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SCHAUER ON PRECEDENT IN THE U.S. SUPREME COURT

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Professor Schauer has told us what it takes for a case to be treated as a precedent, and what it takes for a judge to follow a norm of precedent. Based upon his reading of empirical studies of U.S. Supreme Court voting patterns, an informal canvass of law faculty, and the phenomenon of "persistent dissent," he concludes that stare decisis has but a "rare" and "weak" influence on the Court. I think Schauer exaggerates, despite his carefully hedging his thesis.

WHAT IT IS TO FOLLOW PRECEDENT

To isolate where and how he exaggerates, it is necessary first to sketch how he sets up the terms of inquiry. He writes: "[T]o 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."[1] I think Schauer is correct in stating what it is to follow a precedent. To follow a prior decision as a precedent is not to take the that decision merely as pointing to the existence of eligible reasons to decide the instant case in a certain way; rather it is to take the prior decision as *itself* a reason to decide the instant case a certain way. This is what he means by taking a precedent as a content-independent reason to decide a fresh case similarly. I might add that to follow the doctrine of stare decisis with respect to a given precedent is to appeal to that precedent without regard to the persuasive force its *ratio decidendi* would possess on its own, even if it had not been decisive of any prior case at all.

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1. Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 387 (2007).

HOW TO TELL WHETHER SOMEONE IS FOLLOWING PRECEDENT

So far, so good. But I think Schauer's test for the existence of a norm of precedent needs sharpening. He writes: "a reliable test of the existence or force of a norm of precedent . . . 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."[2]

The test he states is counterfactual: it counts a judge as following a norm of precedent only if she decides the case before her differently from how she *would have decided* it in the absence of a duty to follow precedent. But to correctly attribute norm-following behavior to an individual it is neither necessary nor sufficient for there to be a *duty* to follow that norm.[3] What matters is whether the judge—rightly or wrongly—takes the precedent itself *as a reason* for deciding the case in the way compliance with the norm of stare decisis would require (assuming that that way is determinable). Schauer elsewhere expresses this very view:

> A rule exists for an agent only to the extent that that agent does treat it as a reason for action . . . an agent internalizes a rule when an agent treats a prescriptive generalization as entrenched, taking the fact of a decision's falling within the extension of that prescriptive generalization as a reason for making that decision a

2. *Id.*

3. The distinctions between following a norm, being obligated to follow a norm, and following a norm because obligated to do so may be brought out in the following example. Suppose a circle of folk dancers is executing a certain dance, which is defined by a set of norms. The dancers, having begun the dance, follow the dance-defining norms, are obligated to do so (having joined the circle), but do not follow the norms (solely) because obligated. A dancer might tire of the dance and wish it over, but continue because she believes herself obligated. Now suppose a novice is standing outside the circle, trying to learn the dance. He is following the norms (however ineptly), but is not obligated to do so, and does not do so because obligated. Not having joined the circle, he may give up at any time. Nonetheless, he follows the norms and the norms "exist" for him. (This example is drawn from personal experience as a freshman at the late Antioch College.)

> certain way. When an agent does so, the rule exists for that agent.[4]

We have to bear in mind that there is a difference between cases in which a norm makes a decisive difference and cases in which the norm is operative but not decisive. The latter type of case may be one in which the norm is overridden (more on that below) but it is often rather one of overdetermination. For a given judge, reasons both of precedent and policy may point to the same result. In such cases, it is ambiguous whether a judge follows a precedent as such, or rather as a vivid repository of independently persuasive reasons. But we are not justified in saying that the norm is operative *only* in those cases in which it makes a decisive difference. Such cases may indeed be few (and one may hope they are, for an overdetermined result is likely to be a more widely acceptable result), but that does not mean that the norm only rarely operates. Rarity of *decisive* operation does not entail rarity of operation, *simpliciter*. Schauer's test accommodates this point.

To determine whether a norm of precedent exists for a multimember court, Schauer's test has to be modified. Ironically, the counterfactual test could make it deceptively easy to say that stare decisis was at work. A single Justice might adhere to stare decisis, and alter the outcome in a case by casting a deciding vote, even though the rest of the Court voted ideologically. The stare-decisis-following Justice alters the outcome, but surely a norm of stare decisis can't be said to be followed by *the Court*. Should the pivotal voter decide sufficiently many close cases, though, the idea that *the Court* follows stare decisis would be at least intelligible—even correct—despite the fact that only a single member of the Court does so. The lesson is that stare decisis may be present and weighty even though widely repudiated. The same is true in the individual case: a Justice might reject stare decisis in favor of, say, coherence; but, in

4. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 121 (1991).

practice, that Justice might take "past political decisions" as furnishing *pro tanto* and normally decisive reasons to decide new cases continuously with them.

