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HAS PRECEDENT EVER REALLY MATTERED IN THE SUPREME COURT?

Frederick Schauer*

INTRODUCTION

The doctrine of precedent is in the news. In the last year, and especially from the close of the Supreme Court's 2006 Term to the present, various academic, quasi-academic, and non-academic commentators have been criticizing the Roberts Court for disregarding precedent.¹ For these commentators, the Roberts Court has abdicated its duty *as a court* to treat its earlier decisions with something close to conclusive respect, and to do so regardless of the views of the current Justices about the wisdom of those earlier decisions.² Although the Supreme Court of the United States claims to follow

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1. The intense commentary has been, in part, fueled by the Court's own explicit attention to the issue. *See, e.g.*, *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2704 (2007) (Souter, J., dissenting) (stating that the Court suffers when "important precedent is overturned without good reason"); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2737 (2007) (Breyer, J., dissenting) (arguing that no new or changed conditions existed to justify overturning longstanding precedent); *Morse v. Frederick*, 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting) (objecting to majority's disregard of relevant precedent); *Scott v. Harris*, 127 S. Ct. 1769, 1781 (2007) (Breyer, J., concurring) (concluding that *stare decisis* concerns are weakest when a rule concerns only judges and when there has been little reliance); *Randall v. Sorrell*, 126 S. Ct. 2479, 2503 (2006) (Thomas, J., concurring) (the "court has never felt constrained to follow precedent" when based on "unworkable or [] badly reasoned" decisions (quoting *Payne v. Tennessee*, 501 U.S. 808, 827)).

2. For a prominent example, see Editorial, *Justice Denied*, N.Y. TIMES, July 5, 2007, at 12. *See also* Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sept. 27, 2007, at 92; Charles Lane, *Narrow Victories Move Roberts Court to Right; Decisions Ignore Precedent, Liberal Justices Contend*, WASH. POST, June 29, 2007, at A4; Dorothy Samuels, *Reflections on the New Abortion Ruling and the Roberts Court*, N.Y. TIMES, Apr. 27, 2007, at 26; Geoffrey R. Stone, *Our Faith-Based Justices*, CHI. TRIB., Apr. 30, 2007, at 19.

precedent,³ and although the Justices write their opinions as if they were following precedent,⁴ the Supreme Court's supposed obligation to follow precedent has not traditionally been treated by commentators—academic and non-academic alike—as something to be taken very seriously.⁵ And insofar as the public cares what the Supreme Court does, itself a debatable proposition,⁶ the public seems largely unaware of the idea of precedent, and seems equally unconcerned with whether the Supreme Court follows it or not. When the public agrees with the Court's outcomes, it appears to have little interest in how the Court got there, and when the public disagrees with those outcomes, it becomes no more interested in questions of methodology. Indeed, much the same can be said about elected officials, who, as Michael Dukakis discovered to his detriment in 1988,⁷ seldom receive any political credit for following precedent or praising those who do, at least if the precedent is in support of an otherwise unpopular substantive outcome or policy. At the same time, public officials are equally seldom subject to criticism for disregarding judicial precedent in the service of politically popular policies.⁸ For politicians and the public, following a precedent just because of its status as a precedent seems hardly to matter at all.

3. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2766, 2800, 2835 (2007), the most recent of countless Supreme Court cases in which both the majority and dissenting opinions claimed explicitly to rely on precedent while accusing the other side of disregarding it.

4. Indeed, this is often most apparent in those cases in which even patent departures from precedent are written as if they were based on the very precedents that are being essentially overruled. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969) (per curiam).

5. See Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 1 (1979).
6. See Frederick Schauer, *Foreword: The Court's Agenda – and the Nation's*, 120 HARV. L. REV. 4, 21 (2006).

7. When asked during the 1988 Presidential campaign why, as Governor of Massachusetts, he had vetoed a bill requiring public school teachers to say the Pledge of Allegiance in class, Dukakis responded that the existing case law mandated his veto, a response widely taken at the time to be a significant political gaffe. See Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 26 (2007).

8. A good example comes from the Flag Protection Act of 1989, passed overwhelmingly by Congress almost immediately after the Supreme Court's decision in *Texas v. Johnson*, 491 U.S. 397, 420 (1989), invalidating state flag desecration laws. Given the decision in *Johnson*, it came as no surprise when the Flag Protection Act was invalidated by the Court in *United States v. Eichman*, 496 U.S. 310, 318–19 (1990). Foreshadowing what is to come in this article, it is worth noting that Chief Justice Rehnquist and Justices O'Connor, White, and Stevens, all of whom dissented in *Johnson*, persisted in

Some of the seeming previous unconcern for the constraints of precedent, especially in the academic and serious non-academic literature, is very likely a function of the Warren Court and its legacy. Many of the Warren Court's landmark rulings, including *Mapp v. Ohio*,⁹ *Baker v. Carr*,¹⁰ *New York Times Co. v. Sullivan*,¹¹ and, most famously, *Brown v. Board of Education*,¹² were unmistakable rejections of the Court's earlier precedents. For those with substantive sympathy with these and other Warren Court outcomes, it is understandable that little time would have been spent emphasizing the virtues of stare decisis in particular and precedential constraint in general.

