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*The Norm of Stare Decisis**

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Theory: Precedent might affect Supreme Court decision making in a number of ways. One conception, the conventional view scrutinized by Segal and Spaeth, sees precedent as the primary reason why justices make the decisions that they do. A second regards precedent as a normative constraint on justices acting on their personal preferences. On this account, justices have a preferred rule that they would like to establish in the case before them, but they strategically modify their position to take account of a norm favoring respect for precedent in order to produce a decision as close as is possible to their preferred outcome.

Hypothesis: If precedent is a norm, researchers would be unlikely to detect its presence by conventional examinations of the vote. Rather, it would manifest itself throughout the decision making process in some of the following ways: attorneys' attention to precedent and justices' appeals to and respect for the doctrine.

Methods: Counts of attorneys' use of authorities in written briefs, of justices' appeals to precedent during conference discussion, of justices' invocation of precedent in their opinions, and of the Court's alterations of *stare decisis*.

Results: Since the data support our account of *stare decisis* as a norm that structures judicial decisions, we question research designs that focus solely on how precedent affects the disposition of cases.

During the Marshall Court era, justices wrote few concurring or dissenting opinions; indeed, one of the hallmarks of the period was the degree to which members of the Court agreed on the outcomes of cases. From the lack of dissensus during this period—and throughout most of the Court's history—can we infer that the justices based their decisions on factors associated with the legal model, e.g., precedent, intent of the Framers, plain meaning? The answer offered by many judicial specialists is a resounding yes: prior to 1941, when dissent rates skyrocketed, “traditional legal approaches provided satisfactory explanations for a Supreme Court whose institutional practices led to consensus decisions . . .”

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(Walker, Epstein, Dixon 1988, 362). Or, as Pritchett (1941, 890)—the founder of the modern-day study of law and courts—put it, “presumably\the facts and the law are so clear [in unanimous decisions] that no opportunity is allowed for the autobiographies of the justices to lead them to opposing conclusions.”

Yet, numerous historical and political accounts of the Marshall Court era indicate that this is at best an incomplete characterization. We (Knight and Epstein 1996) and others (Alfange 1994; Clinton 1994; Murphy 1964) have shown that the justices who served during this period—not to mention the Chief Justice himself—were largely strategic actors, who sought to move law as close as possible to their personal policy preferences; in fact, they may have been just as policy-motivated as their present-day counterparts. If these historical and political treatments are to be believed, then the lack of dissent prior to 1941 cannot necessarily be taken to mean that justices based their decisions solely on precedent and the like. Rather, it provides an indication of the power of a particular institution—a norm against filing separate opinions. The justices, in other words, may have tried to move law toward their preferred policy positions but, in so doing, were constrained by the norm of consensus.

We argue that precedent plays the same role as did the norm of consensus during the Marshall Court era: it acts as a constraint on judicial decision making. But, just as one would be unable to make claims about the operation of the no-dissent norm by looking only at the content of Marshall Court votes, one would be unable to demonstrate the importance of precedent by merely considering dissents cast by justices in the progeny of important cases. In both instances, behavior consistent with the norm manifests itself in other ways.

We develop this argument in three steps. First, we detail our account of the importance of precedent on the United States Supreme Court. Second, we suggest a number of types of behavior that would be consistent with our account and consider whether sufficient empirical evidence exists to support it. Third, we discuss the implications of our results for future research on the Supreme Court.

The Mechanisms of Precedential Effect

Precedent might affect Supreme Court decision making in a number of ways. For this discussion we concentrate on two possible mechanisms of precedential effect. The first conception, the conventional view scrutinized by Segal and Spaeth (1996), sees precedent as the major explanation of judicial decisions; the second requires us to make modifications in this

conventional conception, for it regards precedent as a constraint on justices acting on their personal preferences.

Precedent as the Primary Reason for Justices' Decisions

The first mechanism is that precedent provides the primary reason why justices make the decisions that they do (see, generally, Knight 1994). On this account justices use the rules that are established by previous court cases as the basis for their subsequent judicial decisions.

There are two possible interpretations of this mechanism. On one interpretation precedent actually determines the preferences of the justices. If precedent has such an effect, we would anticipate finding the following patterns of behavior: (1) if justices' preferences in the precedent-setting case matched the majority opinion of the Court, justices in subsequent cases will continue to follow the precedent because of its status as a precedent or (2) if, in the original case, justices' preferences conflicted with the majority opinion on the case, then, in subsequent cases, justices will adopt the precedent as their own preference and adjust their decisions accordingly. On the second interpretation of this mechanism, precedent does not actually determine justices' preferences, but it overrides such preferences when the two diverge. That is, if justices' preferences dictate that they vote one way, but precedent dictates that they vote the other way, justices who believe in the importance of precedent should follow precedent and not their preference.

