WHEN TIMING IS EVERYTHING IN THE SUPREME COURT

Dan Schweitzer

THE SUPREME COURT has no shortage of critics. Conservatives decry its decision upholding the Affordable Care Act; liberals protest *Citizens United*; law professors pick apart pretty much every decision. Most agree, though, that the Court's rulings are not arbitrary. They may often be wrong, but the Justices' errors – say the critics – spring from a misguided jurisprudence, a political agenda, too much empathy, and other well-understood motivations.

My thesis is that Supreme Court opinions, on occasion, *are* arbitrary. They are arbitrary in a very particular way – based on the fortuities of when particular issues come before the Court. By that, I am not referring to the Court's changing composition. Had the Court been asked in 1978, rather than in 2008, whether the Second Amendment grants an individual right to possess firearms, the Court would almost certainly have held it does not. Maybe that counts as arbitrary (though the 2008 Court would have been free to reject that hypothetical 1978 decision), but I have something else in mind.

What I propose is this: How the Court decides two interrelated issues sometimes depends on the order in which they make it up to the Court.

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Flip the order and both cases come out the other way. Further, nothing about the underlying statute or constitutional provision dictates the order. One of the two issues just happens to, for example, produce the first circuit conflict – and that happenstance ends up determining the outcome of that issue *and* the related, slower-to-percolate issue.

Suffice it to say, that's not a happy result. Whatever other considerations might appropriately factor into a Supreme Court decision, surely the happenstance of litigation timing (what scholars call "path dependence") is not among them. If I am right, therefore, the Court needs to work harder to eliminate this flaw in its decisionmaking process – particularly in statutory construction cases, where *stare decisis*' greater force makes path dependence more likely.

Proving my hypothesis is difficult because it involves a counterfactual: How would the Court have decided the pair of cases had they arisen in the opposite order? We can never know for certain. Nonetheless, I suspect that most regular practitioners in the Court can point to instances where they are confident this occurred. For me, the clearest example involves plain-error review and the little-known cases of *Johnson v. United States*[1] and *Henderson v. United States*.[2]

A TALE OF PLAIN ERROR: *JOHNSON V. U.S.* AND *HENDERSON V. U.S.*

As a general matter, lawyers must assert claims of error at trial or forfeit them. Ever mindful of ensuring fundamental justice, however, our legal system has created escape valves to the contemporaneous-objection rule. For federal criminal cases, the escape valve appears in Federal Rule of Criminal Procedure 52(b), which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." In other words, as the Supreme Court explained in *United States v. Olano*,[3] a court of appeals may provide relief where there was (1) "error" (2) that is "plain" and (3) that "affect[s] substantial rights,"

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[1] 520 U.S. 461 (1997).

[2] 133 S. Ct. 1121 (2013).

[3] 507 U.S. 725 (1993).

i.e., was prejudicial. *Olano* further clarified that an error is "plain" if it is "clear" or "obvious."[4]

Simple enough, or so it would seem. Yet *Olano* flagged a complication. It agreed that Rule 52(b) requires, "[a]t a minimum," that the error be "clear under current law," *i.e.*, as of the time of appeal. But what about "the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified"?[5] *Olano* left the issue unresolved; 20 years later the Court finally tackled it in *Henderson v. United States*.

Henderson, Part 1

In January 2009, the police arrested Armarcion Henderson for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). His case hopeless, he pleaded guilty in the U.S. District Court for the Western District of Louisiana. The district court imposed an above-Guidelines sentence of 60-months' imprisonment on the ground that he was "try[ing] to help" Henderson by making him eligible for an in-prison drug rehabilitation program. Henderson's counsel did not object – though she should have, because 18 U.S.C. §3582(a) expressly instructs judges that "imprisonment is not an appropriate means of promoting correction and rehabilitation."

At the time, despite § 3582(a)'s direct language, the circuits were divided 3-2 on whether a court could "lengthen a prison term in order to foster a defendant's rehabilitation";[6] the Fifth Circuit had not yet spoken on the issue. The law was therefore unsettled at the time of the trial. But the district court's error became clear while the case was pending on appeal when the Supreme Court decided *Tapia v. United States*, holding that § 3582(a) means what it says and bars district courts from lengthening sentences to foster a defendant's rehabilitation.[7] The Fifth Circuit, and then the Supreme Court, therefore faced the issue reserved in *Olano*. Was the district court's error "plain" for purposes of Rule 52(b) when the law at

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[4] *Id*. at 732, 734.