But now the situation appears to be different, and there has emerged a growing criticism of the Supreme Court for rejecting the conclusions of the Court's previous rulings. Some of this change in the tone of commentary about the Supreme Court seems plainly a function of political shifts, but couching substantive criticism in the language of judicial methodology seems dissonant, for it is not clear that second-order procedural or methodological or institutional constraints on preferred substantive first-order outcomes have ever had much purchase in American constitutional or political debate. The willingness to condemn judicial outcomes that would have been preferred on political grounds or had been reached by the elected branches of government was a staple of the "neutral principles"¹³ and

dissent in *Eichman*. See also *Dickerson v. United States*, 530 U.S. 428, 435–36 (2000) (making clear that Congress hardly hesitated in 1968 before enacting a statute intentionally designed to overrule the Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966)).

9. See *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961) (holding that the exclusionary rule for illegally obtained evidence applies in state proceedings, contrary to the Court's earlier holding in *Wolf v. Colorado*, 338 U.S. 25, 33 (1949)).

10. See *Baker v. Carr*, 369 U.S. 186, 233 (1962) (holding reapportionment questions justiciable and rejecting the contrary view of *Colegrove v. Green*, 328 U.S. 549, 555–56 (1946)).

11. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 268–69 (1964) (concluding that state libel proceedings were subject to First Amendment scrutiny, contrary to the statement in *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952), that the entirety of libel law was wholly outside the coverage of the First Amendment).

12. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (rejecting, in the context of segregation in public schools, the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896)).

13. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959).

“legal process”¹⁴ perspectives of the 1950s and 1960s, and some of this carried over to the early criticism of *Roe v. Wade*¹⁵ by those who on moral or political grounds favored what is now known as the pro-choice position.¹⁶ But for thirty years or more such critiques have been substantially more unfashionable, and for that period we have seen a considerable amount of what might be described as the triumph of substance over form in constitutional criticism and constitutional theory.

Against this background of seeming unconcern for the alleged constraints of precedent, it is tempting to explain the resurgence of criticism of the Supreme Court for not following precedent as simply political or ideological, with critics of the Court’s substantive outcomes resorting to precedent as simple opportunism, using whatever norms are politically, culturally, or academically available to support what is, in reality, a criticism of substance and not of method. And perhaps this explanation is sound.¹⁷ But before reaching such a conclusion, and before too easily concluding that the critics of the Roberts Court are being opportunistic or disingenuous, we need to understand just what it means to follow precedent or to be constrained by it. Thus, it seems desirable to determine whether precedent has ever been a serious constraint on or generator of Supreme Court outcomes, and to determine whether precedential constraint—at least in its *stare decisis* version and at least at the Supreme Court level—is actually a good idea. Addressing those issues is my goal here, for without doing so we have no hope of understanding the

14. E.g., Philip B. Kurland, *Brown v. Board of Education Was the Beginning: The School Desegregation Cases in the United States Supreme Court: 1954–1979*, 1979 WASH. U. L.Q. 309 (1979). On the Legal Process perspective generally, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip Frickey eds., 1994).

15. See *Roe v. Wade*, 410 U.S. 113, 173 (1973).

16. See, most prominently, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 923, 944–45 (1973).

17. And perhaps also there is nothing wrong with taking the substantive outcomes to be expected by one or another stance about judicial method as a reason for praising or condemning that method. See generally Frederick Schauer, *Neutrality and Judicial Review*, 22 L. & PHIL. 217 (2003).

recent re-emergence of a discourse about precedent that has not been seen for generations.

I. STARE DECISIS—THE BASIC IDEA

Although the public discourse about the current Supreme Court tends commonly to be couched in the language of “precedent,” our subject is actually stare decisis.¹⁸ “Precedent” is the broader term, and as it is typically used, encompasses both vertical precedent—the obligation of a lower court to follow the rulings of a higher court in its own “chain of command”¹⁹—and horizontal precedent, the (typically non-absolute) obligation of a court to follow its own previous decisions.²⁰ Because the latter—horizontal precedent—is what I am talking about on this occasion, and because there is no higher court for the Supreme Court of the United States to obey, the issue of vertical precedent can be set aside, and we can direct our attention to the alleged constraints of stare decisis (law Latin for “stand by the thing decided”), the obligation of a court—any court—to follow, at least presumptively, its own previous decisions.²¹

To say that a court has an obligation to follow its own previous decisions is to say that a court has an obligation to treat the fact of a previous decision of some question as a *reason* for deciding it the same way.²² And thus it is no evidence of the recognition or existence of such an obligation for a court to make a decision consistent with a previous decision under circumstances in which that court or a particular judge or Justice would have reached the same outcome even absent the earlier decision. If I love chocolate ice cream, and if I am ordered (by a parent, military superior, prison guard, or

18. See generally Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

19. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 841–42 (1994).

20. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 19 n.22, (1989).