Segal and Spaeth's (1996) analysis can be understood as seeking to test either of these interpretations of this mechanism of precedential effect. Yet, it is worth noting at the onset that Segal and Spaeth (as they acknowledge) do not seek to test the effect of precedent on justices whose preferences match precedent. They are correct in noting that this is a problem of behavioral equivalence: because both the legal model and the attitudinal approach would predict the same behavior in these sorts of cases, they have no empirical test for distinguishing between the two approaches. We would only add that, given the equivalence of the predictions, there is no reason for readers of Segal and Spaeth's essay to reject the legal model in favor of the attitudinal model for these cases.

What they do test is the effect of precedent on justices whose preferences in the original cases do not match the precedent established in those cases. And this is an important area of analysis: if precedent matters, then it ought to affect the subsequent decisions of members of the Court. The problem is that Segal and Spaeth propose an unduly narrow test of these effects. They focus on the influence of precedent on the disposition of cases (on the votes to affirm or reverse the decisions of lower courts)—a focus that will always reject the effect of precedent on judicial choice whenever

the subsequent votes of dissenters in precedent-setting cases do not exactly match the majority vote in the original case—while we suggest elsewhere that such focus is not the most appropriate way of assessing judicial decision making (Epstein and Knight 1995). More specifically, we argue that analyses of courts ought to center on the law that is established by judicial decisions. By law we refer to the substantive rules of behavior that are created by courts through their holdings and justificatory arguments. If legal rules become the primary focus for analyzing the effect of precedent on judicial decision making, then the possibilities for such effects expand beyond the determination of judicial preferences. And such effects cannot be adequately tested through a narrow focus on the disposition of cases.

Precedent as a Constraint on Justices

With this focus on the substantive content of judicial decisions in mind, we suggest a second mechanism of precedential effect: precedent can serve as a constraint on justices acting on their personal preferences. On this account, justices have a preferred rule that they would like to establish in the case before them, but they strategically modify their position to take account of a normative constraint in order to produce a decision as close as is possible to their preferred outcome (see, generally, Knight 1992). A norm favoring respect for precedent can serve as such a constraint.

To see this, consider the task facing justices: they seek to establish a rule as close as possible to their most preferred policy position but, to accomplish this, they must take account of the strategic nature of their choice. On the one hand, they must be attentive to the strategic dimensions of the decision making process within the Court itself: only those rules to which at least five members of the Court subscribe will be established. Thus, they may have to modify their most preferred policy choice in order to accommodate the preferences of the other members of the Court. On the other hand, they must be attentive to the strategic dimensions of judicial decision making outside of the Court: if justices want to establish a legal rule of behavior that will govern the future activity of the members of the society in which their Court exists, they will be constrained to choose from among the set of rules that the members of that society will recognize and accept (Eskridge 1991; Knight 1994). If the Court seeks to establish rules that the people will not respect and with which they will not comply, the fundamental efficacy of the Court is undermined.

For at least two reasons, it is on this external strategic dimension that a norm favoring respect for precedent can significantly affect decision making by constraining judicial choice. First, there are prudential reasons to suggest that justices might follow precedent rather than their own policy preferences. *Stare decisis* is one way in which courts respect the established

expectations of a community. To the extent that the members of a community base their future expectations on the belief that others in that community will follow existing laws, the Court has an interest in minimizing the disruptive effects of overturning existing rules of behavior. If the Court seeks to radically change existing rules, then the changes may be more than that to which the members of the community can adapt, resulting in a decision that does not produce a rule that will be efficacious.

Second, there are normative reasons why justices may follow precedent as opposed to their own preferences. If a community has a fundamental belief that the "rule of law" requires the Court to be constrained by precedent, then justices can be constrained by precedent even if they personally do not accept that fundamental belief. The constraint follows from the effect of the community's belief on its willingness to accept and comply with the decisions of the Court. If the members of the community believe that the legitimate judicial function involves the following of precedent, then they will reject as normatively illegitimate the decisions of any court that regularly and systematically violate precedent. To the extent that justices are concerned with establishing rules that will engender the compliance of the community, they will take account of the fact that they must establish rules that are legitimate in the eyes of that community. In this way a norm of *stare decisis* can constrain the actions of even those Court members who do not share the view that justices should be constrained by past decisions.

