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SPECIAL JUSTIFICATIONS

SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT. By Randy J. Kozel.[1] Cambridge University Press. 2017. PP. x + 180. $99.99 (hardcover), $34.99 (paper).

Randy J. Kozel[2]

INTRODUCTION

In *Settled Versus Right: A Theory of Precedent*, I examine the role of precedent in judicial decisionmaking. The book considers the dynamics of precedential strength, meaning the showing that needs to be made in order to rebut the presumption of deference to precedent. It also addresses the contours of precedential scope, which define the universe of propositions for which a precedent stands as binding authority.[3] In discussing both concepts, I try to illustrate the ways in which the role of precedent is influenced by broader perspectives on legal theory and interpretation. I also offer some thoughts about how an institution like the U.S. Supreme Court might pursue a consistent, unified doctrine of stare decisis even as its members—past and present—adopt very different interpretive philosophies.

The insightful contributions to this Symposium provide an occasion to elaborate upon the book's account of precedent, especially as it relates to the necessary conditions for overruling a flawed decision. The Supreme Court commonly considers whether there is a "special justification" for departing from

1. Diane and M.O. Miller II Research Professor of Law and Associate Dean for Faculty Development, Notre Dame Law School.

2. For helpful comments and conversations, I am grateful to the participants in this Symposium as well as Akhil Amar, Samuel Bray, Richard Garnett, and Jeffrey Pojanowski.

3. For a concise and helpful introduction to debates over precedential scope, see Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 458 (2018) (summarizing the "ratio decidendi view," the "legally salient facts account," and the "predictive theory").

precedent.[4] Yet there is considerable uncertainty about how the idea of a special justification should be understood.

In this Response, I draw on the existing law of special justifications and compare it with the revised approach I defend in *Settled Versus Right*.[5] That revised approach is designed to separate the question of overruling from deeper disagreements about legal interpretation. The hope is to establish stare decisis as a unifying force that enhances the impersonality and continuity of the Court and of the law, promoting values the Justices have described as fundamental. The Response—again prompted by the enlightening Symposium contributions—also steps back to consider the process by which the law of precedent might undergo changes of its own. And I close with some preliminary thoughts about the implications of treating stare decisis as a step on the way to somewhere else, an idea captured in different ways by various contributors' references to "provisional" law,[6] "nonideal" constitutional theory,[7] and the search for answers that are "right for now."[8]

Before turning to these matters, I wish to express my profound gratitude to the organizers of and participants in this Symposium: Paul Horwitz, Corinna Barrett Lain, Allison Orr Larsen, Kurt Lash, Jason Mazzone, Stephen Sachs, Frederick Schauer, and Lawrence Solum. These are scholars for whom I have the utmost admiration, and it is impossible to overstate how honored I am by their willingness to take part. Their Reviews

4. *E.g.*, Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018); Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401, 2409 (2015); Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2408 (2014); Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 2036 (2014); Alleyne v. United States, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 413 (2010); Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). The phrase often carries a citation to *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification."). As noted below, the Court used the phrase "special reason" to convey a similar idea in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992).

5. Throughout this Response, I will focus primarily (though not exclusively) on the Supreme Court's treatment of its constitutional decisions.

6. Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 419 (2018).

7. Solum, *supra* note 3, at 463.

8. Corinna Barrett Lain, *Mostly Settled, But Right For Now*, 33 CONST. COMMENT. 355, 371 (2018).

illuminate numerous dimensions of precedent while opening up promising avenues for future inquiry, and it is a privilege for me to be along for the ride.

I. SPECIAL JUSTIFICATIONS IN EXISTING LAW

The Supreme Court frequently reminds us that overrulings should not occur in the absence of a special justification. The Court occasionally adds that such a justification means something more than disagreement with a prior opinion. It made this point in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, stating that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[9] As Justice Scalia wrote in a statutory case a few years after *Casey*:

> The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of "an arbitrary discretion in the courts" is restrained. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).[10]

Like Justice Scalia's discussion, the Court's recent reminders that an overruling requires more than disagreement have occurred outside the constitutional context, though it has framed those discussions in general terms.[11]

The *Casey* Court described its understanding of special justifications as having been "repeated in our cases."[12] Yet its only citations were to dissents,[13] and Akhil Amar has disputed the accuracy of the Court's historical claim in light of major cases such

9. 505 U.S. at 864.

10. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (quoting THE FEDERALIST No. 78 (C. Rossiter ed. 1961)) (citation omitted). For Justice Scalia, the qualifying reason in *Hubbard* was "the demonstration, over time, that [the relevant precedent] has unacceptable consequences, which can be judicially avoided (absent overruling) only by limiting [the precedent] in a manner that is irrational or by importing exceptions with no basis in law.").

11. *E.g., Halliburton*, 134 S. Ct. at 2407 ("Before overturning a long-settled precedent . . . we require 'special justification,' not just an argument that the precedent was wrongly decided.") (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)). For a recent dissent (signed by four Justices) taking this position in a constitutional case, see Justice Kagan's opinion in *Janus*, 138 S. Ct. at 2497.