Schauer correctly hightlights the role of *thresholds* as distinguishing pseudo-precedent from the real deal. He writes:

> [A]n overridable obligation can be considered an obligation only if the threshold for override is higher than the threshold would have been . . . absent the obligation. . . . [I]f a court under a purported regime of stare 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.[5]

So the existence question turns not on whether precedents are sometimes overruled or ignored. A judge may be *guided* by stare decisis in cases in which she does not *follow* stare decisis. But Schauer rightly points out that if a norm of stare decisis is indeed at work, we are entitled to expect 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."[6]

That is the test (subject to the caveat entered above, against confusing decisiveness with effectiveness). Now, to the evidence. It is of three kinds. The first are the studies of Segal and Spaeth, who have concluded that the norm of stare decisis is a very weak norm in the Supreme Court. Another consists of the impressions reported by

5. Schauer, *supra* note 1, at 389–90.
6. *Id.* at 391.

Con Law faculty at several institutions, principally Harvard Law. The third is an appeal to the prevalence of "persistent dissent" on the Court.

SEGAL AND SPAETH

Segal and Spaeth report that the votes of Justices are more strongly influenced by their individual ideologies than by precedent. Precedent is cited, they say, more as a matter of post hoc rationalization than as prior constraint—just as the Legal Realists observed eighty years ago.

Without going into Segal and Spaeth's methodology, two points can be made that immediately call Schauer's reliance into doubt. First is the point that a weak norm is a norm. A norm may be weak in many ways that do not throw its existence into serious doubt. The norm that governs calling pitches strikes or balls has a much greater impact on the outcome of a baseball game—or season—than does the Infield Fly Rule. That, alone and with other considerations, may make the Infield Fly Rule a weak norm, in multiple senses. It is poorly understood. It is rarely invoked. The line the Rule draws between infield and outfield is much vaguer than those drawn by the fair ball-foul ball rule and the balls-and-strikes rule. The Rule could be probably repealed without radically altering the complexion of the game. But the Infield Fly Rule is nonetheless surely a norm of baseball.

The second point is that stare decisis often operates most effectively in areas in which moral intuitions are feeble and "substantive policy views" unformed. In such deserts, precedent may appear as a welcome oasis, wholly apart from any thought that here reliance interests must reign. To put the point another way, Justices may not always have a prior view on the merits, and precedent relieves them of an occasion to formulate one. This is a difference precedent can make that does not register vividly on Schauer's test; but surely it is often the case that the Justices have no clearer an intuition of what result justice (much less "policy") demands than

anyone else. It isn't that precedent makes a difference here by squelching the conviction that a contrary result would be righter though not extremely so. It makes a difference by pretermitting the need to form a view about what would be the right result, precedent aside. The result consistent with precedent is then right enough, by default, and the burden falls to others to show that it is extremely wrong.[7]

AVOWALS OF CONSTRAINT

How often does a Justice confess to following an erroneous precedent solely because it is precedent? I leave it to those with greater familiarity with the Court to add to Schauer's list, which he has gathered from expert law faculty. I suspect that even an expanded list would not unseat Schauer's judgment that "crisp examples" of avowed precedent-following are few, especially if the domain is restricted to constitutional cases. What to make of it? Again, rarity of conspicuously decisive operation of stare decisis is not conclusive evidence that it is rarely operative—especially if the appearance of rarity can be otherwise explained.

There are many reasons to think the appearance deceptive, several of which Schauer points to. One is the nature of the Court's docket. Cases controlled by precedent are less interesting and so less "cert-worthy." Where mighty issues of constitutional right are not in play, it is less likely that extraordinary reasons will be present to overcome the weight of precedent. One reason an individual Justice might have for not avowing stare decisis as his or her sole reason for deciding a certain way is that in our discursive legal culture one is expected to marshal all the reasons at one's disposal. Few now would cherish the distinction of being a "rule-worshipper" in practice, as opposed to principle. Even Justice Scalia's high regard for rules seems not to extend in any reliable way to stare decisis.

7. This use of precedent should not be dismissed as mere laziness. If the Court chooses to hear no more than eighty cases a year there are other reasons.

The Supreme Court has remarked on stare decisis only rarely, most recently in *Planned Parenthood v. Casey*[8]:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason, doomed.[9]

This division reflects Schauer's point that stare decisis accommodates overrulings founded on extraordinarily strong reasons. The opinion continues:

> Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of stare decisis is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to

8. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

9. *Id.* at 854 (citations omitted in text but gathered in BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921), and Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16 (1991)).

> the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[10]

A lot turns on what might be meant by the phrase "*when* this Court reexamines a prior holding" where that holding was not doomed by the overwhelming weight of reasons. What the Court goes on to say is that it then weighs up costs and benefits of reaffirming—which is not stare decisis. At first glance, it seems as though the Court has confessed Schauer's point. But we can and should look again.

If "*when*" means "whenever we feel like, despite the absence of 'clear[] error' making enforcement 'doomed,'" then the rule the Court sets out is not stare decisis, as Schauer defines it (and I would agree with his understanding). What the Court would be talking about is akin to a "bursting bubble" presumption, where the bubble bursts at a mere glance. But if "*when*" means, "when there is a prima facie special justification for revisiting the prior holding," then what is stated is consistent with a Schauerian rule of stare decisis, even if what ensues from that point in the reasoning is a balancing up of reasons, possibly including stability, reliance, and consistency among others.[11] Bear in mind that the Court—just like anybody else—may be unable to formulate or correctly formulate the rule it follows. So, even if *Casey*'s "*when*" is interpreted the first way, that isn't conclusive of the question, "Does precedent really matter in the Court?"[12]

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10. *Id.* at 854–55 (citations omitted).