But the task of empirically testing the effect of this norm is a complicated one. Just as the norm of consensus made its presence known in ways other than the ideological content of the vote, the norm of *stare decisis* manifests itself in ways other than the vote to continue to dissent from precedent-setting cases. The question, thus, becomes: if a norm of respecting precedent exists on the Court, in what ways would it manifest itself?

The problem in answering this, not unlike the obstacle posed by empirically assessing the norm of consensus, is that the norm of respecting precedent is quite general and individual cases are quite specific. Individual violations of the norm will not result in a general rejection of the Court by the society as a whole; only regular and systematic deviations from the norm will undermine the Court's legitimacy. Accordingly, evidence of individual instances of deviation will not demonstrate that the norm has no effect. As long as justices generally comply with the norm, they will be free to deviate from precedent in those cases in which their personal preferences so differ from the precedent that they feel compelled to change the existing law. Thus, the best we can do in this brief essay is to offer widespread evidence of the existence of behavior that is consistent with the existence of a norm and that is inconsistent with the lack of such a norm.

Table 1. Manifestations and Measures of the Presence of a Norm of *Stare Decisis*

Stage	Manifestation	Measure
Pre-Vote Conference	Attention to Precedent	Use of Precedent in Briefs
	Appeals to Precedent	Invocation of Precedential-Based Arguments
Opinion Circulation and Publication	Claims about Precedent	Citations to Precedent
	Treatment of Precedent	Use of Precedent as a Justification Alterations of Precedent

It is through this indirect evidence that we can make the case for the existence of a norm of *stare decisis*.

A Conceptual and Empirical Look at Behaviors Consistent with a Norm of *Stare Decisis*

To determine whether such evidence exists, we begin by conceptualizing Court decision making as occurring in the three stages depicted in Table 1. Our argument, elaborated below, is that each presents opportunities for a norm about the respect of precedent to structure judicial choices.

Pre-Vote Stage: Attention to Precedent

As many scholars of the judicial process recognize, the foundations of Court decisions are laid after the Court “decides to decide” a case—when attorneys present written and oral arguments to the justices. And, while analysts dispute the extent to which these arguments influence the votes of the justices (compare Epstein and Kobylka 1992 with Segal and Spaeth 1993), none would seriously claim that attorneys do not attempt to exert such influence.

Scholars also agree that the primary way in which attorneys seek to influence judicial decision making is by persuading the justices to adopt legal rules that will produce outcomes favorable to the interests of their clients. To accomplish this, they offer arguments that identify various legal sources, which they claim reflect the law most appropriate to govern the facts of the extant case. It seems reasonable to infer from these attorneys’ arguments those legal sources—be they citations to precedent or other authorities—that they believe will most likely affect Court decisions.

Our examination of one of Segal/Spaeth’s precedent creation-progeny

series, *Edelman v. Jordan* (1974),¹ suggests that attorneys believe in the power of precedent. As Table 2 shows, we gathered the lists of authorities in briefs filed in *Edelman* and its 12 successors and counted the number of citations to cases and to all other authorities. The results are clear: in all but six of the 26 briefs did citations to precedent exceed those to all other sources, including scholarly works, state and federal constitutional provisions, statutes, and regulations.

Of course, this evidence merely suggests that attorneys believe that precedent is an important influence on Court decision making; it does not demonstrate that precedent actually has the anticipated effect. Yet, it is behavior consistent with the existence of a norm favoring respect for precedent. For if attorneys truly believed that precedent was not an effective way for them to influence the Court, there would be no reason for them to give precedent such emphasis in their briefs. An obvious counterargument is that attorneys may not believe in the power of precedent, but feel the need to maintain the emphasis for purely strategic purposes. We address the fundamental weakness of this counterclaim in our concluding section.

Conference Discussion: Appeals to Precedent

After a case is briefed and argued, the Court holds a private conference to discuss it. During conference, the justices state their views on the case (beginning with the Chief Justice and moving in order of seniority) and, frequently, how they would dispose of it (e.g., reverse, remand, affirm). Clearly, as many scholars have demonstrated, justices engage in various forms of strategic behavior during conference. For example, Murphy (1964) suggests that justices view their conference statements as tools of persuasion; indeed, in preparing them, Court members and their clerks are often mindful of the preferences of other justices and the positions they are likely to take. So one justice may try to demonstrate to others how a particular legal rule will lead them to a result more in line with their goals than other courses of action (Epstein and Knight 1995). When justices take this tack, they offer various arguments in support of the superiority of their proposed rule.

