The Fall 2007 Henry J. Miller Lecture
Georgia State University School of Law

To be delivered
Monday, September 10, 2007
12 – 1:15 pm
Georgia State University Student Center
First Floor Ballroom
Free of Charge and Open to the Public
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HAS PRECEDENT EVER REALLY MATTERED IN THE SUPREME COURT?

Preliminary Discussion Draft – August 10, 2007

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The doctrine of precedent is once again in the news, with various academic, quasi-academic, and non-academic commentators criticizing the Roberts Court for disregarding precedent, and in the process abdicating its duty *as a court* to treat its earlier decisions, regardless of the views of the current Justices, with something close to conclusive respect.[2] Yet although the Supreme Court of the United States claims to follow precedent, and although the Justices write their opinions as if they were following precedent, the obligation to follow precedent has rarely been treated by commentators – academic and non-academic alike – as something to be taken very seriously.[3] And insofar as the public cares what the Supreme Court does, itself a debatable proposition,[4] the public remains largely unaware of the idea of precedent, and certainly unconcerned with whether the Supreme Court follows it or not. When the public agrees with the Court's outcomes, it appears to have little concern with how the Court got there, and

[1] I am grateful to Carol Steiker, Matthew Stephenson, William Stuntz, Laurence Tribe, Mark Tushnet, and Lloyd Weinreb for references to cases and secondary literature, and to Barbara Spellman for useful discussion about the idea of precedent and its relation to human thinking, reasoning, and decision-making.
[2] A prominent example is Editorial – *Justice Denied*, New York Times, July 5, 2007, at 12.
[3] *See* Henry Paul Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1 (1979).
[4] See Frederick Schauer, *Foreword: The Court's Agenda – and the Nation's*, 120 Harv. L. Rev. 4 (2006).

when the public disagrees with those outcomes, it is similarly unconcerned with methodology. Indeed, much the same can be said about elected officials, who, as Michael Dukakis discovered to his detriment in 1988,[5] 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, and who equally seldom are subject to criticism for disregarding judicial precedents in the service of politically popular policies.[6]

Some of the seeming previous unconcern for the constraints of precedent, especially in the academic and serious non-academic literature, is undoubtedly a function of the Warren Court and its legacy. Many of the Warren Court's landmark rulings, including *Mapp v. Ohio*,[7] *Baker v. Carr*,[8] *New York Times Co. v. Sullivan*,[9] and, most famously, *Brown v. Board Of Education*,[10] were unmistakable rejections of the Court's earlier precedents, so it is not difficult to understand why those having substantive sympathy with these and other Warren Court outcomes would have spent very little time emphasizing the virtues of stare decisis in particular and precedential constraint in general.

But now things appear to be different, and there is a growing criticism of the Supreme Court for rejecting the conclusions of the Court's previous rulings. Some of the change is likely a function of obvious 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 they been reached by the elected branches of government was a staple of the "neutral principles"[11] and "legal process"[12] perspectives of the 1950s and

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[5] 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 (2007).

[6] 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 (1989), invalidating flag desecration laws, and invalidated by the Court in United States v. Eichman, 496 U.S. 310 (1990). Foreshadowing what is to come in this Lecture, it is worth noting that Chief Justice Rehquist and Justices O'Connor, White, and Stevens, all of whom dissented in *Johnson*, persisted in dissent in *Eichman*.

[7] 367 U.S. 643 (1961) (holding that exclusionary rule for illegally obtained evidence applies in state proceedings, contrary to early holding in Wolf v. Colorado, 338 U.S. 125 (1949))

[8] 369 U.S. 186 (1962) (holding reapportionment questions justiciable, and rejecting the contrary view of Colegrove v. Green, 328 U.S. 549 (1946).

[9] 376 U.S. 254 (1964) (concluding that state libel proceedings were subject to First Amendment scrutiny, contrary to statement in Beauharnais v. Illinois, 343 U.S. 250 (1952), that the entirety of libel law was wholly outside the coverage of the First Amendment).

[10] 347 U.S. 483 (1954) (rejecting, woth respect to public schools, the separate but equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896).

[11] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

[12] *E.g.*, Philip 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.

1960s, and some of this carried over to the early criticism of *Roe v. Wade*[13] by those who on moral or political grounds favored what is now known as the pro-choice position.[14] But for thirty years or more such critiques have been, to put it mildly, unfashionable, and for that period we have seen what might be described as the triumph of substance over form in constitutional criticism and constitutional theory.