[5] *Id*. at 734.

[6] *Tapia v. United States*, 564 U.S. 319, 323 & n.1 (2011).

[7] *Id*. at 326-332.

the time of trial was "unclear" but, due to an intervening ruling, it is plain at the time of the appeal that the court erred?

The United States presented a powerful argument to the Supreme Court for why the answer is no, *i.e.*, for why an error must be plain "both at the time of forfeiture and at the time of review."[8] First, there's the text: "A plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention." What "may be considered" on appeal is the *plain error* that "was not brought to the [district] court's attention." The error at both levels is the same: it had to be "plain," then and now.

Still more powerful were the United States' structural and purpose-based arguments. As it explained, "when the governing law is unclear at the time of trial, that is precisely when a contemporaneous objection is most necessary."[9] Had Henderson's counsel objected at trial, he could have "'prevent[ed] an error from happening in the first place, either because the judge sustains the defendant's objection or the prosecutor backs off, fearing that a trial-level victory might sow the seeds for a later appellate reversal.'"[10] On top of that, "'a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, [ ] state on the record the basis for [the court's decision],' or provide alternative grounds for that decision."[11] Henderson's counsel deprived the court of those options by failing to object.

Conversely, requiring errors to be plain at the time of trial comports with the purpose of the *plain*-error rule itself. Why must an error be "plain" to qualify for this escape valve? One might think counsel's performance was *more* deficient when the error was plain and therefore *less* excusable. Even diligent counsel might overlook a non-obvious error. Why isn't she more deserving of a second bite at the apple? And the answer is not that plain errors are inherently more prejudicial because other Rule 52(b)

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[8] U.S. Br. at 18, *Henderson v. United States*, No. 11-9307 (Oct. 2012).

[9] *Id.* at 31.

[10] *Id.* at 28-29 (quoting Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 958 (2006)).

[11] *Id.* at 31 (quoting Heytens, 115 Yale L.J. at 958).

requirements capture that concern. The plainness requirement must serve a different purpose.

The Supreme Court explained that purpose in *United States v. Frady*,[12] where it stated that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it."[13] In other words, we are willing to overlook defense counsel's failure to lodge a timely objection when the other officers of the court should have stepped in and corrected the error. Failure to do so jeopardizes "the integrity of the proceedings."[14] When the error was not clear and obvious – where "the trial judge and prosecutor were [*not*] derelict in countenancing it" – the contemporaneous-objection rule applies with full force. The plainness requirement, so understood, serves its purpose only when the error was plain at *the time of trial*.

Based on those arguments and others, the United States should have prevailed in *Henderson*. It did not. By a 6-3 vote, the Court held that "as long as the error was plain as of . . . the time of appellate review[,] the error is 'plain' within the meaning of [Rule 52(b)]."[15] My hypothesis is that if this were the first time the Court addressed the "at what time must the error have been plain" issue, it would have ruled for the Government. But it was not the first time. And that takes us to *Johnson v. United States*, decided in 1997 and reverberating far into the future.

Johnson

The United States prosecuted Joyce Johnson for perjury. At the time of her trial, circuit precedent held that the judge, not the jury, decided the element of the materiality of the false statement. Johnson's jury was instructed to that effect; and her counsel did not object. After she was convicted, the Supreme Court held in *United States v. Gaudin*[16] that the materiality of a false statement must be submitted to the jury. Johnson,

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[12] 456 U.S. 152 (1982)

[13] *Id*. at 163.

[14] U.S. Br. at 33, *Henderson*, *supra*.

[15] 133 S. Ct. at 1124-25.

[16] 515 U.S. 506 (1995).

naturally enough, asked the Eleventh Circuit on direct appeal to reverse her conviction based on *Gaudin*. This presented a tricky plain-error issue.