One important source of evidence in support of the existence of a norm of *stare decisis*, we believe, is the extent to which justices invoke precedent in their arguments during these private conferences. There are two reasons why this is important. First, it is evidence of the existence of the norm among the justices themselves. The very fact that precedent would be em-

¹Throughout this article, we use *Edelman v. Jordan* (1974) as our empirical reference point because (1) it generated the greatest number of progeny and (2) its progeny span the longest length of time.

Table 2. Attorneys' Use of Authorities in Written Briefs

Case/Brief	% Precedent	% Other	Total N of Authorities
<i>Edelman</i>			
Petitioner's Brief	68.7	31.1	67
Respondent's Brief	81.9	18.1	127
<i>Fitzpatrick</i>			
Petitioner's Brief	41.6	58.4	113
Respondent's Brief	64.0	36.0	25
<i>Milliken II</i>			
Petitioner's Brief	72.1	27.9	43
Respondent's Brief	74.3	25.7	105
<i>Hutto</i>			
Petitioner's Brief	74.3	25.7	35
Respondent's Brief	36.5	63.5	148
<i>FL Department</i>			
Petitioner's Brief	62.2	37.8	127
Respondent's Brief	69.2	30.8	65
<i>Guardians</i>			
Petitioner's Brief	53.9	46.1	102
Respondent's Brief	67.8	32.2	87
<i>Pennhurst</i>			
Petitioner's Brief	88.3	11.7	77
Respondent's Brief	73.5	26.5	181
<i>Oneida</i>			
Petitioner's Brief	51.9	48.1	106
Respondent's Brief	77.4	22.6	124
<i>Atascadero</i>			
Petitioner's Brief	38.1	61.9	63
Respondent's Brief	47.6	52.4	227
<i>Green</i>			
Petitioner's Brief	66.7	33.3	57
Respondent's Brief	60.0	40.0	60
<i>Papasan</i>			
Petitioner's Brief	64.0	36.0	114
Respondent's Brief	59.0	41.0	78
<i>Welch</i>			
Petitioner's Brief	77.6	22.4	49
Respondent's Brief	63.4	36.6	93
<i>PATH</i>			
Petitioner's Brief	37.8	62.2	90
Respondent's Brief	33.3	66.7	33

Procedure for Data Collection: Locate the Table Authorities (sometimes listed as Citations) in the brief and count the number of cases cited ("Precedent"). Following the cases are lists of Constitutional Provisions (state and federal), Statutes (state and federal), Regulations (state and federal), Miscellaneous Sources, and so forth. Count the number of these ("Other").

Note: For full case names and citations, see the References to Segal and Spaeth (1996).

ployed as a source of persuasion in their *private* communications suggests that the justices believe that it can have an effect on the choices of their colleagues. It is one thing for the justices to ground their public proclamations in the rhetoric of precedent; it is quite another for them to use it in their private deliberations. Second, the invocation of precedent in conference discussions lends support to the claim that a general norm favoring precedent exists in society at large. For justices who seek to establish legal rules that will engender compliance in the community as a whole, priority will be given to those rules that are consistent with a norm favoring respect for precedent if they believe that such a norm exists. Thus, one reason why justices might be persuaded to adjust their position on the holding in a case in the direction of precedent is that such an adjustment will enhance the probability that the resulting decision will be considered legitimate by society.

To determine whether such evidence exists, we examined Justice Brennan's notes of conference discussions over *Edelman* and its progeny; more specifically, we coded whether or not justices invoked precedent in their remarks. Table 3 displays the results.