21. See RUPERT CROSS, PRECEDENT IN ENGLISH LAW 103–25 (3d ed. 1977); BLACK’S LAW DICTIONARY 1443 (8th ed. 2004).

22. See Donald H. Regan, *Reasons, Authority, and the Meaning of “Obey”: Further Thoughts on Raz and Obedience to Law*, 3 CAN. J.L. & JURISPRUDENCE 3, 20 (1990).

whomever) when hungry to eat chocolate ice cream, the fact that my behavior is consistent with the content of the order is no evidence that I am obeying the order, and is no evidence that the order is the reason (or even *a* reason) for me eating the ice cream, for it is likely I would have behaved in exactly the same way even had the order not existed.

So too with judges and precedent. In his majority opinion in *Davis v. Washington*,²³ Justice Scalia cited *Crawford v. Washington*²⁴ in support of the conclusion that the prosecution in a criminal case is barred by the Confrontation Clause²⁵ from using against a defendant the out-of-court testimonial statements of a now-unavailable witness. Yet it is clear from Justice Scalia's opinions in both *Crawford* and *Davis* that he would have favored the outcome in *Davis* even had *Crawford* not been decided, just as it is apparent that Justice Blackmun would have opted for the same outcome in *Roe v. Wade*²⁶ even had *Griswold v. Connecticut*²⁷ not been decided eight years earlier. Similarly, it is plain that Justice Ginsburg would have voted to strike down the exclusion of women from the Virginia Military Institute²⁸ even had the Court not ruled in several previous decisions that such explicit gender discrimination needed to be subject to something considerably higher than the minimal scrutiny of the rational basis standard.²⁹ In all of these instances, and in countless others, the Justices, just as in the example of the chocolate ice cream, are making decisions consistent with an existing precedent, but it would be a mistake to conclude that the Justices were following precedent, obeying precedent, or being constrained by precedent simply because their decisions were consistent with precedent.

23. See *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006).

24. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

25. U.S. CONST. amend. VI.

26. See *Roe v. Wade*, 410 U.S. 113, 166–68 (1973).

27. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

28. *United States v. Virginia*, 518 U.S. 515, 555–58 (1996).

29. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (“[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.” (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981))); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating “[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”).

Thus, actually to follow precedent is to take a precedent's very status—its source and not its content—as a precedent as a reason for deciding the issue now in the same way as it had been decided in the past.³⁰ Admittedly, it is true that we can have multiple reasons for our actions, so that a decision in one way or another cannot conclusively, by itself, tell us whether precedential constraint was a causal factor, and, if so, just how much. Further, at times those multiple reasons might point in the same direction, so we cannot be sure, for example, whether Justice Ginsburg might have voted the way she did in the *VMI* case³¹ on the authority of *Mississippi University for Women v. Hogan*³² and *Craig v. Boren*³³ had she herself disagreed as a first-order matter with what turned out to be her opinion in that case. Nevertheless, over the course of probably more than 10,000 opinions in certainly more than 6000 Supreme Court decisions over the last fifty-five years (the beginning of the Warren Court era), we would expect an appreciable number of instances in which stare decisis actually determined an outcome if in fact stare decisis had been a genuine causal factor in Supreme Court decision-making. So although the existence of multiple outcome-causing reasons makes disentangling the effect of stare decisis difficult, a reliable test of the existence or force of a norm of precedent, given the size of the population of Supreme Court cases, would be the frequency of instances in which a Justice who would have decided a case in one way held otherwise solely because of the obligation to follow precedent. Indeed, this is plainly what the contemporary commentators are suggesting when they chastise the current Court for disregarding precedent. The commentators are not suggesting that Justice Thomas should favor affirmative action, or that Justice Scalia should have different views from the ones he now has about the constitutionality of restrictions on abortion, or that Chief Justice

30. See generally Alexander, *supra* note 20; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

31. See *Virginia*, 518 U.S. 515.

32. See *Hogan*, 458 U.S. 718.

33. See *Craig*, 429 U.S. 190.

Roberts and Justice Alito should suddenly discard the first-order substantive views on important constitutional questions they held when they were appointed to the Court.³⁴ Rather, the precedent-based complaint is that these and other Justices should ignore their precedent-independent views, and instead make decisions consistent with the Court's previous decisions even if their own inclinations and their own analyses would have pointed them in different directions.

In the language of contemporary legal theory, the alleged constraints of precedent and stare decisis are *content-independent*.³⁵ Just like the exasperated parent who eventually says "Because I said so!" to a questioning and recalcitrant child, an obligation to follow a precedent comes from the very status of the precedent as a precedent. Precedential constraint is thus independent of the putative authority-follower's views about the content (or intrinsic persuasiveness) of the precedent. Just as rules derive their authority from their status as rules and not from their content, so too does a precedent derive its precedential force from its status as a previously decided case, and not from the power of its reasoning or the desirability of its outcome. In the particular context of stare decisis, specifically in the context of the Supreme Court of the United States, the claim of the Court's current critics is that the current Justices have an obligation to follow the Court's previous decisions regardless of the current Justices' views about the current correctness of those decisions.