12. 505 U.S. at 864.

13. *See id.*

as *West Virginia State Board of Education v. Barnette*,[14] in which overrulings were "based simply on the belief that the prior case was wrongly decided."[15] Beyond issues of historical lineage, questions also remain as to what a special justification entails under the modern doctrine of stare decisis.

In this Part, I examine two possible conceptions of special justification under existing law. The first requires the showing of some additional problem independent of disagreement with a decision on the merits. The second, developed by Professor Amar, defines the concept in a more negative sense: there is a special justification for overruling so long as a flawed precedent has neither commanded substantial reliance nor been effectively ratified by the people through their widespread embrace.

A. SPECIAL JUSTIFICATION AS PRESENCE OF ADDITIONAL PROBLEM

The Supreme Court's discussions of stare decisis often compare the present state of the world with the conditions that existed when the relevant precedent issued. For example, the Court might ask whether material facts have changed[16] or whether a decision has shown itself to be procedurally unworkable.[17]

Incorrect factual premises and procedural snags are problems quite apart from the disagreement of today's Justices with the rationale of yesterday's decision. Focusing on these types of factors supports a vision of special justifications as requiring an affirmative showing beyond disapproval of a decision on the

14. 319 U.S. 624 (1943).

15. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 235 (2012). Professor Amar also cites several other twentieth-century cases as illustrating the same point.

16. *E.g., Casey*, 505 U.S. at 855; *cf.* Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (describing "changes in technology and consumer sophistication" as justifying the reconsideration of precedent); FCC v. Fox Television Stations, Inc., 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring in the judgment) ("In my view, [the relevant precedent] was wrong when it issued. Time, technological advances, and the [Federal Communications] Commission's untenable rulings in the cases now before the Court show why [the precedent] bears reconsideration."); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 533 (2009) (Thomas, J., concurring) ("[E]ven if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time [when the relevant precedents issued], dramatic technological advances have eviscerated the factual assumptions underlying those decisions.").

17. *E.g.*, Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2481 n. 25 (2018) (stating that a precedent's poor reasoning "*is* a reason to overrule it"); Montejo v. Louisiana, 556 U.S. 778, 792 (2009).

merits. Some additional criterion must be satisfied in order to establish the prima facie case for disrupting settled law.

Yet the Supreme Court has not stopped there. It has also treated a precedent's flawed reasoning as relevant to the stare decisis calculus.[18] This presents a puzzle for the view of special justifications as requiring an additional problem beyond disagreement, because reasoning and disagreement are so closely related. Saying that a decision is poorly reasoned would seem to overlap to a significant extent with saying that it is incorrect.[19] The overlap is difficult to explain if disagreement with a precedent is insufficient to overrule it. The question becomes how weak reasoning can be a special justification in itself, as opposed to a condition that triggers the stare decisis inquiry and starts the search for some further problem such as a mistaken or outmoded factual premise, a procedural flaw, and so on.

A potential response is found in the work of Caleb Nelson, who provides a conceptual and historical defense of the practice of singling out the most glaring judicial errors for special treatment.[20] Under this approach, a precedent is subject to overruling if it is obviously wrong, but not if it is a close call. The special justification is the presence of a clear error as compared with a less egregious mistake.[21] Mere disagreement with a precedent is not enough to overrule it. But a decision that is *clearly* erroneous contains its own basis for departure.

B. SPECIAL JUSTIFICATION AS ABSENCE OF COUNTERVAILING CONSIDERATION

Professor Amar provides a different account of the Supreme Court's insistence on a special justification for overruling in constitutional cases. He contends that, while past decisions are properly given "a rebuttable presumption of correctness," the Court's overruling practice throughout the twentieth century supports the proposition that "absent certain special countervailing considerations . . . today's Court may properly

18. *E.g.*, *Citizens United*, 558 U.S. at 363; *Montejo*, 556 U.S. at 792–93.

19. *Cf. Citizens United*, 558 U.S. at 409 (Stevens, J., concurring in part and dissenting in part) (contending that the evaluation of a precedent's reasoning is a "merits argument").

20. *See* Caleb E. Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 4 (2001).