As we can see, in all but *Hutto v. Finney* (1978) did at least one justice mention a previously-decided case. And, in many of those instances, a particular precedent formed the centerpiece of their conference statements—as in *Atascadero State Hospital v. Scanlon* (1985), when O'Connor simply said, “*Pennhurst* [*State Hospital v. Halderman*, 1984] decided this case and I'd reverse;” or in *Green v. Mansour* (1985), when Blackmun noted that he would “reverse on *Atascadero*.”² At other times, the justices struggled with competing precedents both in their remarks and in their votes. Along these lines, *Edelman* provides an interesting illustration. During conference discussion, Stewart said: “Same jurisdiction issue here as in *Hagens* [*v. Lavine*, 1974] but can't solve it the same way. Can't possibly find *Parden* [*v. Terminal R. Co.*, 1964] type waiver here. My problem comes down to *Ex parte Young* [1908].” But White and Blackmun seemed to disagree. The former argued that “Conditions of scheme are such that [the] state had to agree to disburse as Feds required—a *Parden* type waiver.” And Blackmun noted that he did not “think there's an 11th Amendment problem. It's not the Missouri case [*Employees v. Public Health and Welfare Dep't*, 1973] where state had something forced on it. This comes down on *Parden* side” Powell simply could not make up his mind: at first he passed and, then, tentatively voted to affirm. But, in a December 17,

²Transcripts from conference discussion and memoranda cited in the following paragraphs are available from the authors upon request.

Table 3. Justices' Appeals to Precedent During Conference Discussion

Case	Justice									
	Burger	Douglas	Stewart	White	Marshall	Blackmun	Powell	Rehnquist	Stevens	O'Connor
<i>Edelman</i>	UNC	No	Yes	Yes	UNC	Yes	Yes	Yes	NC	NC
<i>Fitzpatrick</i>	No	NC	Yes	No	No	No	No	Yes	Yes	NC
<i>Milliken II</i>	No	NC	Yes	No	No	No	Yes	Yes	Yes	NC
<i>Hutto</i>	No	NC	No	No	No	UNC	No	No	No	NC
<i>FL Dep't</i>	Yes	NC	NC	No	No	UNC	No	Yes	No	No
<i>Guardians</i>	Yes	NC	NC	Yes	No	Yes	Yes	Yes	Yes	Yes
<i>Oneida</i>	Yes	NC	NC	Yes	Yes	Yes	No	No	Yes	Yes
<i>Atascadero</i>	No	NC	NC	No	No	No	No	No	Yes	Yes
<i>Green</i>	Yes	NC	NC	No	No	Yes	Yes	Yes	Yes	UNC

Legend: Yes = cited precedent in conference remarks or agreed with another justice who cited precedent; No = did not cite precedent in conference remarks or agreed with another justice who did not cite precedent; NC = not on Court; UNC = position unclear because (1) Brennan's notes were illegible, (2) Brennan failed to record any remarks, (3) the justice agreed with another justice for whom Brennan failed to record any remarks or whose comments were written illegibly by Brennan.

Procedure for Data Coding: Examine Brennan's conference notes for each case. Code "Yes," "No," or "UNC" based on the definitions listed above. *Note:* Conference transcripts unavailable for *Pennhurst*, *Papasan*, *Welch*, and *PATH*. Since we rely on Brennan's notes, we have only his conference memoranda (which almost always cite precedent)—not a transcription of his oral remarks. For comparability, we chose not to rely on those memos and, thus, exclude Brennan from this analysis. For full case names and citations, see the References to Segal and Spaeth (1996). *Source:* Papers of Justice William J. Brennan, Library of Congress.

1973 memo, he told the Chief Justice he had “reexamined” his position and wanted his vote recorded in favor of reversal:

The case is still a close one for me because we may leave the respondents remediless. Yet we have not extended *Ex parte Young* to cover the compelling of a state to pay money from general tax funds to private citizens. Before I go that far, I will have to be satisfied that there was a waiver by the state. I have reread *Parden* and *Employees* and concluded that there is no waiver here

Clearly, these kinds of statements—not to mention the data presented in Table 3—provide documentation of the use of precedent in the private deliberations of the Court. Of course, we recognize that this is not definitive evidence of a precedential effect on decision making; yet, at the same time, it is clearly evidence of behavior consistent with the existence of a norm favoring respect for precedent. And it is important to note that it is behavior that makes little sense if the justices know that precedent has no impact on their ultimate decisions. Again, the counterargument of pure strategic behavior can be raised but, as we show later, that argument fails to account for behavior uncovered in these private discussions.

Opinion Circulation and Publication: Claims about and Treatment of Precedent

After the Court discusses a case, the Chief Justice (or the most senior member of the majority, if the Chief Justice is not in the majority) assigns the opinion to himself/herself or to another member of the Court. The next step, typically, is for the writers to circulate drafts of their opinions.