II. ON THE STRENGTH OF THE STARE DECISIS NORM

That there is, by hypothesis, an obligation of a court to follow its own previous decisions because of their status and not because of

34. Or at least such criticism is not a part of the structure of a complaint about the failure to follow precedent. I do not mean to suggest that those who criticize the Justices would not be tickled if the Justices they are criticizing simply changed their first-order substantive views, but it seems plain that the criticism of various Justices for not following precedent is a rhetorical strategy employed under circumstances in which a change of those Justices' substantive views is highly unlikely.

35. See H. L. A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 261–66 (1982); Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 96 n.6 (1992).

their content does not mean that the obligation is absolute. Just as the requirements of Equal Protection and Due Process may be overcome by a governmental showing of a compelling state interest,³⁶ and just as Justice Holmes described the constraints of the First Amendment as being overridable in cases of “clear and present danger,”³⁷ so too is it possible that on occasion the obligations of stare decisis might be overcome without such occasions indicating that there is or was no continuing obligation to follow earlier decisions. When the Supreme Court finds that there exists a governmental interest sufficiently compelling to override the requirement of the Equal Protection clause,³⁸ and when the Court agrees that a compelling interest allows an override of what otherwise would have been the requirements of the First Amendment,³⁹ the equal protection and First Amendment requirements do not disappear. Nor did they disappear even in the very cases in which the compelling interest arose. Similarly, the requirements of stare decisis do not disappear, either for the future or in that case, when they are overridden by particularly powerful reasons for not following a previous decision.

As with the compelling interest and clear and present danger standards, however, an overridable obligation can be considered an obligation only if the threshold for override is higher than the threshold would have been for a decision of that type absent the obligation. Were there no rule of stare decisis, a court would presumably have the freedom to reject any earlier decision it thought mistaken. Consequently, if a court under a purported regime of stare

36. See *Roe v. Wade*, 410 U.S. 113, 165–66 (1973) (holding a state may place “restrictions on abortion . . . so long as those restrictions are tailored to the recognized state interests . . . [and] provide compelling justifications for intervention.”); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (stating a restriction of a fundamental right “must be judged by the stricter standard of whether it promotes a *compelling* state interest.”), *overruled on other grounds in part* by *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Korematsu v. United States*, 323 U.S. 214 (1944).

37. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (stating the freedom of speech would not cover such speech that “create[s] a clear and present danger” to cause the “substantive evils that Congress has a right to prevent.”).

38. See cases cited *supra* note 36.

39. See *New York v. Ferber*, 458 U.S. 747, 774 (1982) (O’Connor, J., concurring) (stating that “compelling interests” may allow “New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct,” notwithstanding the value that society may place on the works).

decisis is free to disregard any previous decisions it believes wrong, then the standard for disregarding is the same when stare decisis applies as when it does not, and the alleged stare decisis norm turns out to be doing no work. If this is so, then stare decisis does not in fact exist as a norm at all. But if, by contrast, it requires a better reason to disregard a mistaken precedent than merely that it is believed mistaken, a stare decisis norm can be said to exist even if it is overridable. In such a case, however, it would be necessary for the standard for override to be higher than the standard for reaching the same outcome absent the precedent. This might be expressed in terms of a belief that the previous decision is extremely or really really wrong, or wrong and extremely harmful, or something of that variety but, for a norm of stare decisis in fact to exist in a meaningful way, there must be a gap between what the standard for rejecting a previous decision would have been without the norm of stare decisis and what that standard is with a norm of stare decisis. And this gap or heightened justification is what the Supreme Court plainly had in mind when it said that it needed a “special justification”⁴⁰ in order to disregard an earlier decision, although the question whether the Court meant what it said, or has acted consistently with what it said, remains to be answered.

Thus, it is not a necessary consequence of the existence of a norm of stare decisis that earlier decisions never be overruled. That *Brown v. Board of Education*⁴¹ overruled *Plessy v. Ferguson*⁴² does not show that stare decisis on the Supreme Court is non-existent. It shows only that if there is a norm of stare decisis, then, unlike British practice prior to 1965, it is a non-absolute norm.⁴³ But for a norm to be non-absolute and still operate as a potentially decision-influencing

40. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

41. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95 (1954) (overruling *Plessy v. Ferguson* after considering public education and “its present place in the American life throughout the Nation.”).

42. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

43. Prior to the Practice Statement on Judicial Precedent of 1966, even the highest courts in Great Britain were not permitted to overrule their own previous decisions, such an act being deemed law-making, and thus reserved for Parliament. See generally CROSS, *supra* note 21.

norm, it must entail some modification of the otherwise applicable decision-making structure *because of* that norm, and that is why, in this context, I describe this modification as a higher threshold for disregarding a previous decision than would have existed without the stare decisis norm. It is a highly likely, but not logically necessary, empirical consequence of the existence of a stare decisis norm, that there will exist at least some decisions that are followed *because of* the norm that would not otherwise be followed, and that some wrong but not extremely wrong decisions remain on the books, or attract agreement from those who would have decided them differently. If in fact the “special justification” standard is illusory, and if in fact the Justices *never* or almost never follow an earlier decision with which they disagree, then it is hard to conclude that even a non-absolute norm of stare decisis actually exists.⁴⁴ In theory, stare decisis could exist even though it never prevailed, for it might exist as a norm that in every case either produced the same result as would have been produced without it or was overridden by compelling reasons.

