IS STARE DECISIS A CONSTRAINT OR A CLOAK?

THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT. By Thomas G. Hansford & James F. Spriggs II. Princeton University Press. 2006. Pp. 155. $29.95.

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The Politics of Precedent on the U.S. Supreme Court[1] is an ambitious work. The authors, Thomas G. Hansford, Assistant Professor of Political Science at the University of South Carolina, and James F. Spriggs II, Associate Professor of Political Science at the University of California-Davis, address a profound and important question: "Why and when will the U.S. Supreme Court alter the meaning of one of its precedents by . . . interpreting it," positively or negatively?[2]

The authors begin from the reasonable premise that Supreme Court decisions are very important. The authors provide two reasons for the importance of the Court's decisions. First, those decisions effectuate a disposition of the case, determining which litigant prevails. Second, and more importantly, Supreme Court decisions have "far-reaching consequences" because they "alter[] the existing state of legal policy and . . . help[] to structure the outcomes of future disputes" by conveying information about the potential consequences of future litigation, thus offering guidance to decision makers.[3] In other words, "Court opinions create precedents that are relevant for future disputes and thus shape the behavior of forward-thinking actors."[4] The Court's decisions influence lower courts, administrative agencies, legislatures, the media, and even private interest groups. When the Court modifies the meaning of a prior precedent, therefore,

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1. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 2 (2006).

2. *Id.* at 2.

3. *Id.* at 3.

4. *Id.*

it changes the law—sometimes with sweeping consequences.[5] These consequences act as a catalyst for the authors' methodical study—an attempt to explain why and how the Supreme Court changes the law by interpreting prior precedents.

The authors are critical—albeit gently so—of much of the recent scholarship attempting to explain the development of the law. According to Hansford and Spriggs, "the literature on Supreme Court decision making is dominated by two competing paradigms."[6] The first is the "attitudinal" model, which proposes that "justices are primarily motivated by concerns about substantive policy outcomes."[7] That is, "the justices vote for the liberal or conservative outcome in a case exclusively as a function of their ideological predispositions."[8] The second perspective is the "legal" model, which posits that "the justices are motivated by a sense of duty or obligation to follow particular legal principles, rights, and norms."[9] In other words, the legal model "contends that judges are jurisprudentially oriented decision makers who respond to normatively relevant legal factors."[10]

According to the attitudinal model, the norm of stare decisis—the norm that courts should follow established precedent by treating like cases alike—is no more than a "cloak" to disguise the purely instrumental decision making of policy-oriented justices who make law according to their policy preferences.[11] Proponents of the legal model, on the other hand, argue that stare decisis acts as a constraint on judicial decision making, such that any new decision by the Court must follow its past decisions.[12] Hansford and Spriggs argue that these two paradigms leave "a significant gap in our understanding of the Court,"[13] and so they propose a middle way:

> [W]e argue that while precedent can operate as a constraint on the justices' decisions, it also represents an opportunity. It represents a

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5. *Id.* at 2–8.
6. *Id.* at 9.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 13.
12. *Id.* at 12–13.
13. *Id.* at 12.

constraint in that justices may respond to the need to legitimize their policy choices and thus gravitate toward some precedents rather than others. It represents an opportunity in the sense the justices can utilize precedent to constrain other actors, thereby promoting the outcomes they prefer.[14]

According to Hansford and Spriggs, precedent can operate as a constraint because the Court must ensure the legitimacy of any new legal rule it crafts. Since "court decisions are not self-executing," the Court must rely on third parties to implement its policy preferences, and those third parties will be less likely to implement a new policy that is facially illegitimate.[15] Given the Court's need to legitimize its policies, "precedent can limit [its] flexibility or discretion. It does so by constraining the alternatives available to the [Court] to those which are legally defensible."[16] But precedent is also an opportunity because the Court *can* make a new rule and can claim that the new rule is based on precedent: "Since legitimacy encourages compliance, it enhances the power of courts and facilitates their ability to cause legal and political change."[17]

The interpretation of precedent is a powerful tool available to the Court.   Broadly speaking, the Court has two options when interpreting a precedent: it may interpret a precedent positively or negatively.   "Positive" interpretation involves more than merely citing a precedent. Positive interpretation means that the Court cites the precedent as a controlling authority or otherwise indicates "the Court's explicit reliance on the case for at least part of its justification for the outcome in the dispute before it."[18] Positive treatment of a precedent "can invigorate its legal authority and possibly expand its scope."[19] "Negative" interpretation, on the other hand, occurs when the Court limits the reach of a prior precedent.   Negative interpretation can take several forms, such as distinguishing a precedent (that is, providing an explanation for why that precedent does not apply in the instant case), limiting a prior precedent to its

14. *Id.* at 13.
15. *Id.* at 19.
16. *Id.* at 21.
17. *Id.* at 19.
18. *Id.* at 6.
19. *Id.*

facts, or even overruling the precedent entirely.[20]   Overruling a precedent is the most dramatic form of negative interpretation because it indicates that the precedent no longer has the force of "binding law."[21]   This brings the authors back to the question that they seek to answer: Why and when will the Court interpret its prior precedent? Even more specifically, when will the Court interpret a precedent positively and when will it interpret a precedent negatively?