Although there are many ways that the norm favoring precedent could manifest itself during this process,³ we have chosen to focus on the products of that process: the final, published versions of the opinion. And we draw attention to two aspects of these products—the claims writers make in their opinions and the way they treat precedent within them.

Claims about Precedent. As all students of public law know, Court members invoke numerous justifications for their opinions, from the intent of the framers to the plain meaning of the words of statutes. Yet, as even Segal and Spaeth (1996, 972) acknowledge, “appeal to precedent is the primary justification justices provide for the decisions they reach.” Several pieces of evidence support this claim. First, very few Supreme Court opinions—majority, dissenting, or concurring—do not cite previously-decided

³For example, our examination of the case records provides evidence that the norm plays a role in structuring the bargaining process over the content of opinions.

cases. A perusal of any volume of the *U.S. Reports* supports this, as does our analysis of a sample of Segal and Spaeth's cases. In particular, we counted the number of citations to cases and to all other authorities in the majority and dissenting opinions cast in *Edelman* and its progeny. As Table 4 shows, in all but three of the 28 opinions, citations to precedent exceeded those to all other sources combined. What is more, the average opinion cited 2.01 previously-decided cases per *U.S. Reports* page; that figure was .93 for all other authorities.

Second, we (as do Segal and Spaeth) note Phelps and Gates' (1991) study, which found that 80% of the constitutional arguments used by Justices Brennan and Rehnquist were based on precedent. Our analysis of the justifications used in majority and dissenting opinions in *Edelman* and its progeny comes to the same general conclusion. Although justices occasionally invoke other legal approaches (e.g., the Framers' intent, the plain meaning of the words), *stare decisis* predominates. Indeed, in only a handful of the opinions listed in Table 4 did an appeal to precedent fail to form the core of the argument.

Of course, the data reported here are limited to a few cases but we doubt that any scholar of the judicial process would take issue with our conclusion that precedent is a prominent feature of most opinions. What they may suggest, though, is that the data actually support Segal and Spaeth's argument. The invocation of the precedent justification by both dissenting and majority opinions renders it meaningless. But this position begs the question of why: Why would justices (for whom precedent was unimportant, as Segal and Spaeth maintain) feel compelled to invoke it, and not just occasionally but regularly—especially since so many other justifications exist?

The answer is clear. The justices' behavior is consistent with a belief that a norm favoring precedent is a fundamental feature of the general conception of the function of the Supreme Court in society at large. To the extent that compliance with this norm is necessary to maintain the fundamental legitimacy of the Supreme Court, such a belief will constrain the justices from deviating from precedent in a regular and systematic way.

Treatment of Precedent. Perhaps the most important evidence of a norm of *stare decisis* comes in the way the Court treats existing precedent. If the justices consistently and often overturned principles established in past cases, then we could hardly label *stare decisis* a "norm"—in the sense that norms establish expectations about future behavior.

But this is not the case. No matter how one counts the number of alterations of precedent, the numbers border on the trivial: the Congressional Research Service (1987, 1991; see also Baum 1995, 149) reports that the Court has overturned prior decisions in only 196 of the cases decided