The district court did the right thing; it complied with circuit precedent. Any error was obviously not plain then. Nor can one fault counsel for not objecting, given that the law was settled in favor of the court's action. Yet by the time of appeal, we know the district court actually committed legal error. In that situation, was the trial court's error "plain" for purposes of Rule 52(b)? Note the contrast with the "special case" *Olano* noted and *Henderson* addressed. The "special case" occurs when the law was *unsettled* as of trial, but became settled by the time of appeal; *Johnson* involved a legal rule that was seemingly *settled* as of trial but proven to be wrong by the time of appeal.

The United States in *Johnson* asked the Court to take the long view and consider *both* situations. Specifically, the United States argued that "[t]he need to enforce the contemporaneous-objection rule is at its zenith in the 'special case' identified in *Olano*: where the governing law is simply unclear at the time of trial."[17] And it contended that "nothing in the text of Rule 52(b) contemplates or permits [a] distinction" between the "special case" of unsettled law and the instant case involving settled (but later held to be wrong) law.[18] Thus, even if policy considerations supported allowing someone in Johnson's shoes to appeal, the Court should not go down that road. In the end, though, the Court focused only on the situation at hand and held by an 8-0 vote that an error is "plain" "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." (Justice Scalia did not join this portion of the opinion.)

The Court devoted a mere two paragraphs to the issue. In the decisive second paragraph, the Court did not cite the language of Rule 52(b) or the purpose of the requirement that an error be "plain." The Court instead ruled on policy grounds. Under the Government's view, Johnson "should have objected to the court's deciding the issue of materiality, even though near-uniform precedent both from this Court and from the Courts of Appeals held that course proper." That makes little sense. As Johnson argued, "such a rule would result in counsel's inevitably making a long and virtually

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[17] U.S. Br. at 31-32, *Johnson v. United States*, No. 96-203 (Jan. 1997)

[18] *Id*. at 33.

useless laundry list of objections to rulings that were plainly supported by existing precedent." Accordingly, held the Court, "in a case such as this . . . it is enough that an error be 'plain' at the time of appellate consideration."[19]

Note the language the Court used: "in a case such as this." The Court was therefore not purporting to decide a case that is *not* like "this" – such as the "special case" noted in *Olano* and addressed in *Henderson*. And yet, as we'll see, for all intents and purposes, *Johnson* did decide that issue.

Henderson, Part 2

Now we can return to *Henderson*. Why did the Court reject the United States' powerful arguments and hold instead that an error is "plain" under Rule 52(b) when the law was unsettled at the time of trial and only made clear while the case was on appeal? The answer, I submit, is *Johnson*.

The Court noted the United States' contention that the purpose of the plainness requirement "is to ensure the integrity of the [trial] proceedings" and to capture only cases where "a competent district judge should be able to avoid [the error] without benefit of objection." It found, however, that that "approach runs headlong into *Johnson*. The error in *Johnson* was not an error that the District Court should have known about at the time. It was the very opposite[.]" Continuing, the Court said that "*Johnson* makes clear that plain-error review is not a grading system for trial judges."[20]

The Court soon turned to the Government's textual argument: that Rule 52(b) speaks in terms of a "plain error" that "was not brought to the [trial] court's attention." The Court declined to grapple with it, stating that "[w]hatever the merits of this textual argument, . . . *Johnson* forecloses it. The error at issue in that case was not even an error, let alone plain, at the time when the defendant might have 'brought [it] to the court's attention.' Nonetheless, we found the error to be 'plain error.' We cannot square the Government's textual argument with our holding in that case."[21]

Prior to responding to the United States' arguments, the Court made its affirmative case for reading Rule 52(b) as assessing plainness only as of the time of appeal. Even there, *Johnson* played a key role. The Court explained

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[19] *Johnson*, 520 U.S. at 467-68 (footnote omitted).

[20] *Henderson*, 133 S. Ct. at 1129 (internal citations and quotation marks omitted).