Against this background of unconcern for the alleged constraints of precedent it is easy 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 out there to support what is in fact a criticism of substance and not of method. And perhaps this explanation is sound.[15] But before reaching that conclusion, we need to understand just what it means to follow precedent or to be constrained by it, we need to determine whether precedent has ever been a serious constraint on or generator of Supreme Court outcomes, and we need 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 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 talks about "precedent," our subject is actually *stare decisis*.[16] "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"[17] – and horizontal precedent, the (possibly non-absolute) obligation of a court to follow its own previous decisions.[18] Because the latter – horizontal precedent – is what I am talking about here, 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 turn directly 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.[19]

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[13] 410 U.S. 113 (1973).
[14] See, most prominently, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973).
[15] 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. Frederick Schauer, *Neutrality and Judicial Review*, 23 L. & Phi. 217 (2003).
[16] *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).
[17] *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817 (1994).
[18] *See* Larry Alexander, *Constrained By Precedent*, 63 S. Cal. L. Rev. 1 (1989).
[19] *See* Rupert Cross, Precedent in English Law 103-22 (3d ed., 1977).

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.[20] 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 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. Justice Scalia cited *Crawford v. Washington*[21] in support of his ruling with respect to applicability of the Confrontation Clause to out-of-court testimonial statements in *Hammon v. Indiana*,[22] but it is clear from Justice Scalia's opinions in both *Crawford* and *Hammon* that he would have preferred the outcome in *Hammon* even without *Crawford*, just as it is clear that Justice Blackmun would have opted for the same outcome in *Roe v. Wade*[23] even without *Griswold v. Connecticut*[24] eight years earlier, and that Justice Ginsburg would have voted to strike down the exclusion of women from the Virginia Military Institute[25] 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.[26] In all of these instances, and in countless others, the Justices, as with my 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 just because their decisions were consistent with precedent.

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.[27] And although it is true that we can have multiple reasons for our actions, and although it is also true that those multiple reasons might at times all point in the same direction, the true test of the existence or force of a norm of precedent is whether a judge or Justice who would have decided a case in one way decided it in a different way 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

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[20] *See* Donald H. Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 Can. J.L. & Jurisp. 3 (1990).
[21] 541 U.S. 36 (2004).
[22] Davis v. Washington and Hammon v. Indiana, 126 S. Ct. 2266 (2006).
[23] 410 U.S. 113 (1973).
[24] 381 U.S. 479 (1965).
[25] United States v. Virginia, 518 U.S. 515 (1996).
[26] Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).
[27] *See* Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987).

should have different views about the constitutionality of restrictions on abortion, or that Chief Justice Roberts and Justice Alito should suddenly discard the views they held when appointed to the Court.[28] 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*.[29] 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, and is thus independent of the putative 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, therefore, and in the particular context of stare decisis in 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 independent 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 their content does not mean that the obligation is absolute. Just as the requirements of the Fourteenth Amendment may be overcome by a governmental showing of a compelling state interest,[30] and just as Justice Holmes described the constraints of the First Amendment as being overridable in cases of "clear and present danger,"[31] so too is it possible for the obligations of stare decisis to be overcome consistent with the continuing existence of an obligation to follow earlier decisions.

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 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 an alleged regime of stare decisis is free to disregard any previous decisions it believes wrong, then the alleged stare decisis norm is doing nothing, and in fact does not exist at all. But if, by contrast, it requires a *better* reason to disregard a mistaken precedent than merely that it is believed

[28] Or at least such criticism is not a part of the structure of a complaint about the failure to follow precedent.
[29] *See* Frederick Schauer, *The Questions of Authority*, 81 Geo. L.J. 95 (1992).
[30] Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969); Korematsu v. United States, 323 U.S. 314 (1944).
[31] Schenck v. United States, 249 U.S. 47 (1919).

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 wrong, or wrong and extremely harmful, or something like that, but there must be a gap between what the standard would have been without the norm of stare decisis and would it is with it. And this is what the Supreme Court plainly had in mind when it said that it needed a "special justification"[32] 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 a 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*[33] overruled *Plessy v. Ferguson*[34] 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 it is non-absolute. But is a consequence of the existence of a stare decisis norm, however, that there ought to be 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.

III. *Is* There a Norm of Stare Decisis?

All of this is by way of saying what a norm[35] of stare decisis would look like were one to exist in and for the Supreme Court of the United States. But the question then is whether one in fact exists. 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, and where does it come from?

In an interesting and important series of studies, the political scientists Jeffrey J. Segal and Harold J. Spaeth have concluded that, at least in the Supreme Court, there exists no such norm, or, to put it more accurately, that the norm of stare decisis is a very weak norm in the Supreme Court.[36] This reference to a "norm" is my language and not

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[32] Dickerson v. United States, 530 U.S. 428, 443 (2000); Arizona v. Rumsey, 467 U.S. 203 (1984).
[33] 347 U.S. 483 (1954).
[34] 163 U.S. 537 (1896).
[35] 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.
[36] Jeffrey J. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2004); Jeffrey J. Segal & Harold J. Spaeth, Majority Rule or Minority Will: Adherence to Precedent on the United States Supreme Court (2001); Jeffrey J. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993); Jeffrey J. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of Supreme Court Justices*, 40 Amer . Pol. Sci. 971 (1996). *See also* Saul Brenner & Harold J. Spaeth, Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946-1992 (1995).

theirs, but the import of their research is that among the factors that determine Supreme Court outcomes, previous decisions are rarely among them.[37] The Justices of course do provide numerous allegedly supporting citations to previous Supreme Court decisions, but Segal and Spaeth have reached the conclusion that the Court's previous decisions only rarely and only weakly influence current results, as opposed to providing, consistent with the standard Legal Realist picture,[38] ex post rationalizations for decisions that have actually been reached on other grounds.

