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Introduction

PRECEDENT, *n*. In Law, a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases. As there are precedents for everything, he only has to ignore those that make against his interest and accentuate those in the line of his desires.

Ambrose Bierce, *The Devil's Dictionary*

The role of precedent in the law is complicated. On the one hand, it forms the basis of common law. Adherence to precedent, a doctrine known as *stare decisis*, forms the foundation that allows for the fundamental principles of stability and uniformity in the law to be built. As the Supreme Court itself has stated, "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[1]

The alternative view, reflected in the above quote from twentieth-century satirist Ambrose Bierce, is closer to the view held by many modern legal scholars. Segal and Spaeth, for example, describe the formal legal rules found in opinions as "merely rationalizing decisions" (2002, 88). Similarly, Segall asserts that "the Justices [of the Supreme Court] employ the fancy but misleading jargon of constitutional law (text, history, and prior cases) to hide the personal value judgments that actually support their decisions" (2012, 3). Finally, and perhaps most closely reflecting the definition that opens this

[1] *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991).

book, Paulsen argues that "sensible notions of judicial integrity would seem to require acknowledgment that stare decisis is a doctrine of convenience, endlessly pliable, followed only when desired, and almost always invoked as a makeweight" (2007, 1209).

As with most things, the truth likely lies somewhere between these two absolutist views and varies greatly across time, space, and context. Formally, the US Supreme Court unquestionably has the last word on the meaning of federal law, and its decisions are binding precedents for all lower federal courts and state courts. Thus, it is possible that *stare decisis* is simultaneously treated by the US Supreme Court merely as an obstacle or a means to an ideological end when it comes to their own future decisions, but absolutely binding on lower federal courts and state courts (when the latter are deciding a federal question). The Supreme Court has made it quite clear that it views this as true with respect to both federal statutory and constitutional law.[2]

However, this leaves open two important questions. First, while the US Supreme Court views its precedents interpreting federal law as absolutely binding on state courts of last resort, do state high courts always share this view? Decades of research argues that the answer to this question is a resounding "no." This work shows that state high courts are motivated by a number of factors when determining how to react to a relevant US Supreme Court precedent such as precedent age, precedent vitality, ideological factors, and specific case facts (Canon 1973; Comparato and McClurg 2007; Fix, Kingsland, and Montgomery 2017; Hoekstra 2005; Kassow, Songer, and Fix 2012; Murphy 1959; Romans 1974).

Second, even if we were to ignore all of this research and assume that state courts of last resort *always* follow US Supreme Court precedents faithfully when deciding *purely federal questions*, how often do such cases actually come before these courts? The answer to this second question is that it is quite rare for state high courts to see cases where there are solely federal questions.

[2] See, e.g., *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 348 (1816); *Provident Institute for Savings* v. *Massachusetts*, 73 U.S. 611, 628 (1867) ("the decisions of this court in cases involving Federal questions are conclusive authorities in the State courts"); *Sims* v. *Georgia*, 385 U.S. 538, 544 (1967) ("Such rule is, as we have said, a constitutional rule binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed"); *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law"); *James* v. *City of Boise, Idaho*, 136 S.Ct. 685, 686 (2016) (*per curiam*) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise").

Most cases state high courts see involve issues of state law only or mixed federal and state issues. In cases involving a mix of federal and state questions, state high courts can use doctrines such as adequate and independent state grounds to avoid the federal issues and focus solely on the state ones. Thus, in many cases, state high courts are under no obligation to follow US Supreme Court precedent.

In this book, we bring a new theoretical perspective to enhance our understanding of how state courts of last resort use relevant US Supreme Court precedents. Our central argument is that while US Supreme Court precedent serves a vital role in shaping legal policy in the states, state courts of last resort retain the final word on the details. The ability of these courts to determine whether and how to use US Supreme Court precedents with minimal interference provides them with a high degree of independent control over state legal policy. One implication of this is that the decisions of the US Supreme Court do not directly impact citizens in their daily lives. Instead, the legal policy content of those decisions is filtered through state high courts where they can be followed, enhanced, altered, or even ignored altogether. Therefore, while the focus of this book is on the use of US Supreme Court precedent by state high courts, its implications go far beyond these fifty-two institutions to further our understanding of the development of legal policy in the United States more broadly.[3] How state high courts use US Supreme Court precedent is central to understanding many broader questions about American law such as how legal policy develops and evolves, the nature of *stare decisis* in a system of judicial federalism, and limitations on the impact of US Supreme Court decisions.