[21] *Id*. at 1130.

that, "[g]iven *Johnson*, a 'time of error' interpretation would prove highly, and unfairly, anomalous." That is because in the wake of *Johnson*, Rule 52(b)'s "words 'plain error' cover both (1) trial court decisions that were plainly correct at the time when the judge made the decision and (2) trial court decisions that were plainly *in*correct at the time when the judge made the decision." Why, then, "should they not also cover (3) cases in the middle – *i.e.*, where the law at the time of the trial judge's decision was neither clearly correct nor incorrect, but unsettled?" They should, the Court concluded, for "[t]o hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals."[22]

That would have been a far more complicated argument to make had *Johnson* not yet been decided. Beyond that, the Court's reasoning amounted to question begging. Whether defendants in those three situations are "similarly situated" for purposes of the plain-error rule was the fundamental issue in the case. The Court insisted they are because "[a]ll three defendants suffered from legal error; all three failed to object; and all three would benefit from the new legal interpretation."[23] True, but as Justice Scalia noted in his dissenting opinion, only the second situation – where the trial court's ruling was plainly incorrect when made – involves "the classic case for plain-error reversal" because "the trial court should have known that law, and hence the raising of the point by counsel should not have been needed."[24] That was precisely the United States' argument – an argument the Court rebutted principally by stating that it cannot be reconciled with *Johnson*.

Reflections

I cannot prove *Henderson* would have come out differently had the Court addressed it before *Johnson*, not after it. Perhaps it would not have. Justice Breyer's opinion for the Court in *Henderson* casts "the basic purpose of Rule 52(b)" as "the creation of a fairness-based exception to the general requirement that an objection be made at trial."[25] When fairness is the driving principle anything is possible, particularly when the question is

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[22] *Id*. at 1127.

[23] *Id*. at 1128.

[24] *Id*. at 1134 (Scalia, J., dissenting).

[25] *Id*. at 1129.

whether to allow defendants to assert errors that (to satisfy the third *Olano* prong) were prejudicial.

Still, *Johnson* played a key role in *Henderson* by allowing the Court to sidestep the United States' strongest arguments. The text? See *Johnson*. The purpose of the contemporaneous-objection rule? See *Johnson*. The purpose of the plainness requirement? See *Johnson*. That didn't leave any room for the United States' position to prevail – even though *Johnson* said it was *not* resolving this issue. Maybe the Government's textual and purpose-based arguments would not have been enough to sway Justice Breyer. But they likely would have swayed Chief Justice Roberts and Justice Kennedy, at the least.

Now let's imagine a world in which the Court heard *Henderson* first, and ruled for the Government. This imaginary opinion held that an error must be plain "both at the time of forfeiture and at the time of review,"[26] and that an error is therefore not "plain" under Rule 52(b) when the law was unsettled at the time of trial. But the opinion included a footnote saying it was not resolving whether the same result would obtain "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal" based on an intervening Supreme Court ruling. The Court then takes up that unresolved issued some years later in a case called *Johnson*. How does the Court decide *Johnson* in this imaginary world?

Perhaps the same way as in our world. Even Justice Scalia's dissent in (real-world) *Henderson* acknowledged that *Johnson* involved a "unique context" in which an objection "would be futile" and "would therefore disserve efficiency." In "that narrow class of cases," Justice Scalia concluded, "a time-of-appeal rule promotes both the fairness and efficiency concerns of" the contemporaneous-objection rule.[27]

On the other hand, imaginary-world *Johnson* would have had to deal with the prior ruling in imaginary-world *Henderson*. And *that Henderson* held that when Rule 52(b) refers to plain error, it means plain both as of the time of trial and appeal. Just as real-world *Johnson* rebutted the key Government arguments in *Henderson*, so might the imaginary-world *Henderson* have rebutted the key defense arguments in *Johnson*. Sure, the policy concerns discussed by Justice Scalia are strong. But as the Court has

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[26] U.S. Br. at 18, *Henderson, supra*.

[27] *Henderson*, 133 S. Ct. at 1133 (Scalia, J., dissenting).

long held, a statute's language should be interpreted consistently across its applications.

Would both *Henderson* and *Johnson* have come out differently if they came to the Court in reverse order? We will, of course, never know. I think *Henderson* would probably have come out differently; and *Johnson* might have. If that is true, it should give us pause.

ANTICIPATING THE NEXT CASE

The Court is not blind to the risks of path dependence. The Justices are keenly aware that their decisions have ripple effects, societal and jurisprudential. And they are specifically aware that how they interpret a statute constrains how they can interpret it in future cases involving different facts. So what do they do about that?