III. IS THERE A NORM OF STARE DECISIS?

All of this is by way of attempting to explain what a norm⁴⁵ of stare decisis would look like were one to exist in and for the Supreme Court of the United States. But as we know from the example of unicorns, it is one thing to explain what something would look like if it were to exist and another to determine whether it in fact exists or not. So although we now have a pretty good idea of what a norm of stare decisis would look like and how it would operate were it to exist, we do not yet know whether it really does exist, or, like unicorns, has a conceptual but not a real existence. Consequently, the question now before us is whether a norm of stare decisis does indeed

44. As should by now be clear, I use “exists” in this context solely to refer to some norm being accepted and employed by some group of decision-makers in some decision-making domain. Existence is thus for my present purposes a purely sociologically descriptive notion, unrelated to questions of moral epistemology or normative political theory.

45. I use the term “norm” here to refer to an existing practice taken to be desirable, the departure from which is thus grounds for criticism.

exist. The contemporary critics of the Roberts Court assume that a norm of stare decisis exists, because otherwise the criticism of the Court for not following it would make no sense. But is there such a norm? What is the norm that the Roberts Court is in fact disregarding, where does it come from, and has it existed in the past?

A considerable number of political scientists have looked at precisely this question, and the existing research provides very strong support for the view that, at least in the Supreme Court, there exists no strong norm of stare decisis.⁴⁶ This reference to a “norm” is my language and not that of the political scientists, but the import of the political science research lies in its supporting the conclusion that among the factors that determine Supreme Court outcomes, previous decisions are rarely among them.⁴⁷ The Justices of course do provide numerous allegedly supporting citations to previous Supreme Court decisions, but the principal conclusion of the empirical research is that the data do not support the traditional picture about the importance of precedent in the Supreme Court.⁴⁸ Rather, it appears that the Court’s previous decisions only rarely and weakly influence current results. Instead of being causal of Supreme Court outcomes, the Court’s prior decisions appear to provide, consistent with the

46. See Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 973, 983–84 (1996). See generally LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); SAUL BRENNER & HAROLD J. SPAETH, *STARE DECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992* (1995); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (2001); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008). Somewhat more qualified views can be found in LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 5–7 (1992); THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 3–12 (2006); Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J. POL. 778, 792–96 (1997).

47. Although not directly relevant here, it is worth noting that under Segal and Spaeth’s “attitudinal” model, ideology, broadly speaking—substantive policy views—is the single greatest determinant of the votes of the Justices. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

48. See generally Anthony Lewis, *Foreword* to *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* vii, vii–viii (Vincent Blasi ed., 1983).

standard Legal Realist picture of the effect of precedent in general,⁴⁹ primarily ex post justifications and rationalizations for decisions that have actually been reached on grounds other than precedent.

The empirical research does not support the conclusion, nor does it claim, that individual Justices *never* take the Court's previous rulings as authoritative, but the research is most consistent with the proposition that the cases in which the Justices actually *follow* precedent are rare, and the cases in which following precedent is dispositive are rarer still. So as should be clear by now, the set of cases or opinions that display genuine constraint by stare decisis will not include those in which a Justice cites an earlier decision to support what he or she should or would, even absent the previous case, likely have concluded even absent the earlier decision. If we eliminate these cases and opinions in which the citation of earlier cases is largely redundant, we find ourselves now searching for instances in which a Justice voted contrary to his or her precedent-independent beliefs solely because of the current felt obligation to follow precedent. Such instances do exist, but it turns out that they are few and far between. Justice Stewart had dissented in *Griswold v. Connecticut*, insisting that the Constitution contained no "general right of privacy,"⁵⁰ but joined the majority in *Roe v. Wade* because of what to him was the controlling force of a case with which he had disagreed.⁵¹ In several criminal procedure cases of the 1950s and 1960s, Justice Harlan voted to apply earlier decisions in which he had been a dissenter,⁵² and Justice White did the same thing when, despite his strong dissent in *Miranda v. Arizona*⁵³ in 1966, he voted

49. There are numerous versions of Legal Realism, of course, but a common theme of much of Legal Realism is that the stated reasons for a decision are rarely the genuine reasons, as opposed to the after-the-fact justifications for decisions reached on other and unstated grounds. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930). See generally WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

50. *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting).

51. *Roe v. Wade*, 410 U.S. 113, 168, 170 (1973) (Stewart, J., concurring).