Table 4. Justices' Citations to Authorities in their Opinions

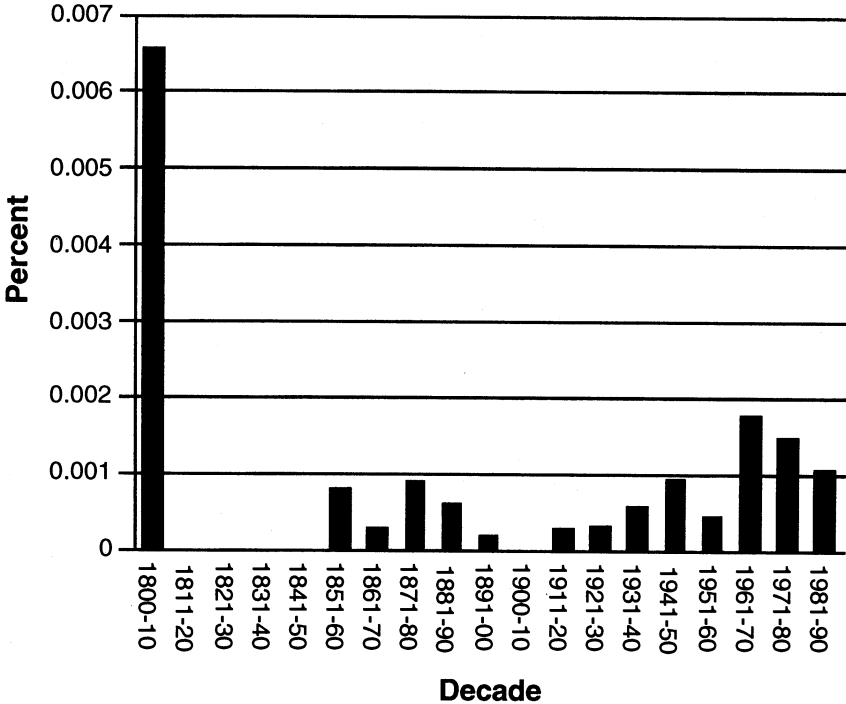
Case	Citations to Precedent (Average per Page)	Citations to Other Authorities (Average per Page)
<i>Edelman</i>		
Majority Opinion	1.42	0.58
Dissenting Opinion #1	2.20	0.60
Dissenting Opinion #2	1.00	2.00
Dissenting Opinion #3	1.56	0.78
<i>Fitzpatrick</i>		
Majority Opinion	1.00	1.00
<i>Milliken II</i>		
Majority Opinion	1.57	0.22
<i>Hutto</i>		
Majority Opinion	1.43	0.67
Dissenting Opinion	1.22	0.56
<i>FL Department</i>		
Judgment	.68	0.11
<i>Guardians</i>		
Judgment	1.39	0.78
Dissenting Opinion #1	3.21	2.26
Dissenting Opinion #2	2.20	.70
<i>Pennhurst</i>		
Majority Opinion	2.15	0.27
Dissenting Opinion #1	4.00	2.00
Dissenting Opinion #2	2.49	0.46
<i>Oneida</i>		
Majority Opinion	2.20	0.64
<i>Atascadero</i>		
Majority Opinion	2.42	0.75
Dissenting Opinion #1	0.70	0.63
Dissenting Opinion #2	7.00	3.00
Dissenting Opinion #3	4.00	1.00
<i>Green</i>		
Majority Opinion	1.90	0.70
Dissenting Opinion #1	1.00	0.67
Dissenting Opinion #2	1.33	1.00
Dissenting Opinion #3	3.00	1.00
<i>Papasan</i>		
Majority Opinion	1.29	0.63
<i>Welch</i>		
Judgment	1.67	0.79
Dissenting Opinion	1.08	0.52
<i>PATH</i>		
Majority Opinion	1.10	1.60

Procedure for Data Collection/Coding: Count the number of citations to precedent: do not double count, do not count lower court citations to the case at hand. Count the number of citations to all other authorities, including constitutional provisions, statutes, regulations, scholarly works, and so forth: do not double count.

The average number per page = $\frac{\text{number of citations}}{\text{number of pages of opinion in } U.S. \text{ Reports.}}$

Note: We included only opinions dissenting in full. For full case names and citations, see the References to Segal and Spaeth (1996).

Figure 1. Cases Overruled as Percentage of Cases Available for Overruling



Note: Percent = $\frac{\text{number of cases overruled per decade}}{\text{cases available for overruling}}$

Where: cases available for overruling = cumulative number of opinions of the Court per decade.

Sources: Number of Cases Overruled: Epstein, Segal, Spaeth, and Walker 1994, Table 2-14. Number of Opinions: Blaustein and Mersky 1978, Table 9; Epstein, Segal, Spaeth, and Walker 1994, Table 2-7.

through 1990; Brenner and Spaeth (1995), using a different decision rule, claim that the Vinson through Rehnquist Courts overruled about 2.5 cases per term; and we note that of the 54 "landmark precedents" listed in Appendix II of the Segal and Spaeth (1996) essay, only 15% appear on Brenner and Spaeth's list of overruling decisions. Figure 1 provides yet another perspective on the data: it displays cases overruled as a percentage of all cases available for overruling (that is, all cases decided by the Court with a full opinion). And the story that it tells could not be clearer. Even though the Court's propensity to alter precedents has increased over the past couple of decades, the percentages remain minute.

To be sure, we recognize that the explicit abandonment of precedent is the most extreme method of disposing of prior decisions the justices no longer find useful; certainly, they maintain rulings on the books that they have effectively gutted. But, the key point, as Baum (1995, 149) highlights, is this:

The Court adheres to precedents far more often than it overturns them, either explicitly or implicitly Certainly most justices accept the principle that “any departure from the doctrine of *stare decisis* demands special justification.” Like the law in general, the rule of adhering to precedent hardly controls the Court’s decisions, but it does structure and influence them.