21. *See id.* at 7.

overrule yesterday's case simply because today's Court believes the old case incorrectly interpreted the Constitution."[22]

As for those countervailing considerations, they take two forms. First, a decision that initially was erroneous "may in some situations stand if the precedent is later championed not merely by the Court, but also by the people."[23] The initial tension between the decision and the Constitution is alleviated, "consistent with the document's emphasis on popular sovereignty."[24] Second, the Justices should "give due weight to the ways in which litigants who come before the Court may have reasonably relied upon prior case law."[25] Reliance interests "limit the Court's ability to abruptly change course, even if persuaded of past error."[26]

Professor Amar's theory harmonizes the Supreme Court's statements about special justifications with its apparent willingness to overrule certain decisions based on disagreement with their rationales. If we view the need for a special justification as demanding not the presence of an additional problem but rather the absence of a countervailing consideration, there is no inconsistency in the Court's statements of commitment to stare decisis even while it treats disagreement with a prior decision as a sufficient basis for departure. Such an understanding, Professor Amar concludes, "puts precedent in its proper place" as determined by the Constitution's text and structure and as informed by the Court's historical practice.[27]

II. SPECIAL JUSTIFICATIONS AND SECOND-BEST STARE DECISIS

The previous Part discussed two potential ways of understanding the role of special justifications in existing law. In this Part, I describe a third approach that is overtly prescriptive. This approach, which is the one I develop in *Settled Versus Right*, urges a revision meant to better promote values of impersonality and continuity—values that are salient in the Supreme Court's discussions of precedent. I refer to this theory as *second-best stare*

22. AMAR, *supra* note 15, at 234–35.
23. *Id.* at 238.
24. *Id.*
25. *Id.* at 239.
26. *Id.*
27. *Id.* at 241.

decisis, a term meant to suggest that the rules of precedent must respond to the challenges posed by our world of disagreement over the proper ends and means of constitutional interpretation.

A. PRECEDENT AND IMPERSONALITY

Deferring to precedent underscores the importance of impersonality and the nature of the Supreme Court as an enduring institution. In 1986, the Court described stare decisis as "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion."[28] Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals[.]"[29] The aspiration is to "contribut[e] to the integrity of our constitutional system of government, both in appearance and in fact."[30] As Justice Stewart wrote in a dissent that the Court would quote in *Casey*, "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government."[31] Justice Harlan's dissent in *Mapp v. Ohio*, which *Casey* also cited, likewise rejects the idea that "mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law."[32]

The doctrine of stare decisis is not only, or even mainly, about appearances. As Professor Larsen notes, "What hangs in the balance of the precedent debate is more than just an approval rating for the Justices in a national poll."[33] It is the Court's ability to pursue the ideal of impersonality through its operations. Stare decisis promotes "public faith in the judiciary as a source of impersonal and reasoned judgments" by helping those judgments to be genuinely impersonal and reasoned.[34] That explains the Court's description of stare decisis as "a basic self-governing

28. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

29. *Id.*

30. *Id.* at 265–66.

31. Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); *see also id.* ("No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.").

32. Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting).

33. Allison Orr Larsen, *Supreme Court Norms of Impersonality*, 33 CONST. COMMENT. 373, 375 (2018).

34. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

principle within the Judicial Branch."[35] More recently, the Court added that stare decisis "is a foundation stone of the rule of law."[36] And Chief Justice Roberts made a similar point in his concurrence in *Citizens United v. FEC*, which noted that the "greatest purpose" of stare decisis is "to serve a constitutional ideal—the rule of law."[37] Fidelity to precedent both ensures and demonstrates that the Constitution binds judges and Justices just as it does other citizens.[38]

The importance of impersonality is reinforced by examining other practices of the Supreme Court, several of which Professor Larsen draws together in her Review. Prominent among them is the Justices' practice of referring to prior decisions in terms of what "We held," a reminder of the Court's identity as a continuous institution.[39] As Professor Larsen puts it, "Every time a Justice writes the word 'we' instead of 'I' he is subtly enforcing—to himself as well as to others—that the enterprise of Supreme Court decision-making is a collective one."[40] Not every Supreme Court custom works this way; as Professor Larsen recognizes, the proliferation of separate opinions shifts the focus to individual Justices, as do discussions of "self stare decisis" that emphasize the substance of a particular Justice's jurisprudence.[41] Nevertheless, much of how the Court conducts itself is consistent with a desire to highlight the institution over the individual. As Chief Justice Roberts has stressed, every Justice "should be worried about the Court acting as a Court and functioning as a Court."[42]

35. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

36. Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 2036 (2014).

37. *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

38. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) ("A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law."); *id.* ("Even when the prior judicial resolution seems plainly wrong to a majority of the present Court, adherence to precedent can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a 'law which binds [it] as well as the litigants.'") (quoting ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 50 (1976)).

39. References to "this Court" and "the Court" are also common.

40. Larsen, *supra* note 33, at 378; *see also id.* (noting that "when an opinion is announced it is styled not as 'the majority opinion' but as 'the opinion of the Court'").

41. *Id.* at 381.

42. Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC (Jan./Feb. 2007).

A commitment to impersonality is itself a personal choice, as Professor Horwitz explains.[43] He considers why an individual Justice might make that choice and concludes that the answer is found in the "troika" of office, honor, and oath.[44] Professor Horwitz reminds us that each Justice "faces an indefeasible obligation to reflect on what the judicial office and judicial duty demand and to follow that vision faithfully."[45] Drawing on his analysis, I might add that a Justice who concludes that impersonality is the proper touchstone faces further questions about how to put her commitment into practice. A Justice who is committed to, say, bringing the law in line with the Constitution's original meaning can decide cases impersonally even if her choices lead her to vote to overrule applicable precedents. But fidelity to precedent is unique in promoting a particular kind of impersonality, one that reduces institutional variability within the Court notwithstanding the Justices' disagreements about the nature of constitutional interpretation. That is how the doctrine of stare decisis can transform a group of impersonal Justices into an impersonal Court.