52. See Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251, 279.

53. *Miranda v. Arizona*, 384 U.S. 436, 504 (1966).

in 1980 in *Edwards v. Arizona* to extend *Miranda*'s ban on police questioning after a suspect had invoked his *Miranda* rights. Similarly, Justice Scalia has been willing, on stare decisis grounds, to apply the dormant commerce clause to invalidate explicitly protectionist legislation, even though he himself believes the so-called dormant commerce clause has no basis in the text or history of the Constitution.⁵⁴ And in *Ring v. Arizona*,⁵⁵ a case applying *Apprendi v. New Jersey*,⁵⁶ Justice Kennedy, in a concurring opinion, thought it important to note that "[t]hough it is still my view that *Apprendi v. New Jersey* . . . was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way."⁵⁷

There are undoubtedly other examples, to be sure, but it is interesting that this brief list may well constitute a quite large percentage, at least for the fifty-five years from the beginning of the Warren Court era, of the entirety of such cases. When requested to think of cases in which a Supreme Court Justice who had voted one way on an issue, or was known to have certain first-order views about some constitutional issue, subsequently voted the other way because of the obligation to follow a precedent with which he or she had disagreed, numerous colleagues at multiple institutions were unanimous in concluding that there were very few. Indeed, the foregoing list is pretty much all that these various colleagues could think of, at least in terms of providing crisp and unambiguous examples in which a Justice known from his or her opinions or extra-judicial writings to believe one proposition or conclusion had voted contrary to those beliefs because of the felt obligation to follow an earlier decision of the Court.⁵⁸

54. See *W. Lynn Creamery v. Healy*, 512 U.S. 186, 209–10 (1994) (Scalia, J., concurring); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., joined by Scalia, J., dissenting); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988).

55. *Ring v. Arizona*, 536 U.S. 584, 613 (2002).

56. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

57. *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

58. I do not claim that asking one's friends or colleagues is a reliable research method, but it is difficult to prove a negative, and thus an otherwise lazy (but nevertheless common) research approach occasionally has its advantages.

That such instances of genuine stare decisis influence are so rare is underscored by the ubiquity of the opposite phenomenon. Supreme Court Justices whose views have been rejected by a majority of their colleagues overwhelmingly continue to adhere to those outvoted views in subsequent cases—the phenomenon of persistent dissent—thus in effect rejecting the idea of stare decisis and rejecting the constraints of precedent.⁵⁹ Consider, for example, the opinions of Justices Brennan and Marshall in obscenity cases subsequent to the landmark 1973 decisions in *Miller v. California*⁶⁰ and *Paris Adult Theatre I v. Slaton*.⁶¹ In *Miller* and *Paris Adult Theatre*, Justice Brennan, himself the author in *Roth v. United States*⁶² of the Supreme Court's "non-speech" approach allowing the regulation of legally defined obscenity in the face of First Amendment objections, dissented, concluding that the approach he had earlier created had proved unworkable in practice and created constitutionally impermissible vagueness problems with a consequent chilling effect on constitutionally protected material.⁶³

Justice Brennan's dissenting position in the 1973 obscenity cases is a plausible one—indeed, it may even be right—but it did not command a majority of the Court. Yet for Justice Brennan, the Court's majority opinions in these cases did not compel him to follow them, and he continued to dissent in any subsequent obscenity case in which an obscenity law or a conviction under it was upheld.⁶⁴ And, indeed, Justice Brennan had, to his credit, written thoughtfully and forcefully in justification of his own practice of persistent dissent.⁶⁵

59. See generally Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467. For an earlier plea that Supreme Court Justices engage unashamedly in just this practice, see generally William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949). See also Justice Reed's opinion in *Smith v. Allright*, 321 U.S. 649, 665 (1944).

60. *Miller v. California*, 413 U.S. 15 (1973).

61. *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

62. *Roth v. United States*, 354 U.S. 476, 469 (1957).

63. *Paris Adult Theatre I*, 413 U.S. at 73–74, 91 (Brennan, J., dissenting).

64. See, e.g., *Pope v. Illinois*, 481 U.S. 497, 506–07 (1987); *Smith v. United States*, 431 U.S. 291, 311 (1977); *Hamling v. United States*, 418 U.S. 87, 142 (1974). And this list of cases excludes a far more substantial number of dissents from denials of certiorari in which the Court refused to review obscenity convictions.

65. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 427, 436–37 (1986).

I use this example precisely because it is so crisp. The constitutional rule—legally defined obscenity is outside of the coverage of the First Amendment—to which Justice Brennan refused to give stare decisis effect, was just the one he himself had created sixteen years earlier in *Roth*, and which he subsequently rejected in *Miller* for reasons of practical unworkability rather than fundamental theoretical error. And although reasonable minds can differ on this question, the written, printed, and photographic materials at issue in these cases, the materials in defense of which Justice Brennan refused to apply the principle of stare decisis, could hardly be thought of as lying at the center of free speech values.⁶⁶

I do not want to single out Justice Brennan unfairly. His behavior—which to his credit he was willing to explain and justify—was entirely consistent with that of almost all of his colleagues almost all of the time. That same behavior of persisting in dissent is seen in many dissenting Justices, who continue to adhere to their dissents, and do not take—supposed norms of stare decisis notwithstanding—a majority decision of the Court to have reason-giving or decision-guiding effect.⁶⁷ If one looks at actual Supreme Court practice, therefore, one is forced to conclude that there is hardly any existing norm of stare decisis on the Supreme Court. This conclusion is based not on any single form of research, and each of these forms has its undeniable flaws. My conclusion, however, is based on the confluence of the empirical research by political scientists, the paucity of crisp examples of outcome-changing precedential effect for individual Justices, the phenomenon of persistent dissent, and the

66. And in this respect these cases differ from the death penalty cases, in which Justices Brennan and Marshall were also persistent dissenters, but in which the very consequences of death make it maximally plausible for a dissenter from the death penalty to adhere to that dissenting position. See generally Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 592 (1995); Laura K. May, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988).

