Precedent as Tactical Weaponry

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Now I know how to "play" Professor David Shapiro to my own advantage—that is, in the unlikely event we ever end up as fellow Justices on the Supreme Court, fellow judges on a multimember lower court, or (getting a wee bit closer to possible reality) fellow law faculty members voting on the same issue at a faculty meeting. For now I know David Shapiro's theory of precedent and stare decisis.

Professor Shapiro's terrific article[1] lays out the factors, the considerations, the balance, and the style of reasoning he would employ in using precedent to decide his own decision-making process. He also lays bare the (opposite!) results to which his use of precedent might lead in a particular instance.[2] This is a marvelous window into Brother Shapiro's reasoning process. Knowing what I now know, I can craft my arguments so as most to appeal to him, so as to get his vote on my side. Even though I am a confirmed skeptic about stare decisis, I can *use* Shapiro's views against him and invoke precedent tactically when it suits my purposes—such as to pick up Shapiro's vote.

For example, if I were inclined to think that *Seminole Tribe* was rightly decided and should remain the rule (I'm not; but that's beside the point), I not only have my arguments on the merits in my persuasive arsenal but also Shapiro's susceptibility to arguments from precedent that might get him to vote my way even if he disagrees on the merits. I have *two* types of arguments instead of just *one*! I can get Shapiro to vote my way for reasons I think are right *or* for reasons I think are wrong. If I'm a good tactician, I may now more easily form the necessary decisional majority in favor of the result I think correct.

To be sure, Professor Shapiro knows *my* views about stare decisis, too. Much to my delight, it appears he has read some of my articles![3] To distill my views drastically and crassly, I think that the doctrine of stare decisis is really only so much hooey.[4] Professor Shapiro understands this. So, I suppose he knows how to "play" me, too.

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1. David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEXAS L. REV. 929 (2008).

2. *See id.* at 947–56.

3. (Which is more than I can say for my own mother.) Shapiro refers to my writing in his article at page 933, notes 11–12, and page 941, note 44.

4. *See* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 ALB. L. REV. 671, 680

But look at how much less value that information is to him than knowledge of his position is to me if we are both trying to be good, tactical coalition builders. Shapiro cannot get me to adhere to a position I think wrong and he thinks right on prudential "value-of-precedent" grounds of any kind. So what good is this knowledge to him? He cannot get me to vote his way unless I actually agree with his view on the merits of the particular issue. I guess it means he will go trawling for votes elsewhere—presumably among folks who either agree with him on the merits or who agree with him (or can be persuaded to vote his way) on stare decisis grounds.

Now, I know just a minuscule enough game theory to know that I do not know very much about game theory. But this simple Shapiro–Paulsen two-player game suggests (or confirms) some general insights about the role of precedent in adjudication involving multimember courts.

There are two kinds of people in this world: those who understand that stare decisis in constitutional interpretation is utter nonsense and (if I may be so impolite) those who don't—and who therefore foolishly cling to, or claw around for, some sort of imprecise "theory" of precedent to validate their foolishness. And *then* there are those who, knowing that stare decisis is hooey, prey on the fools who do not quite get it. They feign belief in precedent for the tactical advantage it confers in the multimember coalition-building game.[5]

Clearly, if one is devious, this last stance is the best strategy. My own "strategy" is no good at all. I don't believe in stare decisis (at least not in the strong sense of deciding a case contrary to what I otherwise would conclude—on full information and reflection—is the correct answer solely because of the weight of a prior contrary, if unpersuasive, judicial decision). I am no fool or dupe in this regard, so nobody tries to "play" me very much. Fellow Justices have fewer arguments with which to persuade me, so they leave me alone. Advocates do not direct their arguments to me as much as they do to the stare decisis fools. In fact, nobody pays attention to me at all. I am Scalia on steroids. I might as well just be an academic.

In fact, it's even worse than that. Since I have been honest about my views on the force of precedent, none of my judicial colleagues will take me very seriously when I make an argument trying to get them to decide an issue

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(1995) (arguing that stare decisis is a hoax, unconstitutional, or both); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2731–34 (2003) (arguing that stare decisis is unconstitutional except when it is irrelevant and misleading); *see also* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000) (arguing that stare decisis, accepted on the terms the Court claims for it, is a doctrine of policy that may be displaced by contrary statutory directive).