For starters, the Court asks hypothetical questions at oral argument. As Justice Scalia put it, "I want to know how this principle of law works out in other situations. You tell me it produces a happy result here. Well, that's fine and good, but what about all of these other situations?"[28] Any advocate who has argued before the Court knows this is not just talk. At virtually every argument, the Justices relentlessly probe the implications of counsel's position, testing whether the proposed rule or interpretation sensibly applies when the facts are changed.

What happens when counsel proposes a rule or interpretation that "produces a happy result here" but produces a less-than-happy result in "these other situations"? The Court has two general options, the choice of which makes path dependence more or less likely. Sometimes, as in *Johnson*, the Court reserves the answer to the "other situation."[29] As shown above, that approach creates the risk that the order in which the Court addresses the different situations will determine the outcome of the cases.

The Court's other option is to take "other situations" into account when construing the statute. In *Clark v. Martinez*,[30] the Court insisted this

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[28] *Interviews with United States Supreme Court Justices*, 2010 The Scribes Journal of Legal Writing 51, 77 (Bryan Garner interview with Justice Scalia).

[29] Another recent example where the Court reserved the elephant in the room is *Magwood v. Patterson*, 561 U.S. 320, 342 (2010).

[30] 543 U.S. 371 (2005).

is its usual course. As Professor Jonathan Siegel helpfully put it, the case turned on the following question: Where "a statute takes the form, 'if (A or B), then C,' must C have the same meaning in cases involving A as in cases involving B?"[31] *Martinez* said yes, even where the Court had previously given C a particular meaning – in a case involving A – based on constitutional concerns not present in cases involving B. (Got that?) The Court broadly announced that

> when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court.[32]

The Court issued a similar proclamation, albeit in a footnote and after it had already construed the disputed statute, in *Leocal v. Ashcroft*.[33] *Leocal* interpreted what some have dubbed a "hybrid statute": a statute that prohibits certain conduct and imposes both civil and criminal sanctions for violations (usually in separate subsections). These statutes create an interpretative conundrum when the substantive rule is ambiguous because the "remedial" civil context might call for broadly construing the substantive prohibition, while the rule of lenity that applies in the criminal context might call for a narrow construction. *Leocal* involved 18 U.S.C. § 16, which defines the term "crime of violence" and has "been incorporated into a variety of statutory provisions, both criminal and noncriminal." The case arose in a civil context, deportation. The Court explained, however, that "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."[34]

Path dependence is not a problem when the Court follows the *Martinez* approach to the letter. That approach *demands* that the Court assess other applications not before it, and requires that the "lowest common denomi-

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[31] Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 Tex. L. Rev. 339, 339-40 (2005).

[32] *Martinez*, 542 U.S. at 380-81.

[33] 543 U.S. 1 (2004).

[34] *Id*. at 7, 12 n.8.

nator, as it were, must govern"[35] – *i.e.*, the interpretation that works best for *all* anticipated applications, not just the one before the Court. But can the Court realistically apply the *Martinez* approach to the letter, and take into account all "the necessary consequences of its choice"? And even if it could, are there independent reasons why it should not?

CAN THE COURT SOLVE THE TIMING PROBLEM?

Martinez has not proven to be a groundbreaking statutory-construction decision. The Court occasionally cites it, but has not expressly reaffirmed *Martinez*'s "lowest common denominator" rule, which would force the Court to "consider the necessary consequences of its [interpretive] choice."[36]

That's not surprising. There is simply no practical way by which the Court, when resolving a case, can account for all possible future situations involving the same provision. Nor, given Article III's bar on advisory opinions, *could* the Court definitively rule on all scenarios that might arise in the future and involve parties not presently before it. The Court, out of necessity, will continue to reserve issues.

That said, I believe the Court can take steps to minimize the chances that its interpretation of a provision will depend on the fortuity of litigation timing. First off, the Court can reaffirm *Martinez*'s pronouncement that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice" – even when those consequences include "problems" that do not "pertain to the particular litigant before the Court."[37] That does not mean the Court must consider *every* potential "consequence[] of its choice." But the Court should abide by the spirit of *Martinez*'s pronouncement and take future scenarios into account where possible.