1.1 A TALE OF THREE STATE COURT DECISIONS

In *Greenwood* v. *California*,[4] the US Supreme Court first addressed the question of whether a warrantless search and seizure of garbage left outside of one's immediate property violated the Fourth Amendment. In addressing this question, the Court applied the two-part test from *Katz* v. *United States* asking whether the individual had a reasonable expectation of privacy and whether

3 There are fifty-two state high courts in the United States rather than fifty, as Texas and Oklahoma have two state high courts (Texas/Oklahoma Supreme Court for civil appeals and Texas/Oklahoma Court of Criminal Appeals for criminal appeals).

4 486 U.S. 35 (1988).

that expectation would be considered reasonable by society.[5] While the Court held that the first prong of the *Katz* test was likely met, the second part was not for three reasons. First, the Court noted that "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."[6] Second, the Court noted that the fact the garbage was placed in its location "for the express purpose of having strangers take it" diminished any reasonable expectation of privacy.[7] Third, the Court held that police were not required "to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."[8]

As is common following a major US Supreme Court criminal procedure decision, several state courts soon confronted cases with similar issues raising questions about how to deal with the new precedent. One of the first such cases came later that same year in *State* v. *Trahan*.[9] In *Trahan*, the Nebraska Supreme Court held that *Greenwood* applied to similar questions in Nebraska as its own "prior case law has been consistent with the *Greenwood* rationale."[10] Following Nebraska's lead, many other state high courts concluded that their state constitutions offered no greater protection over the privacy of one's trash than the Fourth Amendment did.[11]

Conversely, the New Jersey Supreme Court took a different approach in *State* v. *Hempele*.[12] The facts in *Hempele* were, in the words of the Court, "almost identical" to those in *Greenwood*,[13] as trash in a closed container left on the street for collection was seized by police without a warrant in the course of an investigation. Applying the recent *Greenwood* decision, the New Jersey Supreme Court found that the action did not violate the Fourth Amendment. However, the Court did not stop its analysis at that point. It then turned to a discussion of the search and seizure provision in the New Jersey Constitution. While noting that the relevant text of the Fourth Amendment and the New Jersey Constitution were similar, the Court emphasized that it was its role

5 389 U.S. 347 (1967).
6 *Greenwood*, *supra* note 4, at 40 (internal citations omitted).
7 Id. at 40–41.
8 Id. at 41.
9 428 N.W.2d 619 (Neb. 1988).
10 Id. at 623.
11 See, e.g., *Rikard* v. *State*, 123 S.W.3d 114 (Ark. 2003); *People* v. *Hillman*, 834 P.2d 1271 (Colo. 1992); *State* v. *Donato*, 20 P.3d 5 (Idaho 2001); *State* v. *McMurray*, 860 N.W.2d 686 (Minn. 2015); *State* v. *Schwartz*, 689 N.W.2d 430 (S.D. 2004).
12 576 A.2d 793 (N.J. 1990).
13 Id. at 798.

to make an independent assessment of the meaning of the state constitution nonetheless:[14]

> In interpreting the New Jersey Constitution, we look for direction to the United States Supreme Court, whose opinions can provide valuable sources of wisdom for us. But although that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine.[15]

In its analysis of the question under the state constitution, the New Jersey Supreme Court went through each of the three reasons given by the US Supreme Court in *Greenwood* to justify its holding that the Fourth Amendment did not protect garbage set aside for collection from warrantless searches. Additionally, it addressed two more arguments raised by the state but not addressed in *Greenwood*: "because [garbage] is pervasively regulated and because it is abandoned."[16] In each instance, the New Jersey high court held that the reasoning was not sufficient to overcome the reasonable expectation of privacy requirement of the state constitution, concluding that a warrantless search of garbage was a violation of the New Jersey Constitution. A minority of other state high courts have also found a state constitutional right in this area post-*Greenwood*.[17]