5. I guess this makes *three* types of people (unless you count nonstrategic precedent skeptics and strategic-playing precedent skeptics as subcategories of the first type). This reminds me of one of my favorite jokes. There are three kinds of people in this world: those who can count and those who can't.

my way on stare decisis grounds. (My academic colleagues don't take me very seriously either, of course.) "Paulsen, you don't believe in stare decisis! What are you doing trying to persuade me to vote your way on the basis of an argument you think is wrong?!" It's kind of an estoppel-by-prior-expressed-contrary-opinion move. Of course, I can still appeal to the fact that *they* think that this wrong argument is right in their scheme. I am not so much playing hypocrite as urging them to stick to their wrong principles, which is the right thing to do in their world. Alas, I am showing them deep *respect*! But still, the reality is that an appeal to commonly shared premises is usually a more persuasive way to argue. My way is a little tricky and might be regarded as too slick by the person I am trying to persuade. In fact, they might not quite get it. (Remember, this is the category of persons I regard as legal-system dupes or fools in other respects.)

In fact, it's even worse than *that*. Not only does no one appeal to my sense of precedent and come knocking on my door; not only do my arguments from precedent ring hollow to colleagues I aim to persuade; but, sadly, I probably am never appointed to a judgeship at all. Who wants a judge who doesn't want to play—who doesn't even believe in—the stare decisis game? Because most people give lip service to precedent, and there are many more fools than wiseguys with respect to stare decisis, an out-of-the-closet precedent denier is unlikely to even get into the position of having relatively little power on a multimember court. I might as well just be an academic.

So who is the fool after all? I suppose it's the poor, honest academic law professor who recognizes stare decisis for the hooey it is and does not play along. If I really wanted power, I should have *played along*, all along.

Clearly, that is the best game-playing strategy. One should state, as cryptically and generally as possible, one's belief in a doctrine of precedent, talk about it respectfully, and learn to manipulate it skillfully—even if one is secretly a confirmed Stare Decisis Atheist. It arms you with more arguments you can use against your believing colleagues; you know how to play their game and you can "play" them with skill. It means that more arguments will be directed to you; you become a power center. Because the doctrine is so marvelously manipulable, you can accept (or appear to accept) those arguments when it suits your purposes and work your way around them when it does not. And, you are far more likely to be confirmed in the first place.

A slightly less good strategic position is that of the true believer in—rather than the cynical in-the-know manipulator of—some version of stare decisis. Unlike the Manipulator, the Believer really does think that precedent counts for something. This means that arguments about precedent are directed at the Believer, and he or she is more likely to become a "swing" vote and exercise greater decisional power. Of course, the Believer might become frustrated that his or her arguments from precedent are not accepted, at least not consistently, by Manipulators. Why was it that a perfectly good argument from precedent that worked last time around seems not to have

persuaded my colleague this time? So the Believer/Dupe wonders, not realizing that he is being played.

Now the really interesting feature of this game is that it sometimes is hard to tell a Manipulator and a Believer apart. They are both mouthing the same words, more or less. Which one is simply a great player, and which one is simply being played? It is hard to look into another's soul, of course, but after reading enough Supreme Court opinions, one can get a pretty good idea. William H. Rehnquist was a master manipulator of precedent, though it was obvious enough where he would come out in the end—if he had the votes for his preferred position. William Brennan was also a master manipulator. He knew that precedent was putty, but he could pretend with the best of them. Then there are the Believers. Sandra Day O'Connor was a true believer—and, boy, could she be played![6] Interestingly, this posture gave O'Connor, one of the Court's weakest members, the greatest effective voting power. David Souter is probably a believer who is also a pretty good player; but because he is also good at not being played by others, he actually has less power. Anthony Kennedy may be a true believer in precedent, but I am inclined to think he really just *wants to be played* because he realizes how such a position advances strategic voting power and he wants that power. Use me, please, he grovels. Call him Kennedy the Collaborator, the *Vichy* Justice.

I think I'm on to Chief Justice John Roberts, too. He is the consummate player. By training (Rehnquist clerk, Solicitor General's office, long-time skilled Supreme Court practitioner, appellate judge) and by temperament (often formed by training), he enjoys and is very good at the precedent game. He is a connoisseur of precedent; he can use it to persuade others, can use it to buttress his positions, and can use it to increase his own judicial capital. (It seems as though Roberts likes to cite precedent a lot, thereby increasing its general market value while subtly redefining the value of any particular precedent.) When push comes to shove, I strongly suspect that Roberts—a sharp cookie—realizes that stare decisis, in any strong sense, is at least deeply problematic, if not quite utter nonsense. I doubt whether he would often vote contrary to his views of the merits of a case. (Rehnquist sometimes did, I think.)[7] But Roberts dares not, Scalia-like, proclaim that the emperor has no clothes because *they are his clothes*. Emperor John Roberts

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6. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

7. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 715–19 (2004) (upholding a state law discriminating on the basis of religious expression in awarding scholarship benefits); Dickerson v. United States, 530 U.S. 428, 443 (2000) (upholding *Miranda* as a constitutional rule, contrary to his earlier opinions, on the basis of stare decisis). Again, however, I think Rehnquist would have voted the other way if he'd had the votes to make his opinion the majority. (I am less sure about *Locke v. Davey* than about *Dickerson*; Rehnquist liked to vindicate state government authority and was never much of a fan of free exercise of religion or freedom of speech.)

realizes that precedent invocation is how the game is played, and he means to win.