11. One way to understand the "rule of four" is as a signal from four members of the Court—a number sufficient for a writ of certiorari—that the petition succeeds in showing that there is indeed a "prima facie special justification." If that is correct, then—as Schauer acknowledges—stare decisis will often expend itself at that stage, and be difficult to detect at work in the subsequent decision.

12. My colleague Eric Segall insists that the Court has never applied anything like the *Casey* "test" —not before, not since, not in *Casey* itself. I take his point but do not assign it the significance he does. Following a norm is one thing: having in hand and applying a canonical *formulation* of that norm is another. It may be worth noting that the *Casey* dictum reportedly was slotted into the Court's opinion to

PERSISTENT DISSENT

A Justice devoted to stare decisis ought to apply the Court's precedents, and not dissent when it comes time to apply them. Yet crisp examples of persistent dissent are rife while crisp examples of avowed submission to precedent are few—in constitutional cases anyway. Why, if a rule of stare decisis exists for the Court?

As Schauer is no doubt aware, persistent dissent is most often manifested by Justices who participated on the losing side in the prior decision that has become the relevant precedent. This suggests a psychological explanation. A Justice who has personally invested in a doctrine precisely contrary to that of a precedent is likely to discount the cogency of that precedent far more steeply than he or she would if not so invested. Submission to such precedents by silence (or separate concurrence) may feel pusillanimous (or pouty) if the high horse of dissent is already saddled and ready. That is unlikely to be so for a Justice faced with a precedent he or she may think wrong, but had no part in.

CONCLUSION

Schauer concludes with two points. One, the Roberts Court shouldn't be criticized for departing from a stare decisis norm honored by its predecessors, for, in fact, its predecessors have not taken stare decisis seriously. Two, the impulse to criticize may nonetheless be turned to a profitable and non-ideological discussion of the desirability of valuing "stability, consistency, settlement, reliance, notice, and predictability"[13]—what we could call "the stare decisis values"—to a higher degree than the Court has done.

On the first point, the critics of the Roberts Court might be understood differently and somewhat more charitably. In any case,

placate Justice Souter, whose formula it is. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007).

13. Schauer, *supra* note 1, at 401.

Schauer is surely right that if they[14] are transparently motivated by a desire to protect precedents they find morally attractive from reversal or erosion at the hands of the Court, their making a call for a return to stare decisis[15] is unlikely to be either persuasive or effective.

As to the second point, I agree that stare decisis serves important values. But I doubt that (over)emphasizing the infirmity of the norm of precedent is the most effective way to reinvigorate it. It is usually easier to urge compliance with an existing rule than to make persuasive a case for imposing a new one. Fresh constraints tend to be more irksome than those we have grown used to.[16] This after all is part of the charm of stare decisis.

Besides, critical commentary abstractly keyed to the values served by stare decisis may lead attentive Justices to consult those values directly, rather than the precedents. But employing a rule of stare decisis is not the same as making it a practice to weigh up anew the stare-decisis values from case to case.[17] "What strong justification is there for overturning the rule of case C?" is not the same inquiry as

14. "The critics" Schauer is concerned to set straight include the "prominent example" of an Editorial—Editorial, *Justice Denied*, N.Y. TIMES, July 5, 2007, at 12. But the *Times*'s chief complaint is that "Time and again the court has ruled, almost always 5-4, in favor of corporations and powerful interests while slamming the courthouse door on individuals and ideals that truly need the court's shelter." The Editorial is also critical of Chief Justice Roberts in particular for pursuing an "archconservative approach" at the expense of the "greater consensus" that he testified in his confirmation hearings he would seek to promote. Precedent is not invoked under the rule of stare decisis but as an indication of the "sharp shift to the right" the Court has taken despite the demands of substantive justice, consensus on the Court, and fidelity to the Chief Justice's pre-appointment testimony.

15. Compare Herman Oliphant, A *Return to Stare Decisis*, 14 A.B.A. J. 71 (1928), a Legal Realist tour de force.

16. This is known among social psychologists as the "endowment effect." *See* Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193–206 (1991).

17. Joseph Raz's concept of "exclusionary" reasons depends crucially on the difference between weighing reasons for and against doing X, on one hand, and determining whether a threshold has been met by reasons, for or against doing X. My promise to meet you at the diner functions properly if I act on the promise rather than on the reasons that inclined me to make it. The promise excludes my acting on ordinary reasons to and not to do as promised, but does not exclude extraordinary reasons (e.g., that I can save a life by breaking the date). Raz has been challenged on the ground that it all comes down to weighing reasons: for I act on my promise only by at least implicitly judging that the weightiness of my promise is greater than that of any conflicting reason. Exclusion, it is alleged, collapses into weighing. For Raz's response to these and related challenges, see Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153 (1989).

"To what extent would stare-decisis values be served by following the rule of case C?" The latter, perhaps ironically, would not be to apply the rule of stare decisis, but to dispense with it altogether.