Finally, unlike either the Nebraska or the New Jersey high court, the Illinois Supreme Court avoided the larger constitutional question altogether in *People* v. *McNeal*.[18] Rather than wading into the debate over whether to apply *Greenwood* – like the high courts of many other states – when faced with a challenge to a warrantless search and seizure of evidence in a garbage can, the Illinois Supreme Court made no mention of *Greenwood*. Instead the Illinois Supreme Court ignored the *Greenwood* decision,[19] grounding its rationale for upholding the specific search in the case on exigent circumstances. In doing

[14] State high courts have the power to interpret constitutional rights under their state constitutions different from similarly – or even identically – worded protections in the federal constitution under the adequate and independent state ground doctrine. The adequate and independent state ground doctrine is discussed at length in Chapter 2, Section 2.3.1 of this book.

[15] *Hempele*, *supra* note 12, at 800 (internal citations omitted).

[16] Id. at 804.

[17] See *State* v. *Crane*, 329 P.3d 689 (N.M. 2014); *State* v. *Goss*, 834 A.2d 316 (N.H. 2003); *State* v. *Lien*, 441 P.3d 185 (Or. 2019); *State* v. *Morris*, 680 A.2d 90 (Vt. 1996); *State* v. *Boland*, 800 P.2d 1112 (Wash. 1990).

[18] 677 N.E.2d 841 (Ill. 1997).

[19] Interestingly, it also ignored one of its own pre-*Greenwood* precedents directly addressing this question in line with the *Greenwood* decision. See *People* v. *Collins*, 478 N.E.2d 267 (Ill. 1985).

so, it avoided any need to address the question of whether a privacy expectation in one's trash existed under the Illinois Constitution.

1.2 A NEW THEORETICAL APPROACH

The issue of whether someone has the right to be free from a warrantless search of their trash may seem like a relatively trivial legal question. At first glance, one may think that all we can learn from *Trahan*, *Hempele*, and *McNeal* is that such protections exist in New Jersey, but not in Nebraska, and probably not in Illinois. Yet, these cases illustrate a point that goes beyond these three cases or this single issue. In these cases we see a significant range of reactions that a state high court can have when faced with a relevant US Supreme Court precedent. Taken together, they illustrate some of the core issues with existing studies of state high court reactions to US Supreme Court precedent, thus providing a clear illustration of why the more comprehensive theory presented in this book is needed.

Much of the prior research on this topic has reduced state high court responses to a simple dichotomy: comply or not comply (see, e.g., Fix, Kingsland, and Montgomery 2017; Kassow, Songer, and Fix 2012). However, this represents an oversimplification of the process. True, one could consider the behavior of the New Jersey Supreme Court in *Hempele* as noncompliant, and one would not be wholly inaccurate. The New Jersey Court did not follow the relevant US Supreme Court precedent. This is the definition of noncompliance. The problem here is that questions of compliance alone are not theoretically sufficient for many of the questions legal scholars should be asking. Unlike lower federal courts, state high courts are not agents of the Supreme Court. They are bound to the Supreme Court's precedents only in matters of federal law. The New Jersey Supreme Court specifically recognized this, finding that "The Hempeles left their garbage at a location accessible to the public. They cannot escape the force of *Greenwood*. The garbage searches …were valid under the fourth amendment."[20] However, as noted above, the New Jersey Supreme Court also considered the separate protections afforded citizens of New Jersey under their state constitution, finding that the New Jersey Constitution offered greater protection than the federal constitution. To term this noncompliance – as many existing empirical studies would – would be conceptually inaccurate as it would ignore over a century of US Supreme Court doctrine holding that state courts are free to decide cases on adequate and independent state grounds.

[20] *Hempele*, *supra* note 12, at 799.