B. PRECEDENT AND PLURALISM

One point I emphasize in *Settled Versus Right* is that if stare decisis is to promote impersonality by serving as a bridge between interpretive schools, debates over the role of precedent need to be kept separate from disagreements about the merits of a decision. When applications of stare decisis end up repackaging disputes about constitutional interpretation, fidelity to precedent loses its ability to draw together Justices with varying approaches to the Constitution. A shared commitment to precedent no longer carries the prospect of transcending interpretive and methodological divides. The doctrine sacrifices its force as what Professor Schauer calls a "second-best coordinating device for achieving legal consistency against the background of disagreements . . . ."[46]

43. Paul Horwitz, *The Constitutional Marriage of Personality and Impersonality: Office, Honor, and the Oath*, 33 CONST. COMMENT. 343 (2018).

44. *Id.* at 347.

45. *Id.* at 352.

46. Frederick Schauer, *On Treating Unlike Cases Alike*, 33 CONST. COMMENT. 437, 441 (2018).

In response to this concern, I offer a revised, second-best doctrine of stare decisis. The premise of second-best stare decisis is that some considerations that might be relevant to the durability of precedent in a world of interpretive harmony should be consciously disregarded in a world of interpretive pluralism, by which I mean pervasive disagreement about constitutional theory and methodology. The factors to be excluded are the ones that present the greatest risk of getting tangled up with disputed matters of interpretive philosophy. Stripped of those factors, the revised doctrine revolves around considerations whose content does not depend on the interpretive approach that a given Justice adopts.

1. Facts and Procedure

I noted above that the Supreme Court has treated changed facts as an adequate reason for reconsidering precedent. Second-best stare decisis takes the same approach, given that the analysis of factual changes can proceed independently of interpretive philosophy.

A useful illustration comes from the Court's recent decision in *South Dakota v. Wayfair, Inc.*[47] At issue was the power of States to impose tax-collection obligations on out-of-state sellers. The Court had previously interpreted the Dormant Commerce Clause as prohibiting States from imposing any such obligations on a seller with no physical presence within its borders.[48] But since the last time the Court addressed the issue in 1992, a revolution had occurred in Internet selling and consumer behavior. Returning to the issue in 2018, the Court overruled its precedents and eliminated the physical presence requirement.[49]

Whether or not one agrees with its result, *Wayfair* is a good example of a situation where factual change warranted a fresh look at precedent.[50] It does not matter whether a Justice is an originalist, a living constitutionalist, a pragmatist, or otherwise.

47. 138 S. Ct. 2080 (2018).

48. *See* Quill Corp. v. North Dakota, 504 U.S. 298 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois, 386 U.S. 753 (1967) (also finding such obligations to violate the Due Process Clause).

49. *Wayfair*, 138 S. Ct. at 2099.

50. *See id.* at 2096 (noting the Court previously "did not have before it the present realities of the interstate marketplace"); *id.* at 2097 (adding that "*Quill* was wrong on its own terms when it was decided in 1992").

Whatever her interpretive tendencies and constitutional theory, she can acknowledge that the world of Internet retailing changed markedly in the decades leading up to *Wayfair*. The implications of that change might strike different Justices in different ways, but the change itself is an adequate reason for asking whether it is time to revisit the relevant precedent.

The same goes for issues of procedural workability. Differences of opinion will continue to arise over whether certain precedents are too cumbersome to retain, but procedural workability ultimately rests on considerations that can be kept separate from interpretive philosophy. Like the inquiry into factual changes, the inquiry into procedural workability is suitable for our second-best world of interpretive pluralism.

By recognizing these types of considerations as appropriate bases for revisiting precedent, second-best stare decisis leaves room for correcting or updating certain flawed decisions. As Professor Lain notes, inquiring into factors such as a precedent's factual underpinnings "provides an important outlet for extra-legal context to find expression in the law."[51] The point of stare decisis is not to freeze judicial mistakes, but rather to make sure that change happens for the right reasons.

2. Reasoning and Effects

Not every facet of the Supreme Court's stare decisis doctrine fares as well in a second-best world of interpretive pluralism. Return to the question whether a precedent is poorly reasoned. That inquiry tends to be bound up with reactions to a precedent on the merits.[52] If originalists treat precedents that are framed in living constitutionalist terms as weakly reasoned and thus subject to overruling, and if living constitutionalists take the same approach toward originalist precedents, stare decisis loses the ability to serve as a link between interpretive schools. In a pluralistic legal culture, the perceived soundness of a precedent's

51. Lain, *supra* note 8, at 369. Professor Lain also issues some important challenges to second-best stare decisis, including in its definition of factual change. Those challenges are offered within a broader approach that accepts the use of stare decisis to "minimize . . . the discarding of precedent based on nothing more than a change in the majority Justices' views." *See id.* at 356.