Segal and Spaeth do not claim, of course, that individual Justices *never* take the Court's previous rulings as authoritative, but they do claim that the cases in which the Justices do so are rare. 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 should would, even absent the previous case, likely have concluded even absent the earlier decision. And thus if we eliminate these cases and opinions, we find ourselves now searching for instances in which a Justice voted contrary to his or her precedent-independent beliefs solely because of the felt obligation to follow precedent. Such instances do exist, but it turns out that they are few and far between. Justice Stewart had been a dissenter in *Griswold*, insisting that the Constitution contained no "general right to privacy,"[39] but joined the majority in *Roe* because of what to him was the controlling force of a case with which he had disagreed.[40] In several criminal procedure cases of the 1950s and 1960s, Justice Harlan had voted to apply earlier decisions in which he had been a dissenter,[41] and Justice White did the same thing when, despite his strong dissent in *Miranda v. Arizona*[42] in 1966, he voted 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 that the so-called dormant commerce clause has no basis in the text or history of the Constitution.[43] And in *Ring v. Arizona*,[44] a case applying *Apprendi v. New Jersey*,[45] Justice Kennedy in a concurring opinion noted that

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[37] 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.

[38] 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 reachede on other and unstated grounds. *See* Jerome Frank, Law and the Modern Mind (1930); Wilfred Rumble, American Legal Realism: Skepticism, Reform, and the Judicial Process (1968); William Twining, Karl Llewellyn and the Realist Movement (1973);

[39] Griswold v. Connecticut, 381 U.S. 479 (1965) (Stewart, J., dissenting).

[40] Roe v. Wade, 410 U.S. 113 (1973) (Stewart, J., concurring).

[41] *See* Henry J. Bourguignon, *The Second Justice Harlan: His Principles of Judicial Decision Making*, 1979 Sup. Ct. Rev. 251.

[42] 384 U.S. 436 (1966).

[43] *See* West Lynn Creamery v. Healy, 512 U.S. 186 (1994) (Scalia, J., concurring in the judgment). *See also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (Thomas, J., joined by Scalia, J., dissenting); New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988).

[44] 536 U.S. 584 (2002).

[45] 530 U.S. 466 (2000).

"[t]hough it is still my view that *Apprendi* was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way."[46]

There are undoubtedly other examples, to be sure, but it is interesting that this brief list is the entirety of examples that ten constitutional law or criminal procedure or public law specialists on the Harvard Law School faculty could come up with. When requested to think of cases in which a Supreme Court Justice who had voted one way on an issue subsequently voted the other way because of the obligation to follow a precedent with which he or she had disagreed, these colleagues were unanimous in concluding that there were very few, and the above list is pretty much all that the group could think of, at least in terms of crisp examples in which a Justice known from his or her opinions of extra-judicial writings to believe one thing had voted contrary to those beliefs because of the felt obligation to follow an earlier decision of the Court.[47]

That such instances of genuine stare decisis influence are rare is underscored by the ubiquity of the opposite phenomenon. Justices whose views have been rejected by a majority of his or her colleagues overwhelmingly continue to adhere to those views in subsequent cases, in effect rejecting the idea of stare decisis and rejecting the constraints of precedent.[48] Consider, for example, the opinions of Justices Brennan and Marshall in obscenity cases subsequent to the landmark 1973 decisions in *Miller v. California*[49] and *Paris Adult Theatre I v. Slaton*.[50] In *Miller* and *Paris Adult Theatre*, Justice Brennan, himself the author in *Roth v. United States*[51] of the 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.[52]

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. But 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.[53] And, indeed, Justice Brennan had,

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[46] 536 U.S. at 613 (Kennedy, J., concurring).
[47] I do not claim that asking one's colleagues is a good research method, but it is difficult to prove a negative, and thus an otherwise lazy (but nevertheless common) research approach occasionally has its advantages.
[48] *See* Earl Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467. For an earlier plea for just this practice, see William O. Douglas, *Stare Decisis*, 42 Colum. L. Rev. 735 (1949). And see also Justice Reed's opinion in Smith v. Allright, 321 U.S. 649, 665 (1944).
[49] 413 U.S. 15 (1973).
[50] 413 U.S. 49 (1973).
[51] 354 U.S. 476 (1957).
[52] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (Brennan, J., dissenting).
[53] *See, e.g.*, Pope v. Illinois, 481 U.S. 497 (1987); Smith v. United States, 431 U.S. 291 (1977); Hamling v. United States, 418 U.S. 87 (1974). And this excludes a substantial number of dissents from denials of certiorari in which the Court refused to review obscenity convictions.