To answer these questions, the authors put forward "a parsimonious theoretical model that lays bare the essential variables influencing the Court's decision to interpret precedent positively or negatively."[22]   The authors argue:

> [Supreme Court] justices have two primary reasons to interpret precedent: (1) the justices treat precedent in order to maximize the extent to which the Court's body of precedent reflects their own policy preferences; and (2) the justices use precedent in an effort to legitimize their current policy choices and thus foster the influence of their opinions. We contend that both of these motivations relate to the justices' overriding desire to affect distributional consequences—such as the relative bargaining advantage of different actors and the distribution of resources in society—in ways they prefer.[23]

In constructing their "parsimonious theoretical model," the authors represent these two motivations mathematically as follows:

> When will the Supreme Court choose to interpret a precedent in a positive manner? If the benefit or utility of interpreting a precedent depends upon the benefits resulting from potential effects on the

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20.   *Id.*

21.   *Id.*

22.   *Id.* at 12.

23.   *Id.* The authors

make the assumption that the justices want to influence legal policy in a way which leads to outcomes consistent with their preferences. Further assuming that their behavior is goal-oriented, the justices will choose when and how to interpret precedent based on their desire both to create new, efficacious legal policy that reflects their policy preferences and to shift existing legal policy closer to their preferred position.

Id. at 18.

scope and content of extant legal policy and the legitimacy of new legal policy, then the utility of the positive interpretation of a precedent simply can be represented as:

$$u(positive\ interpretation) = influence\ over\ extant\ policy$$

$$+\ legitimization\ of\ new\ policy$$

. . . .

When will the Court interpret a precedent in a negative manner (e.g., limit or distinguish the precedent)? If, as above, the utility of interpreting a precedent depends upon the benefits associated with the potential influence on extant policy and the legitimacy of new policy, then the utility of a negative interpretation of a precedent can also be represented as:

$$u(negative\ interpretation) = influence\ over\ extant\ policy$$

$$+\ legitimization\ of\ new\ policy.[24]$$

The authors identify two independent variables: the "ideological distance" between a precedent and a justice and the "vitality" of the precedent.[25] According to the authors, these two variables and the interaction between these two variables are the greatest indicators of whether a Court will interpret a given precedent—and also whether the Court will interpret that precedent positively or negatively.[26]

"Ideological distance" is a measure of how well the policy preferences of a particular justice mesh with the policy principles that a given precedent embodies.[27] For example, if a justice possesses a strong opinion that the Commerce Clause does not empower Congress to regulate a purely local commercial activity, he will be ideologically distant from a precedent that holds that Congress actually can regulate purely local commercial activities. The authors measure the "ideological tenor" of a precedent by determining "the percentage of the time the median member of the majority voting coalition in the precedent case voted liberally in the issue area of the

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24. *Id.* at 28, 35.
25. *Id.* at 29.
26. *See id.* at 28–42.
27. *Id.* at 59.

case over his or her entire Court career."[28] But to do that, the authors need to identify the ideological tenor of the "median member" of the majority voting coalition, which means they first need to measure the ideological tenor of the Court itself. The authors' solution to this problem is to "calculate the median value of the sitting justices' issue-specific liberalism scores (where we again use the percentage of the time each justice voted liberally over her career as a measure of individual policy preference)."[29] In other words, the authors count the votes of the justices in twelve "value areas" and score them against what a "liberal" position would be in each of those twelve "value areas."[30]

After determining the ideological tenor of the median member of the majority voting coalition, the authors may then quantify the "value" of the independent variable of ideological distance: "Our measure of *Ideological Distance* [as an independent variable] is the absolute value of the difference between the issue-specific ideology of the median of the majority voting coalition in a precedent and the issue-specific ideology of the median member of the Court in the given year."[31]

"Vitality" is a measure of the extent to which a precedent "maintain[s] legal authority."[32] According to the authors, "[t]he norm of *stare decisis* implies that, for legitimacy reasons, the justices are more likely to rely on those precedents possessing greater legal weight."[33] Contrary to some scholars, the authors do not believe that the age of a precedent is a good indicator of that precedent's "weight" or vitality. The age of the precedent is not a dispositive factor in determining that precedent's "weight" because it is likely that "some precedents become more vital over time as they become an increasingly solid foundation for subsequent decisions and precedents, while others become less vital as they are chipped away."[34] Similarly, the authors disagree with scholars who have

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28. *Id.*

29. *Id.*

30. *Id.* at 59 & n.6. The twelve "value areas" are: "criminal procedure, civil rights, First Amendment, due process, privacy, attorneys, unions, economics, federal taxation, federalism, interstate relations, and judicial power." *Id.*

31. *Id.* at 59–60.