52. Professor Monaghan adds that "[w]hether a precedent is seen as *clearly* wrong is often a function of the judge's self-confidence more than of any objective fact." Monaghan, *supra* note 38, at 762.

reasoning accordingly should be kept out of the stare decisis calculus.[53]

Second-best stare decisis takes a comparable approach to the analysis of a precedent's substantive effects. The examination of substantive effects is related to the evaluation of reasoning, but the two are distinct. A decision's *reasoning* might be unsound according to some theories because, for instance, it ignores the Constitution's original public meaning.[54] But the *effects* of that mistaken reasoning are a separate matter; they might include implications for the balance of governmental powers or the liberty of private persons.[55]

Some interpretive philosophies take the position that substantive effects are irrelevant to the decision whether to overrule. If a precedent's reasoning is unsupportable, a precedent is subject to overruling for that reason alone.[56] But on other theories, effects can matter, and not every judicial mistake is in equal need of overruling.

A judge or constitutional lawyer who believes that a precedent's effects should play a role in the stare decisis analysis must explain how the assessment of those effects is consistent with her broader theory of interpretation.[57] For example, Professor Lash draws on his commitment to originalism, which is grounded

53. It is possible for today's Justice to consider, irrespective of her own interpretive methodology, whether the precedent under consideration is poorly reasoned in light of its own (implicit or explicit) methodological premises. I have suggested that this sort of inquiry creates difficulties, including by asking today's Justice to draw upon an interpretive philosophy that she may view as fundamentally flawed or illegitimate (pp. 119-121).

54. *See generally* Solum, *supra* note 3.

55. *Cf.* Monaghan, *supra* note 38, at 758 ("Even an 'overriding conviction' of prior error is not enough; the precedent must have some palpable adverse consequences beyond its existence.") (footnotes omitted) (quoting Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 6 (1941)).

56. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 4 (2007) (arguing that use of a precedent in constitutional cases is permissible only if it is the result of an "honest, skilled effort that poses the right questions and tries to solve them through the right methods"); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 290 (2005) (arguing that stare decisis undermines most theories of constitutional interpretation).

57. Professor Solum reasons that such an approach is inconsistent with originalism. *See* Solum, *supra* note 3, at 462–63. My own thinking about originalism has been deeply influenced by Professor Solum's work, and I defer to him regarding the premises of originalism. I simply note that for constitutional lawyers who believe that fidelity to original meanings is compatible with deference to nonoriginalist precedents under certain circumstances, there should be coherence between the justifications for one's commitment to originalism and the determination of which flawed precedents may survive (pp. 64-67).

in considerations of popular sovereignty, to articulate a theory of stare decisis that treats judicial mistakes as in more urgent need of correction when they substantially interfere with the will of the people.[58] By comparison, if a Justice is unwilling to consider factors such as moral implications in resolving constitutional questions of first impression but is willing to consider such matters in deciding whether to depart from precedent, there must be an explanation of how her approach to precedent coheres with her broader constitutional theory.[59]

The point is that for those who believe a precedent's substantive effects to be part of the overruling calculus, there must be coherence between constitutional theory and the determination of which effects are relevant. Yet the pursuit of coherence creates challenges for the doctrine of stare decisis in a world of interpretive pluralism. If the Justices disagree about which effects of a precedent are legally relevant, and if those disagreements track their respective views about interpretation more generally, debates over stare decisis will tend to merge with debates over constitutional theory and methodology. For those who think one of the functions of stare decisis is to connect judges across time, this convergence is problematic. Second-best stare decisis responds by dispensing with the analysis of a precedent's substantive effects in most cases. Again, the goal is to refine the doctrine to better pursue ideals of impersonality and continuity.

At the same time, the second-best theory recognizes an exception. A Justice may perceive some precedents as not simply ill-advised, but extraordinarily harmful. In those cases, it is appropriate for the Justice to vote to overrule based on her own philosophy of constitutional interpretation (pp. 121-124). This exception cuts against institutional impersonality by allowing individual theories to drive departures from precedent. Nevertheless, it does so in a narrow band of cases, excluding such considerations in the lion's share. The structure of the inquiry also prevents the universe of exceptions from expanding too much; there are only so many times a Justice can credibly declare flawed decisions to be extraordinary in the harms they create. And the

58. *See generally* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437 (2007).

