no such thing.

Watching Neil Gorsuch's confirmation hearing yesterday, I had a flashback. The year was 2005. Republican (soon to be

Wade. He proceeded to call *Roe* a “super-duper precedent,” thereby entirely inventing a new jurisprudential category apparently immune to further Supreme Court scrutiny.

Flash-forward to yesterday, when California senator Dianne Feinstein **appeared to actually downgrade *Roe*** from a “super-duper precedent” to a mere “super precedent.” On Monday she said of the Supreme Court’s history of upholding *Roe*, “If these judgments when combined do not constitute super precedent, I don’t know what does.” Then, on Tuesday she had the following exchange with Judge Gorsuch:



.@SenFeinstein asks Judge #Gorsuch: "Do you view Roe as having super-precedent?" #SCOTUS #SCOTUSnominee

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Let's begin with the most elementary legal basics. There is no such thing as "super precedent." The concept simply doesn't exist in the law. There is *stare decisis*, the legal principle that binds lower courts to follow the rulings of superior courts and also traditionally holds that courts should be reluctant to overturn *their own* precedents. But there is no such thing as a precedent so settled it is irreversible.

To put it plainly, then, the Supreme Court has the power to reverse its own rulings. The tradition of *stare decisis* holds that it should do so only in compelling circumstances, to correct a legal wrong. This is what Judge Gorsuch is talking about when he speaks to Senator Feinstein of the value of certainty and predictability in judicial pronouncements. *Stare decisis* is indeed an important part of our nation's legal fabric.

But that does not mean — and has never meant — that the Supreme Court can't reverse itself. Indeed, **as Justice Brandeis wrote in 1932**, because the Supreme Court is the final word on constitutional interpretation, legal stability bows to legal correctness:

But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Brandeis's words are just as true now as they were then. The Supreme Court has **overruled itself dozens of times** over the years, reversing some

Those desiring proof of the bankruptcy of “super precedent” as a concept need only consider the example of *Plessy v. Ferguson*. In that 1896 case, the justices constitutionalized second-class status for African Americans, providing their seal of approval to the apparatus of segregation entrenched throughout the American South. An entire oppressive way of life was built around “separate but equal,” the famous doctrine enshrined in *Plessy*.

In short, Feinstein’s argument is disingenuous, and the Democrats know it.

That doctrine endured for 58 very long and consequential years. Yet who among us would argue that *Plessy* was entitled to a greater degree of deference simply because it lasted a long time and had a huge cultural impact?

Indeed, you can list Supreme Court case after Supreme Court case that virtually any Democrat would eagerly say should have been overruled, no matter its age or influence. Would Dianne Feinstein’s respect for *Bowers v. Hardwick* (holding that there was no constitutional right to engage in sodomy) have increased merely because of the passage of time? Does age improve the holdings of *Dred Scott*, which helped launch the Civil War, or of the *Korematsu* decision, which validated Japanese internment? Indeed, the latter precedent has **never been specifically overturned**. The passage of time and the number of cases citing a precedent’s reasoning have nothing at all to do with its validity.

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constitutional status. It's all outcomes-based reasoning, just like the “reasoning” that holds that Judge Gorsuch is unfit not because his jurisprudence is wrongheaded but because he rules for corporations (or against African Americans) too often.

The truth is that *Roe* is terrible constitutional law. The Supreme Court concocted a right to kill children out of thin constitutional air, and the defense of that right now rests not on sound legal reasoning but on zealous and fanatical political pressure. The Left makes up a new legal doctrine with the same enthusiasm that it made up the right to abortion. There is no “super precedent.” There is only precedent, and *Roe* is one precedent that cannot and should not withstand the proper application of law or logic.

Judge Gorsuch is right. *Roe* has been “reaffirmed many times,” each time a mistake. The Supreme Court doesn't just have the *right* to correct such shoddy precedents; it has an *obligation* to do so, too.



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