to his credit, written thoughtfully and forcefully in justification of his own practice of persistent dissent.[54]

I use this example because it is so clear. The position to which Justice Brennan refused to give stare decisis effect was one he himself had created sixteen years earlier, and which he subsequently rejected for reasons of practical unworkability rather than fundamental theoretical error. And although reasonable minds can differ, 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.[55]

I do not want to pick on Justice Brennan. 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, behavior pursuant to which dissenting Justices 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.[56] If one looks at actual Supreme Court practice, therefore, one is forced to conclude that there is hardly any norm of stare decisis on the Supreme Court, and the norm that the current Court is commonly accused of rejecting is one that appears now not very much to exist and that appears not to have very much existed for at least several generations.

IV. On the Value of Stare Decisis

That there is scarcely any stare decisis norm on the Supreme Court – very little felt obligation to follow precedent – is hardly an oversight. Justice Scalia has been most explicit in explaining his refusal to accept such a norm,[57] arguing that his oath required him to interpret and obey the Constitution and not others' views about the Constitution, and 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 one views can incorporate one's one views about deference to the views of others or deference to earlier decisions. And 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

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[54] William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427 (1986).

[55] And in this respect these cases differ from the death penalty cases, in which Justices Brennan and Marshall were also persistent dissenters. *See* 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). *See also* Laura K. May, *Justice Brennan and the Jurisprudence of Dissent*, 61 Temple L. Rev. 307 (1988).

[56] *See* Maurice Kelman, *The Forked Path of Dissent*, 1985 Sup. Ct. Rev. 227; Earl 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 Paul Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1 (1979).

[57] *See, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting). *See also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (Scalia, J., dissenting).

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, requiring a 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 colleagues.

There are, of course, arguments going the other way. A norm of stare decisis might be defended on any of several different grounds,[58] but most common would one or another variety of the position that law is the special steward of stability for stability's sake and consistency for consistency's sake, a position most famously expressed by Justice Brandeis in *Burnet v. Coronado Oil and Gas Co*,[59] in which he said that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[60]

As the clash of opinions in *Payne v. Tennessee*[61] 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 morally or politically important individual rights 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.

V. A Limited Conclusion

My conclusion that precedent has rarely genuinely mattered in the Supreme Court, as opposed to being a nice makeweight phrase, 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 high moral, political, and policy consequence, it may be the last place to look to find actual traces of stare decisis, and for that it would be far more fruitful to look at the mine run of less momentous cases in the state courts and lower federal courts, where a larger percentage of the docket is comprised of more routine cases not involving individual rights or larger questions of governmental structure, and thus where the values of consistency for consistency's sake may be comparatively more important.

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[58] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Payne v. Tennessee, 501 U.S. 808 (1991); Patterson v. McLean Credit Union, 491 U.S. 164 91989); Akron v. Akron Center for reproductive Health, Inc., 462 U.S. 416 (1983).
[59] 285 U.S. 393 (1932).
[60] 285 U.S. at 406 (Brandeis, J., dissenting).
[61] 501 U.S. 808 (1991).

In addition, the Supreme Court's control of its own docket and its very limited number of cases – fewer than 80 decided with full arguments and opinions out of more than 8000 petitions in the 2006 Term – is such that very few cases truly presenting stare decisis opportunities will be part of the Court's business at all. Cases simply 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 for which it will be extremely rare for the exact same question to be presented 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 and even of constitutional law, 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.[62] 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 legal of legal determinacy of these cases, are such in which the constraints of law, including but not limited to the constraints of a norm of stare decisis, are at a low ebb.

Yet 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, but it has a special visibility as a court. Whether the 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 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. Thus, the Supreme Court, even if unwittingly, likely serves as an exemplar for the political branches and for the larger public of what courts do and how they do it.

The evidence indicates that the Supreme Court's current critics are mistaken in claiming that the Roberts Court is in some way taking stare decisis less seriously than did its predecessors. But that is not to say that 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, reliance, notice, and predictability more than do other governmental decision-making bodies. Even if the critics are criticizing from the perch of a largely non-existent norm, now may nevertheless prove to be an opportune moment for the Court's longstanding disregard for precedent to be subjected to some entirely appropriate, long needed, and hopefully less ideologically or politically motivated, critical commentary.

[62] *See* Frederick Schauer, *Judging in a Corner of the Law*, 61 S. Cal. L. Rev. 1717 (1988).