What about the Honorable Mr. Justice David Shapiro? No fool he, Shapiro recognizes the problems with, and manipulability of, stare decisis. The former he explains, and the latter he demonstrates, with his alternative-endings-to-the-mystery illustration of how precedent leads him to one of two contradictory conclusions.[8] But he also understands group dynamics and group decision making. I suspect that the august deliberations of the Harvard Law School faculty on important matters of the day, if any, have given him a more thorough working knowledge of game theory than could any article or treatise. In short, *he gets it*. And he understands that, for better or worse, to succeed in the game, he must play it. Thus, the paragraph of Shapiro's article I find most intriguing is the following one:

> On a practical level—that of determining how to be an effective member of the group—I know that *I must give precedent some due*, simply *because that is the way the Court operates*. To be sure, some Justices, like some commentators, have evinced little respect for precedent, at least constitutional precedent, when it conflicts with their own views, but even they are usually willing to *play by more generally accepted rules* and deal with precedent *as if it mattered*. Indeed, I recall one extraordinary incident when I was an academic listening to another academic propose a quite radical reading of a particular constitutional provision; when I asked him how he would go about implementing his idea if he were on the Court, he replied that he would look for a close case at the margin where the impact of case law was debatable and introduce his idea in either a concurrence or a dissent. Then, he would continue to press it more forcefully over the course of time until he could acquire an ally or two, and eventually, he hoped, he could command a majority. This response struck me as both cynical and strategically sound. As several political-science scholars have observed, precedent sets the framework for debate, and even one who does not put much stock in it has to recognize this fact if he is to achieve anything. If, as has been wisely said, "[h]ypocrisy is the homage vice pays to virtue," it is also the homage strategy pays to reality.[9]

This seems exactly right. Precedent is useful tactical weaponry in the judicial-majority-forming game. The wise practitioner, the sly deceiver, and the hard-boiled realist must treat precedent "as if it mattered" because that is

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8. *See* Shapiro, *supra* note 1, at 953–55.

9. Shapiro, *supra* note 1, at 941 (emphasis added) (footnotes omitted) (quoting FRANÇOIS DUC DE LA ROCHEFOUCAULD, REFLECTIONS; OR SENTENCES AND MORAL MAXIMS maxim 218, at 27 (J.W. Willis Bund & J. Hain Friswell trans., New York, Scribner, Welford & Co. 1871) (translated from the 1678 and 1827 eds.)).

the way the Supreme Court, and every other court, operates. Mastery of the uses and abuses of precedent is an essential skill of lawyering and judging.

But that leaves me pondering two questions from the perspective of a lowly law teacher. First, how should we teach precedent-ology—the study of the use of precedent in legal decision making—to our students? Should we teach it as we understand it, somewhat cynically, as a strategic or tactical *tool* to be manipulated to serve other purposes and to spin the unwitting? (And what are the ethics of such an approach?) Or should we teach our students that the emperor's clothes are important ones to be respected because that is the game as we know it? (And there is nothing remotely unethical about teaching students to respect the use of precedent, for it is an integral and eminently respectable part of the operation of our legal system.) Shapiro's article leaves me uncertain and pondering.

My second question is personal. If I were to seek to leave my lowly position as a law teacher to become an Exalted Supreme Court Justice (Shapiro's fantasy hypothetical), should I not now *adopt* something like Shapiro's position? I could easily say that, upon further reflection, I see the value in respecting the tradition of precedent after all and now repudiate (in part) my earlier academic writings because I have wrongly undervalued the need for going along with how the judicial game really is played (and I now want to play!). After all, there is no binding stare decisis as to one's own prior academic writings.

In fact, in order to clear the path for my ascent, I now hereby take exactly this position. Distinguishing (without overruling) all I have said before, I declare that, notwithstanding anything I might have said, and might yet say, in my purely *academic* capacity,[10] I would, as a Supreme Court Justice, faithfully follow the tradition and practice of precedent as dictated by the practices and conventions of the legal profession in the United States and embraced by the U.S. Supreme Court.

10. I have a "forthcoming" that further commits me against stare decisis, but that too was written in a purely academic capacity. *See* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. (forthcoming May 2008) (symposium on precedent and the Roberts Court).