It is most possible when a party specifically argues in its briefing that the rule proposed by the opposing side would produce a serious problem in a specific different situation. The United States did just that in *Johnson*. The Court should have considered the "consequences of its choice" on the

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[35] *Martinez*, 543 U.S. at 380.

[36] *Ibid*.

[37] *Id*. at 380-81.

situation raised by the United States (namely, the *Olano* "special case") as a check on the interpretation it was considering adopting.

The Court, without citing *Martinez*, has shown itself capable of employing this forward-looking approach in recent years. Examples include:

- *Lozman v. Riviera Beach* (in determining whether a floating home is a "vessel" within the meaning of 1 U.S.C. § 3, thus triggering federal maritime jurisdiction, the Court expressed concern that the lower court's rule would make "a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, [or] a door taken off its hinges" subject to federal maritime jurisdiction);[38]
- *Dan's City Used Cars, Inc. v. Pelkey* (in assessing whether federal law preempts "state-law claims stemming from the storage and disposal of a car," the Court explained that petitioner's argument would produce the unlikely result that state and local zoning laws were preempted);[39]
- *Gobeille v. Liberty Mutual Ins. Co.* (in holding that ERISA preempts a state law "requiring disclosure of payments relating to health care claims," the Court expressly distinguished "a state law, such as a tax on hospitals, the enforcement of which necessitates incidental reporting by ERISA plans").[40]

As those cases show, this approach does not raise Article III concerns. Rather, as *Martinez* explained, when a litigant points to a proposed rule's impact on others, "he is not attempting to vindicate the [ ] rights of others, . . .; he seeks to vindicate his own *statutory* rights."[41] He does so by prodding the Court to adopt a rule that works across applications – that is, a rule that does not depend on the happenstance of timing.

A second way the Court can minimize the impact of litigation timing is by flexibly applying the presumption that words be given the same meaning across a statute and its applications. The presumption is sound, and no Justice disputes its general validity. The Court has nonetheless held that

[38] 133 S. Ct. 735, 740 (2013).

[39] 133 S. Ct. 1769, 1775, 1780 (2013).

[40] 136 S. Ct. 936, 940, 946 (2016) (internal citation omitted).

[41] *Martinez*, 543 U.S. at 382.

the presumption is not "rigid" and "readily yields" to context.[42] For example, in *Robinson v. Shell Oil Co.*,[43] the Court held that the term "employee" includes former employees in some sections of Title VII of the Civil Rights Act of 1964 but not in other sections – even though Title VII defines "employee" act-wide in 42 U.S.C. § 2000e(f). The Court should recognize that preventing "litigation timing fortuity" is a context that can justify rebutting the presumption of consistent usage.

A "realist" might argue that I'm being naïve: The Court decides the second of two interrelated cases based not on the inherent logic of the first case but on the other motivations I noted at the outset, *e.g.*, ideology, political agenda, empathy, etc. If the first case's reasoning helps produce the result a Justice wants in the second case, he or she will rely on it. If it produces a result the Justice doesn't like in the second case, he or she will distinguish the first case – for Justices are remarkably skilled at distinguishing precedents they don't like. Further, most decisions are based on multiple grounds, not all of which will apply in the next case. This gives Justices room to maneuver.

That all may be true – sometimes. But as Justice Kagan reportedly remarked, lower-profile cases that do not involve divisive issues where ideology trumps everything else – cases such as *Johnson* and *Henderson* – are "where you can persuade each other and you can find a greater answer than anyone could see at the beginning."[44] Precisely for that reason, the Justices are more likely to apply a relevant precedent for all (or most of) its worth. The Justices therefore need to be aware of the risk of path dependence and take care to prevent it. If that requires deciding more and reserving less, so be it. Judicial minimalism is not always a virtue.

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[42] *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

[43] 519 U.S. 337 (1997).

[44] Tal Kopan, *Elena Kagan talks diversity and (dis)agreement on the Supreme Court*, Politico.com (Dec. 14, 2012) (describing Justice Kagan's speech at Washington D.C.'s Sixth and I Historic Synagogue the day before).