The Illinois Supreme Court decision in *McNeal* illustrates another issue with much of the existing research in this area. Most studies of state high court responses to US Supreme Court precedents derive the sample of cases studied from all state high court decisions that cite the precedent. Under such an approach, typical studies of state high court reactions to relevant US Supreme Court precedents would simply exclude the *McNeal* decision. This would not pose a problem were *McNeal* the rare example of a case where a state high court ignores a relevant US Supreme Court precedent. However, as we show throughout this book, such behavior is not rare at all. For example, in Chapter 5 we show that in nearly 11 percent of cases where *Atkins* v. *Virginia* (a Supreme Court opinion that banned the execution of intellectually disabled individuals) is a relevant precedent, state high courts fail to include even a single mention of the precedent. Even more remarkably, in Chapter 6 we show that state high courts ignore *Lemon* v. *Kurtzman* (a Supreme Court opinion that created a test to deal with Establishment Clause questions) in nearly half of all cases involving questions of religious establishment. Thus, while existing work has enhanced our knowledge of how state high courts react to relevant US Supreme Court precedent, it tells us nothing about why these courts simply ignore these precedents altogether in a nontrivial – and systematic – set of cases.

We depart from prior work in this area in a way that moves past these issues to help us understand *whether and how* state high courts use relevant US Supreme Court precedents. Drawing on extensive historical and doctrinal background, we develop a theoretical framework that recognizes the true complexity of the US Supreme Court–state high court relationship. While many view the relationship between the US Supreme Court and state high courts as either strictly top-down or top-down with competing pressures from other state actors (Benesh and Martinek 2002; Fix, Kingsland, and Montgomery 2017; Hansford, Spriggs, and Stenger 2013; Hoekstra 2005; Kassow, Songer, and Fix 2012), such a perspective is inconsistent with the US Supreme Court's definition of this relationship going back to some of its earliest case law. State high courts are only bound by the decisions of the US Supreme Court when two conditions are met. First, the state court must be deciding a purely federal question. Second, there must not be an alternative way to adequately address the question relying on state law alone (or the state must elect not to pursue such an approach).[21] Absent these conditions states are free to treat US

[21] There is one limitation on this approach. State high courts can use their state constitutions to expand individual rights, but not to reduce them. With respect to individual rights that are in both the federal and a state constitution, the US Supreme Court interpretation of individual

Supreme Court precedents in the same manner they do the decisions of other state courts: as authoritative but not binding. Moreover, in some contexts, the roles are fully reversed. The US Supreme Court has held that it must follow the interpretation of state high courts with respect to the meaning of their own state laws and constitutions when dealing with matters of purely state law.

While we start from a foundational understanding of the relationship between the US Supreme Court and state high courts, we also recognize that this interaction occurs in a complex political environment. State high court judges are not merely politicians in robes, but neither are they models of mechanical jurisprudence. As such, our theory of state high court responses to US Supreme Court precedent bridges our doctrinal foundation with a rich political science literature on decision-making on state high courts. Specifically, we recognize that, like all judges, judges on state high courts are driven by multiple goals, and chief among these goals is a desire to set legal policy in line with their preferences (Baum 1997). We further recognize that "judges do not judge in a vacuum" (Fix 2014, 134). Unlike their federal counterparts, the vast majority of state high court judges do not hold their jobs for life.[22] Instead these judges must either face the voters of their state in a bid for reelection/retention or depend upon reappointment by the political branches of their state government. As such, state high court judges operate within a political environment where their decisions could impact their professional future. Regardless of their method of retention/reappointment, state high court judges are cognizant of the potential backlash the political branches of their state's government can bring against them for unpopular decisions (Leonard 2016; Romano and Curry 2019).

The primary contribution of this book is to introduce a theory that recognizes the importance of the legal policy motivations of the judges on state high courts, the political environment in which they operate, and the legal foundation that defines the nature of the US Supreme Court–state high court relationship. We build from neo-institutionalist theories used to explain judicial decision-making on state high courts in other contexts (see, e.g., Brace and Hall 1995; 1997; Hall 1987; Hall and Brace 1992; Hoekstra 2005; Langer 2002). Consistent with this literature, our principal theoretical argument is

rights are in effect a floor below which rights protections cannot fall. However, state courts are free to interpret their state constitutions as providing enhanced protections of individual rights (Brennan Jr 1977), and they frequently do so.