67. See generally Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227; Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L.J. 669 (1994); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

explicit rejection of the stare decisis norm by Justices such as Justice Scalia. With all of these mutually-reinforcing sources of data pointing in the same direction, it is hard to resist the conclusion that the norm the current Court is commonly accused of rejecting is one that appears now not to exist and that appears not to have existed for at least several generations.

IV. ON THE VALUE OF STARE DECISIS

That there has been for more than fifty years scarcely any extant stare decisis norm in the Supreme Court⁶⁸—very little felt obligation to follow precedent just because it is precedent and not because the precedent is believed to be correct—is hardly an oversight. Justice Scalia has been most explicit in explaining his refusal to accept such a norm,⁶⁹ arguing that his oath requires him to interpret and obey the Constitution and not others' views about the Constitution. He has thus consistently argued that he was appointed by the President and confirmed by the Senate to give *his* views, and not the views of his predecessors. This position is a bit question-begging because the view that a Justice is expected to express his or her own views is not inconsistent with the position that one's own views can incorporate one's own views about deference to the views of others or deference to earlier decisions. Contrary to Justice Scalia's conclusion, the view that the oath of office requires following the Constitution is open to the interpretation that stare decisis is sufficiently part of the Constitution itself, or that a judicial method incorporating stare decisis is sufficiently part of the Constitution itself (and was in 1789 when Article III was adopted), that rejection of stare decisis is not required by the oath of office. Still, Justice Scalia's point is plain enough, and underscores the fact that a norm of stare decisis is, in important respects, counter-intuitive. It is hardly self-evident that requiring a

68. See James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008).

69. See, e.g., *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., dissenting).

judge to suppress his or her own best all-things-considered judgment to the dead hand of the past or to the (from his or her perspective) erroneous views of one's historical colleagues is sensible. And it is likely to appear particularly non-sensible to the judge at precisely the moment when following the stare decisis norm will direct that judge to make what he or she believes to be wrong decision.

There are, of course, arguments going the other way, arguments that make stare decisis appear less counter-intuitive. Thus, a norm of stare decisis might be defended on any of several different grounds.⁷⁰ Most common would be one or another variety of the position that law is the special steward of stability for stability's sake, consistency for consistency's sake, and settlement for settlement's sake; a position most famously expressed by Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*⁷¹ where Brandeis memorably stated that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."⁷²

As the clash of opinions in *Payne v. Tennessee*⁷³ made clear some years ago, it is not self-evident that Justice Brandeis's position in *Coronado Oil* is as attractive outside the realm of commercial and related issues as within. Nor is it self-evident that on issues involving

70. See *Casey*, 505 U.S. at 845–46 (applying the doctrine of stare decisis where a prior decision was still workable and its basis had not changed); *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991) (stating stare decisis is "not an inexorable command" and overturning precedent is proper "when governing decisions are unworkable or are badly reasoned"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (holding stare decisis has "special force in the area of statutory interpretation . . . [where] Congress remains free to alter what we have done."); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983) (reaffirming *Roe v. Wade* and stating "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.").

71. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

72. *Id.*

73. *Payne v. Tennessee*, 501 U.S. 808, 829–30, 850, 859 (1991) (overruling its prior decisions in *Booth v. Maryland* and *South Carolina v. Gathers* and holding that evidence relating to a murder victim and the impact on the victim's family was admissible at a capital sentencing hearing); *id.* at 842–43 (Souter, J., concurring) (finding precedent in the Court's stare decisis that decisions "wrongly decided, unworkable . . . call[] for some further action by the Court . . . not to compound the original error, but to overrule the precedent."); *id.* at 848 (Marshall, J., dissenting) (stating the "overruling of one of this Court's precedents ought to be a matter of great moment and consequence."); *id.* at 859 (Stevens, J., dissenting) (claiming the "majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion.").

morally or politically important individual rights that we can or should expect Supreme Court Justices to suppress their own best moral, political, and constitutional judgment to the values of stability, notice, reliance, or simply being consistent with the past. But regardless of whether in the final analysis that position—that stare decisis has little place in the Supreme Court—is correct or not, it is quite plain that it is the position that has prevailed on the Supreme Court at least since the days of Chief Justice Earl Warren, and in all likelihood for some time before that as well.