32. *Id.* at 23.

33. *Id.*

34. *Id.* at 24.

argued that the size of the coalition issuing the majority opinion is a factor that determines that decision's precedential weight, although the authors do include a "control" for this factor in their empirical models.[35] Instead, the authors conceptualize "precedent vitality" as a function of how the Supreme Court has interpreted that precedent in other cases. If the Supreme Court has previously interpreted a given precedent positively, it will have a higher vitality. Conversely, if the Court has treated a precedent negatively, it will have a lower vitality. The authors represent this mathematically by assigning a value of +1 to the precedent for each positive treatment, and -1 for each negative treatment.[36] So, for example, if a case has been interpreted by the Supreme Court five times, and four of those were positive and one was negative, its "vitality score" would be 3 (i.e., +4 - 1).

The authors devote a great deal of space to testing their theoretical model. They set out "[t]o examine empirically the U.S. Supreme Court's interpretation of a precedent in a given year," by evaluating how the Court treated all of the "orally argued opinions [it] decided from the 1946 through 1999 terms."[37] This "universe" of cases produced a sample of 6363 Supreme Court precedents.[38] To test their original hypothesis, the authors "use a dataset containing an observation for each precedent in each year of its existence, beginning in the year it was decided and ending in 2001."[39] A case decided in 1967, for example, would receive thirty-five "observations," one for each year from 1967 to 2001.[40] During each "observation," the authors identify all Supreme Court majority opinions, decided by the end of 2001, that subsequently interpreted one of these 6363 precedents and they code their results to indicate whether the Court's subsequent treatment of that case is positive or negative.[41]

The results are surprising and informative. According to Hansford and Spriggs,

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35. *Id.* at 41.

36. *Id.* at 24–25, 29–40, 60–61.

37. *Id.* at 58.

38. *Id.* The authors indicate that they excluded sixty-seven cases where the outcome was deemed "non-ideological." *Id.* at 43 n.2.

39. *Id.* at 58.

40. *Id.*

41. *Id.*

> Our data indicate that of the 6,363 precedents decided between the 1946 and 1999 terms of the Court, the Court subsequently interpreted 3,063 (48.1%) by the end of 2001. Approximately 31% (1,961) of these precedents received positive interpretation by the Court, while 34% (2,151) of them were negatively interpreted. In addition, the Court exclusively interpreted about 14% (912) of these precedents positively and interpreted another 17.3% (1,102) of them only negatively. Finally, the Court interpreted 16.5% (1,049) of these precedents both positively and negatively over this time span.
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> . . . [T]he probability of any one precedent being interpreted in a particular year is low. For example, the average precedent has a 2.0% chance of being negatively interpreted by the Court in the average year and a 1.8% chance of being treated positively.[42]

After analyzing the results of their tests, the authors offer several findings. Two of those findings follow. First, "the Court's interpretation of precedent depends on the extent to which the justices agree with a precedent. As the ideological distance between the Court and a precedent increases, the likelihood of the Court interpreting the precedent positively decreases, while the likelihood of the Court interpreting it negatively increases."[43] In other words, the probability that a Court will treat a given precedent positively is inversely proportional to the ideological distance of that precedent. Second,

> the vitality of a precedent influences the Court's decision about how to interpret it. . . . [P]recedent vitality conditions the effect of ideological distance on the Court's decision to positively or negatively interpret a precedent. Precedent vitality diminishes the negative effect of ideological distance on the probability of positive interpretation and accentuates the positive effect of ideological distance on the likelihood of negative treatment.[44]

This second conclusion is problematic; it means that, in practice, "the justices are more likely to negatively treat a precedent they dislike on

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42. *Id.* at 50–51, 63.
43. *Id.* at 74.
44. *Id.* at 74–75.

ideological grounds if that precedent is currently quite vital."[45] This is highly counterintuitive: if a precedent has a high vitality score, then a justice who is opposed to that precedent would actually be undermining his own legitimacy. The authors do not address this apparent contradiction. The authors state that "the results of all our empirical chapters point to the conclusion that when treating a precedent positively the justices are more motivated by legitimacy concerns, while when treating a precedent negatively they are primarily motivated by the desire to shape extant legal policy."[46]