[22] Only Massachusetts, New Hampshire, and Rhode Island give the judges on their highest court life tenure–although New Jersey does as well after surviving one reappointment term by the governor. However, in both Massachusetts and New Hampshire, this is somewhat limited as there is mandatory retirement after age seventy.

that the decision by a state high court regarding whether and how to deal with a relevant US Supreme Court precedent is affected by an array of legal, political, contextual, and institutional factors. While we explain the details of our theory in greater depth in Chapter 3, it is sufficient at this point to note that we view state high courts as having available to them a set of four possible choices each time they decide a case for which there exists a relevant US Supreme Court precedent. They can either follow the precedent by applying it to the case before them, cite the precedent in passing without providing any analysis, negatively treat the precedent by criticizing or distinguishing it based on the facts of the case, or simply ignore the precedent altogether by making no mention of it whatsoever in their decision (as the Illinois Supreme Court did in the *McNeal* case discussed early in the chapter). How they select among these choices will be a function of the degree of flexibility afforded them by the precedent itself, the applicability of other legal doctrines (such as adequate and independent state grounds), the facts of the specific case before them, their own past usage of the precedent, the institutional design of their state judiciary, and their state political environment.

1.3 A ROAD MAP FOR THE BOOK

The questions raised in this introduction are of significance both for our understanding of how legal policy develops in the United States, and also for larger, normative reasons. The average American knows very little about their state courts (McKenzie and Unger 2011), and media coverage of these institutions is relatively minimal compared to the US Supreme Court (Hughes 2020; Vining Jr and Wilhelm 2011).[23] Yet we argue in this book that these institutions possess significant power to shape the meaning of US Supreme Court precedents and sometimes to ignore them altogether. Thus, it may well be that uniformity of the law is but a myth. Rather than a single flavor of constitutional law in the United States, we may actually have fifty distinct versions. This suggests that legal scholars, the news media, and the mass public alike should give these institutions significantly more attention than they currently do. At the end of the day, an individual's rights may depend less on what the US Supreme Court says they are and more on how the highest court of that individual's state responds to the Supreme Court's decision defining those rights.

[23] Recent work by Curry and Fix (2019) suggests that in some cases, state high court judges themselves may be working to increase knowledge about their institutions through the use of social media platforms.

The remainder of this book will clarify our central argument and marshal empirical evidence to support our theoretical claims. Throughout the book, we focus on communicating complex technical or doctrinal points via intuitive explanations given as much as possible in plain English rather than relying on technical jargon. Specifically, we will proceed as follows.

Chapter 2 provides a historical overview of the evolution of *stare decisis*, or the idea that precedent should be binding on future court decisions, from its origins in medieval England to its modern form in the United States. This historical treatment provides context for the importance of our research question and shines light on some common misconceptions. Most importantly, the final section of this chapter provides a rich array of historical evidence to justify our departure from much of the prior literature that treats the US Supreme Court–state high court relationship as one where vertical *stare decisis* applies. Rather, using a thorough discussion of legal doctrines that (1) insulate state court decisions dealing solely with questions of state law from US Supreme Court review and (2) provide state courts the further ability to avoid US Supreme Court review even when federal and state law questions are mixed, we show that the US Supreme Court–state high court relationship is more akin to traditional notions of horizontal *stare decisis* in many instances. Our analysis of the history of legal doctrine in this area shows how these core legal principles facilitate a high level of state high court independence over legal policy even when faced with relevant US Supreme Court precedent. In addition to providing a basis for our departure from existing theoretical explanations of state high court reactions to US Supreme Court precedent, our examination of the history of doctrinal development in this area provides a foundation for some of the core assumptions underlying our theory.

Chapter 3 elucidates our theory of precedent usage by state high courts. We begin by providing a brief overview of the literature on state high court decision-making generally and on the use of precedent by state courts specifically. We then show how our new theoretical approach fits in with this existing literature, where it departs from these existing works, and the core assumptions on which it relies. We devote the bulk of the chapter to expanding on the core of our theory outlined above. Specifically, we discuss each of the factors that we argue determine state high court decisions on whether and how to use relevant US Supreme Court precedents, and how each of these factors should influence those decisions. Throughout this chapter, we make use of both anecdotal examples and analogies to help clarify our theoretical arguments.

Chapter 4 focuses on the data and measurement issues created by our new theoretical approach. This chapter begins by providing an overview as to existing approaches that have been used to examine how state high courts