59. *Cf.* AMAR, *supra* note 15, at 231 ("If the touchstone here is pure practicality, it is hard to see why pure practicality cannot also be the touchstone for all issues of constitutional interpretation across the board[.]").

nature of the exception encourages candid discussion about the role of interpretive philosophy in informing the treatment of precedent, clarifying the ways in which individual theories are relevant and the ways in which they are not. As Professor Lain puts it: "[B]y creating a safety valve in the doctrine for the Justices to express their disagreement with precedent on the merits, and by limiting the relevance of those disagreements to the 'rare and exceptional situations' where the precedent is extraordinarily harmful (as opposed to just flagrantly wrong)," second-best stare decisis aims to "channel[] non-doctrinal policy preferences into a forum where they can be debated directly."[60]

* * *

It is worth pausing to note the substantial overlap between second-best stare decisis and the existing law of precedent as described in the previous Part. The second-best theory recognizes that if a precedent rests on a factual premise that was mistaken from the outset or has become untenable over time, there is a special justification for overruling—though I suggest that the conception of factual change in the Supreme Court's caselaw has sometimes been too broad (pp. 110-114). Second-best stare decisis also contends that a precedent's procedural unworkability is a valid reason for reconsidering it. Further, the theory provides that if a Justice views a precedent as extraordinarily harmful in its substantive effects, that is another reason for voting to overrule. And while second-best stare decisis maintains that deeming a precedent's reasoning to be clearly flawed is inadequate to support an overruling, the theory does not go so far as to accord deference to decisions that "undisputedly misconstrue clear constitutional text," for example by reading "two Senators" to mean "five Senators."[61]

Likewise, second-best stare decisis acknowledges the value of adherence to precedent when the Constitution's meaning is unclear (pp. 165-169) and when the prior Court "did not err in interpreting the Constitution, but merely chose a suboptimal set

60. Lain, *supra* note 8, at 367.

61. Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 821 (2018); *see also* p. 121 (noting that no deference is appropriate if "a Supreme Court opinion . . . cross[ed] into the realm of illegitimacy, for instance because it was written by a justice who expressly ignored the relevant enactments and ruled based on personal affinity or a flip of the coin").

of implementing sub-rules that nonetheless fell within the range of plausible implementations."[62] Finally, the theory holds that a decision's impact on reliance expectations can warrant its preservation despite its flaws (pp. 116-118).

The central difference between second-best stare decisis and the existing doctrine is the former's exclusion of certain considerations based on their entanglement with fundamental interpretive debates. To enable precedent to serve as a bridge between Justices within a system marked by interpretive disagreement, second-best stare decisis makes certain accommodations to establish the doctrine's independence from disputes over constitutional theory.

III. CHANGING THE LAW OF CHANGE

As Professor Sachs rightly observes, my theory of second-best stare decisis is "openly revisionary, rather than merely trying to capture our existing legal practice (including our practice of precedent)."[63] That holds true regardless of whether the Supreme Court's statements about special justifications are best understood as requiring an additional problem beyond disagreement on the merits, or rather the absence of a countervailing consideration such as reasonable reliance.

In *Settled Versus Right*, I explain why a Justice might consider adopting second-best stare decisis as a theory of precedent. I devote less attention to the theory's constitutional underpinnings, for the simple reason that the lawfulness of stare decisis, even in constitutional cases, is well established in the Supreme Court's jurisprudence.

But Professor Sachs raises an important point: He notes that the doctrine that seemingly enjoys acceptance at the Supreme Court is "the existing one," without the revisions I suggest.[64] A question thus arises as to whether the second-best version I defend would alter the lawfulness of the doctrine of stare decisis.

I do not think it would. Within constitutional bounds, to which I will turn in a moment, I am inclined to view the doctrine

62. AMAR, *supra* note 15, at 234; *cf.* Nelson, *supra* note 20, at 5 (analyzing the role of stare decisis within the realm of "indeterminacy of the external sources of law that courts were supposed to apply").

63. Sachs, *supra* note 6, at 418.

64. *Id.* at 424.

of stare decisis as a set of common law rules.[65] Those rules can change from time to time.[66] As for how such changes may occur, one possibility is that they must be found in "prevailing standards" rather than brought about intentionally by the Supreme Court.[67] But I remain sympathetic to the view that the Court has the power to make intentional changes to the law of precedent, at least if those changes are designed to allow the doctrine to better achieve its objectives as the Court has described them over the years. In other words, the revision of common law rules of precedent should be informed by the goals of stare decisis as the Supreme Court has repeatedly characterized them (p. 15).[68] At the same time, the existing law of precedent should be preserved in so far as it can facilitate the achievement of those goals.[69]

There is another objection that warrants consideration. What if I am giving too much import to the Justices' statements in recent decades about the connection between impersonality and precedent? Perhaps the Justices' statements misconstrue the Court's role in the constitutional order, which entails an obligation to correct the mistakes of the past and ensure that "judges are enforcing the people's document, not their own

65. *See* Kozel, *supra* note 61, at 824. For treatments of the relationship between the rules of stare decisis and the common law, see, for example, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 168–72 (2013), and John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 505 (2000).

66. *Cf.* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 651 (1999) ("Whether or not one accepts the notion that stare decisis inheres in the judicial power conferred in Article III, the argument could certainly be made that the founding generation must have contemplated that this common-law doctrine of judicial management did not foreclose further development of the considerations that inform the decision whether to retain a judicial precedent.") (footnote omitted).

67. Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. (forthcoming 2019).

68. I am also persuaded that the doctrine of stare decisis does not itself warrant stare decisis effect. For an introduction to this argument, see pp. 171-173. This point may not matter if, for example, one believes that the existing rules of stare decisis are procedurally unworkable and that a special justification for overruling is therefore present. *Cf.* 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. 1165, 1167 (2008) (describing the current doctrine as "embarrassingly unworkable"). But we need not go so far in order to conclude that the Court has the power to revise the rules of precedent in pursuing the objectives it has articulated for the doctrine of stare decisis.

69. I take a similar approach in suggesting certain revisions to the rules of precedential scope (pp. 145-146).

deviations."[70] It may be true, the argument goes, that the Justices have been "far better at announcing the importance of precedent than they have been in actually being constrained by it."[71] But it is not the practice of stare decisis that should change; it is the parlance, including the very idea that there is any problem with personnel changes leading to overrulings by today's Court.

By way of response, I would suggest that stare decisis coheres with key features of the constitutional framework. Supreme Court Justices are insulated from electoral and official oversight; precedent furnishes a means of limiting their discretion. Supreme Court Justices are charged with interpreting a document that is specific in some respects but uncertain in others; precedent furnishes a way of filling gaps and settling questions. The Supreme Court is vested with a distinctive judicial power, distancing the work of the Justices from that of their political peers. And the Constitution does not leave the process of change exclusively to the judiciary; Article V always remains available.[72]

I do not mean to overstate the case. While Supreme Court Justices are protected from official and electoral control upon reaching the bench, the Constitution entrusts their appointment to the political branches. What is more, as Professor Amar notes, the Constitution "explicitly and self-referentially obliges all officials to swear oaths to itself, not to conceded misinterpretations of it."[73]

To my mind, the Constitution does not make plain its intentions regarding the role of judicial precedent. The best we can do is draw inferences, and not every constitutional feature points in the same direction. On balance, the view that strikes me as most consistent with the constitutional blueprint is one of essential continuity in legal interpretation. That entails a presumption of deference to prior decisions. But it does not answer the further question of what is required in order to rebut the presumption.[74]

Answering that latter question is the province of the common law of precedent. And the process of common law development is informed by the values the Supreme Court has described as

70. AMAR, *supra* note 15, at 238.
71. Schauer, *supra* note 46, at 440.
72. *See* Kozel, *supra* note 61, at 803–19.
73. AMAR, *supra* note 15, at 237.
74. *See* Kozel, *supra* note 61, at 827.

important to the doctrine, which brings us back to the depictions of continuity and impersonality as (sometimes) warranting the toleration of judicial missteps, both to protect reliance expectations and to cultivate a broader understanding of the constitutional backdrop as basically stable. Sometimes it really is most important to get the law right. But within the category of cases that do not rest on mistaken factual premises, that have been workable in procedural terms, that do not flatly contradict unmistakable constitutional text, and that do not rise to the level of extraordinary importance in their substantive effects, I suggest that continuity ought to be preserved, and I view the role of the Court within the constitutional framework as supporting that understanding.

CONCLUSION: STARE DECISIS IN THE MEANTIME?

Second-best stare decisis is founded on compromise and continuity, even in the face of reasonable grounds for charting a new course. Its backdrop is the existence of fundamental disagreements about the objectives and techniques of constitutional adjudication.

It is possible for the backdrop to change. Someday the most basic disputes about constitutional philosophy might be resolved. There would still be differences of opinion from case to case, but there would be general agreement about constitutional theory and methodology. And that agreement might eventually become so entrenched and well-accepted that a retreat would be difficult to fathom. This would not necessarily mean the end of stare decisis; even within a particular interpretive school, deference to precedent can provide significant value by, among other things, protecting reliance expectations and serving as a "mechanism[] of institutional settlement."[75] But the unique challenges posed by interpretive pluralism would fade away.

Even if one believes that various strands of American constitutional theory eventually will converge, there is still the question of what happens in the meantime. Stare decisis offers a response. Professor Schauer connects precedent with the goal of establishing "coherence or cohesiveness among various different

75. Solum, *supra* note 3, at 464.

particulars."[76] This is a laudable goal in any situation, but it is especially important during times of interpretive disagreement. A pluralistic legal culture can emphasize the individual over the institution and challenge the notion of the Supreme Court—and the law—as continuous and enduring. Stare decisis pushes back, reaffirming that the Court is "in fact discovering and bound by law."[77] The doctrine allows the Court to link its opinions together despite their inevitable differences. By ascribing "likeness" to disparate cases in this way, the Court creates a "community of decisions and community of decision-makers."[78]

We can juxtapose this conception of stare decisis as a unifying force—a conception that carries special resonance during periods of deep disagreement—against the "subprecedent" phenomenon discussed by Professor Mazzone.[79] Subprecedents, he contends, are for one reason or another "more easily ignored and easier to overturn" than other decisions."[80] Some subprecedents are narrow by design, reflecting "efforts to minimize the significance of judicial decisions, to limit their reach and power, and to curtail the work they may do in future cases."[81] These decisions resist precedential effect by seeking to stand outside the creation of a generally applicable legal rule. Yet allowing too many one-offs could put pressure on the idea of a coherent "community of decisions."[82] The doctrine of stare decisis responds by treating legal rules as continuous rather than episodic. That approach is valuable in a world of interpretive pluralism that can call into question the extent to which constitutional law transcends the moment.