The conclusion that justices are motivated differently depending on whether they interpret precedent positively or negatively leads to a perplexing question: what are we to make of all of this? The authors have attempted an ambitious project, but the work as a whole is flawed for several reasons. First, the authors have attempted to write a book that will appeal to both legal academics and political scientists, but the book is actually of limited utility to legal scholars and practitioners because, like much of political science (as opposed to political theory), the book is exclusively empirical and predictive as opposed to normative and prescriptive. Lawyers and legal scholars who read this book will be presented with an opportunity to ponder the nature of legal change, but this is ultimately of little use to the lawyer who goes to court and argues a case. The simple fact is that lawyers live or die by precedents; a lawyer who argues that the Court should treat the precedent negatively because the Court is "ideologically distant" from the precedent would not be a persuasive advocate. (This does not apply to a lawyer's attempt to portray a case as having a low "vitality," however; one of the first tricks of the trade a student is taught in law school is the skill of distinguishing cases and arguing why a given precedent should not be binding on the case he is trying to win.)[47]

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45. *Id.* at 75.

46. *Id.* at 131.

47. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7 (Amy Gutmann ed., 1997). Justice Scalia describes the essential nature of distinguishing cases:

> Besides the ability to think about, and devise, the "best" legal rule, there is another skill imparted in the first year of law school that is essential to the making of a good common-law [practitioner]. It is the technique of what is called "distinguishing" cases. That is a necessary skill, because an absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision made in one case will be followed in the next. Quite obviously, without such a principle common-law courts would not be making any "law"; they would just be resolving the

Second, this is definitely not a book for beginners. Although the book is well written, its underlying theory remains obscure and difficult to decipher. Over two-thirds of the book is devoted to testing empirically the authors' theory, and the reader feels every word as he slogs his way through page after page of arcane statistical analysis. The authors frequently use phrases such as "Cox proportional hazards model estimation" or "Wald test" without ever defining them.[48] Policy wonks may enjoy this type of reading, but most attorneys will not (with the possible exception of tax attorneys). Additionally, despite the fact that the authors devote so much space to empirical tests, they selectively omit much of the data that would be useful for the reader. For example, as mentioned above, the authors claim that they measured the ideological tenor of the Court by counting the justices' votes in twelve "value areas," and yet nowhere in the book do the authors include the results of that investigation. It would be very beneficial to the reader to see which justices the authors scored as conservative and which as liberal. The "value areas" themselves are never discussed in great depth. What does it mean to say that a justice has voted "liberally" on issues of civil rights, for example? While the so-called "right to choose" an abortion is probably included in the "value area" of civil rights, the authors do not give any information about what other issues would fit into that category.   Does the category "civil rights" include freedom of religion or the right to bear arms? How should a "liberal" justice vote in these issues?

Finally, and most importantly, the implications of the authors' findings are actually very disquieting. The authors believe that they have proven that justices make decisions based on policy preferences; they distinguish other "attitudinal" models because the authors believe that their model shows that the justices are not free to ignore prior precedents completely. But the authors intentionally avoid the question of whether a sitting justice would ever pay more than lip service to the doctrine of stare decisis. At two occasions in the book, the authors inform the reader that they are not interested in determining whether "precedent will inevitably change a justice's

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particular dispute before them. It is the requirement that future courts adhere to the
principle underlying a judicial decision which causes that decision to be a legal rule.
Id.

48.   *See, e.g.*, HANSFORD & SPRIGGS, *supra* note 1, at 83.

vote on the merits, [but] we do contend that this norm creates incentives for the justices to respond to precedent in predictable ways."[49] They are far more interested in describing a system in which the justices can and will vote based on their policy preferences. Although the authors believe that they have posited a middle way between the cloak and the constraint, the reality is that their "parsimonious theoretical model" is draped in a thick velvet cape.

The truth is that it matters very much whether justices are bound by precedent or whether they are free to make up the law as they go. Alexander Hamilton recognized this when he wrote *The Federalist No. 78*. In Hamilton's words, "[Judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[50] Hansford and Spriggs even seem to recognize the consequences of their theory when they say (ever so casually, as if they do not want to draw attention to the danger of their conclusions) that "[t]he changes in Supreme Court preferences that can result from the arrival of new justices have real implications for the future meaning and authority of precedents set by prior Courts."[51] If the citizens of the United States ever discover that the justices simply make up the law as they go based on their policy preferences, then those citizens will take whatever steps are necessary to pick justices who will vote the way the majority wants. And that is a recipe for the nullification of judicial review, the protection of minority rights, and the entire system of ordered liberty as we know it.

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49.   *Id.* at 22 (citation omitted).

50.   THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

51.   HANSFORD & SPRIGGS, *supra* note 1, at 129.