Surely the relevant data support Baum’s sentiment, and they are consistent with the claim that a norm of *stare decisis* exists in the Supreme Court.

Discussion

In some ways our response to Segal and Spaeth is not so much a critique as it is an attempt to redirect discussion about the role of precedent in judicial decision making. Supreme Court justices make decisions that significantly affect the nature and substance of American law. Thus, to understand fully the effects of precedent on judicial decision making we should focus on the ways in which the Court affects the substantive rules of society, the rules that constitute this law.

By considering one way in which precedent can affect the choices of justices—as a normative constraint on decision making—we took such a tack in this essay. On our account, justices might be motivated by their own preferences over what the law should be, but they are constrained in efforts to establish their preferences by a norm favoring respect for *stare decisis*. This constraint forces justices to modify their decisions in the direction of the rules established by existing precedent. Because full documentation of this mechanism would require us to offer a detailed analysis of the evolution of the law in various substantive areas, we have presented something more modest and indirect: evidence of types of behavior that are consistent with the existence of such a norm and inconsistent with the claim that precedent does not matter for Supreme Court decision making. We believe that this indirect evidence offers substantial support for the view that a norm of *stare decisis* exists.

One might challenge our interpretation of the evidence by suggesting that all we have shown is that attorneys and judges act strategically as if there were such a norm. This seems related to a fairly common view that, although precedent does not have any real effect on the justices, there are reasons why legal actors maintain the myth of the normative rule of law.

But such challenges undermine their own argument and provide the best basis for rejecting them. First, if good reasons exist to maintain the “myth” of the rule of law (such as those offered here about the importance of maintaining the legitimacy of the Court in the society at large) and if the justices act with knowledge of such reasons, then those reasons have a causal effect on the decisions of the Court. Second, there is only one plausible reason for attorneys and justices to invoke precedent strategically: that it will, in fact, be strategically efficacious in causing others to accept their own preferred position. And it is easy to see that it will only have this efficacious effect if others actually believe in the importance of the norm. This follows from the fact that the strategic use of norms is parasitic on the actual acceptance of the norm by some segment of a community (Elster 1995). Put simply, unless some members of society actually accept a norm favoring respect for precedent, there will be no way of affecting behavior strategically by invoking such a norm. This suggests that efforts to interpret the behavior that we have documented here as merely strategic rest on a belief that attorneys and judges, unlike political scientists, are ignorant of the fact that no one still believes in the normative force of precedent.

We think rather that the types of behavior documented in our analysis are evidence of something important: the effect of a norm favoring respect for precedent on the Supreme Court. The existence of such a norm implies that arguments invoking precedent affect the nature and substance of the legal rules established by the Court.

But there is much work to be done in order to understand the underlying mechanisms that produce this effect. For one thing, our identification of a particular mechanism—a norm of *stare decisis*—raises numerous questions that beg for scholarly treatment: under what conditions and to what extent will the norm actually affect the choices of individual justices? How does precedent enter into the strategic arguments of attorneys and justices? How did the norm emerge? And what explains its persistence over time?

Second, and more fundamentally, scholars need to analyze the empirical basis of a central claim offered by critics of the view that precedent matters: there is a precedent to be invoked for every preference that a Supreme Court justice may have. Should this claim hold, then it is easy to see how it would undermine the argument for the causal efficacy of precedent. If justices can always find a precedent to match their own preferences, then they can couch their personal preferences in the rhetoric of precedent without having to modify their underlying position on a case. When we cast the analysis in terms of dispositional votes, we can see why analysts might believe the empirical basis of the claim. If all justices need to do is to find a precedent that will support a vote to affirm or reverse, then all that is required to support the claim are two decisions in each case, one of which that can be interpreted on

each side of the dispositional question. But, when we cast the analysis in terms of the substantive content of the law, the threshold for satisfying the empirical claim that there is always a precedent for every possible preference becomes much more difficult to meet. To be sure, if there were a precedent that correlates with every possible rule that the Court would desire to establish in every case, then we would be unable to find evidence of the causal effect of a norm of *stare decisis*. To the extent that there is a lack of correlation between the distribution of precedents and the distribution of preferences on the Court, there is ample opportunity for precedent to have a constraining effect on judicial decision making. Whether or not such a correlation exists, thus, is a crucial question for scholars to address.

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