There is reason to be guardedly optimistic about the ability of differently-minded Justices to rally around a commitment to precedent even if they are unable to reach agreement about constitutional theory. Justices across the philosophical and methodological spectrum have written or signed onto opinions recognizing the value of stare decisis, suggesting the plausibility

76. Schauer, *supra* note 46, at 447 (citing RONALD DWORKIN, LAW'S EMPIRE (1986)).
77. *Id.* at 452.
78. *Id.*
79. Jason Mazzone, *Subprecedents*, 33 CONST. COMMENT. 389 (2018).
80. *Id.* at 390.
81. *See id.* at 391.
82. Schauer, *supra* note 46, at 451 (footnote omitted).

of a shared commitment at a general level.[83] Equally significant is what one gives up by accepting stare decisis. Fidelity to precedent does not demand that a Justice abandon her commitment to originalism, or living constitutionalism, or anything else in cases of first impression. Instead, it asks her to mediate that commitment in certain other cases by following precedent in the absence of a special justification for overruling.[84] The doctrine makes the same request of adherents of every methodological school. Everyone gives something up, and everyone gets something in return. First and foremost is the contribution to the Court's status as an impersonal, enduring institution. Moreover, by helping to entrench stare decisis as a decisionmaking norm, a Justice increases the likelihood that the Court will defer to precedents she supports even if her preferred mode of interpretation falls out of favor.[85] Of course, a meaningful doctrine of stare decisis is not likely to be perfect from anyone's perspective. That, in a way, is the point.

Conceptualizing stare decisis as a doctrine of the meantime—as Professor Sachs puts it, "as a provisional doctrine, supplying us with stand-in answers when we're unsure of the real ones"[86]—may also affect its perceived legitimacy. For example, some commentators have challenged the consistency of stare decisis with originalism.[87] Professor Solum raises the possibility, subject to a fuller exploration of the Constitution's original public meaning, that a commitment to originalism may sometimes be compatible with fidelity to flawed precedents, if "the prior decision involved a good faith attempt to determine the original meaning of the constitutional text."[88] Still, depending on how the historical inquiry plays out, tension between stare decisis and theories like originalism may remain.

83. For a sampling, see Part II.A, *supra*.

84. *See* Amy Coney Barrett, *Precedent and Jurisprudential Agreement*, 91 TEX. L. REV. 1711, 1711 (2013) (noting that stare decisis can "mediate intense disagreements between justices about the fundamental nature of the Constitution").

85. This argument runs parallel to Michael Gerhardt's description of a "golden rule" of precedent pursuant to which the Justices "generally know from experience, training, and temperament they cannot be too disdainful of precedents or else they risk having other justices show the same, or even more, disdain for their preferred precedents." MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 79 (2008).

86. Sachs, *supra* note 6, at 418–19.

87. *See* Lawson, *supra* note 56; Paulsen, *supra* note 56.

88. Solum, *supra* note 3, at 465.

Some of the tension dissipates if we think of stare decisis as a transitional doctrine. Consider Professor Solum's argument that even if a consensus in favor of originalism were to emerge at the Supreme Court, gradual implementation might be appropriate given the justifications for originalism itself.[89] Deferring to nonoriginalist decisions would become an application of "nonideal" constitutional theory, in which stare decisis is not "the first best option" but rather "an originalist second best."[90] We can extrapolate from Professor Solum's analysis and extend his argument to other interpretive philosophies as well. Someday we might put our fundamental constitutional disagreements to rest. In the meantime, at least we have precedent.

Discussions about the virtues of competing constitutional theories continue apace, and that is a good thing. Those discussions, and the premises they reveal and refine, assist everyone from judges to lawyers to academics in understanding the contours and implications of constitutional law. Still, room remains for stare decisis. The doctrine emphasizes continuity and impersonality even as—especially as—the legal community ponders the big questions of constitutional interpretation. We will keep on disagreeing about constitutional theory for the foreseeable future, but that should not prevent us from seeking out doctrines and practices that are "right for now."[91] At base, that is the aspiration of second-best stare decisis: to deliver on the promise of impersonality and continuity even in the midst of interpretive disputes.

89. *See id.* at 461.

90. *Id.* at 464; *see also* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 309 (2008) (citing JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999)).

91. Lain, *supra* note 8, at 371.