A LIMITED CONCLUSION

My conclusion that precedent has rarely genuinely mattered in the Supreme Court, as opposed to being a causally inert makeweight phrase, and as opposed to largely causally inert citations to previous decisions, should not be taken as a claim about courts in general, or about stare decisis in general, or about precedent in general. Because the Supreme Court's docket is dominated by cases of exceptionally high moral, political, and policy consequence, the Supreme Court may actually be the last place to look to find actual traces of stare decisis. If we are searching for stare decisis, it is likely far more fruitful to look at the mine run of less momentous cases in the state courts and in the lower federal courts, for that is where a larger percentage of the docket is comprised of more routine cases involving neither individual rights nor fundamental questions of governmental structure, and thus where the values of consistency for consistency's sake may be seen to be comparatively more important.

In addition, the Supreme Court's control of its own docket and its very limited number of cases—only seventy-three decided with full arguments and opinions out of almost 9000 petitions in the 2006 Term⁷⁴—is such that very few cases truly presenting stare decisis opportunities will be part of the Court's business at all. Cases simply

74. To be exact, the Court in the 2006 Term was asked to decide 8902 cases, of which it decided 278 summarily without opinion and seventy-three with full signed opinions. *The Supreme Court, 2005 Term—The Statistics*, 121 HARV. L. REV. 436 (2006).

raising the same questions as earlier will not be heard at all, and thus the set of cases that actually are heard is a set in which it will be extremely rare for there to be cases presenting the exact same question as one that had been presented at some earlier time. The Supreme Court's output of cases decided by full opinion after briefing and argument is highly unrepresentative of law generally and even of constitutional law particularly. Instead, the Court's output of decisions is an output consisting almost entirely of cases that found their way onto the pinnacle of American adjudication precisely because there was no law or because the law was virtually in equipoise between the opposing positions.⁷⁵ As a result, the cases in this small and unrepresentative set are those, especially given the confluence of high political and moral stakes with the constitutional or legal indeterminacy of these cases, in which the constraints of law, including but not limited to the constraints of a norm of stare decisis, are at a low ebb.⁷⁶

Although it would therefore be an error to generalize from the Supreme Court's longstanding and substantial neglect of the precedential effect of its own previous decisions to a conclusion about the existing practices of courts and judges in general, the Supreme Court not only has a special visibility, it has a special visibility as a court. Whether the Supreme Court's docket is actually representative of law generally or the business of courts generally is a different question from whether significant numbers of people might not see the Court and its work as more representative than it is, and thus infer, even if erroneously, that the Supreme Court is more similar to other courts than it is different. Consequently, the Supreme Court, even if unwittingly, likely serves as an exemplar for the

75. See Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1727–28 (1988).

76. I also make no claim here that stare decisis plays no role in the Court's decisions about which cases to take. It seems plausible that stare decisis is a much larger factor in the decision to deny certiorari than it is for the decision of the cases for which certiorari is granted. But it is also plausible that, knowing of the weakness of the stare decisis norm for cases subject to full briefing and argument, Justices will rarely vote against certiorari solely on stare decisis grounds. As between these two competing hypotheses, my hunch is that the latter is more likely true, but I offer this as nothing more than an unsupported hunch.

political branches and for the larger public of what courts do and what methods of reasoning they employ in doing it.

The evidence indicates that the Supreme Court's current critics are mistaken in claiming the Roberts Court is in some way taking *stare decisis* less seriously than did its predecessors on the Warren, Burger, and Rehnquist Courts.⁷⁷ That is not to say it might not be desirable not only for the Roberts Court but also for the Supreme Court of the future to take *stare decisis* more seriously than has been the case for a long time, and thus to value stability, consistency, settlement, reliance, notice, and predictability more than do other governmental decision-making bodies. Even if the critics are criticizing the Court from the perch of a largely non-existent norm, the current period, one in which the Court and its role are undergoing a substantial transformation in the public's eye, may nevertheless prove to be an opportune moment for the Court's longstanding and arguably troubling disregard for precedent to be subjected to some entirely appropriate, long needed, and hopefully less ideologically or politically motivated, critical commentary.

77. At times the claim of ignoring precedent makes the additional mistake of claiming that the Roberts Court is ignoring the precedents that the critic happens to prefer without acknowledging precedents going in the opposite direction. Ronald Dworkin, for example, in Dworkin, *supra* note 2, chastises the Court in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), for ignoring the holding in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969), in ruling against the student speaker in a public school free speech case. Dworkin is correct that the result in *Frederick* is in some tension with the result in *Tinker*, but the opposite result in *Frederick* would have been in just as much tension with the more recent *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (holding a principal's decision that the "need to protect the privacy of individuals . . . within [a] school community" did not violate the First Amendment), and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding school officials may determine that "to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission" and thus does not violate First Amendment rights), neither of which Dworkin mentions. Plausible arguments can be made that it would have been better in *Frederick* to follow *Tinker*, thus treating the *Hazelwood* and *Bethel* precedents more casually. But given the array of conflicting precedents, criticizing the *Frederick* majority for ignoring precedent, as such, seems considerably more than the evidence can sustain.

