



2014

Introduction In Precedent In The United States Supreme Court

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Introduction

Christopher J. Peters

The contributions to this volume address, from a variety of perspectives, the topic of the United States Supreme Court’s faithfulness, or lack thereof, to its own prior decisions. That topic is perennially a “hot” one in American law and legal academia, and periodically in American politics as well. It is inevitable that whenever a new prospective Justice is nominated to serve on the Court, he or she will be grilled extensively by senators about his or her views on *stare decisis*.¹

This sometimes-obsessive American focus on *stare decisis* owes much to the Court’s controversial 1973 decision *Roe v. Wade*,² which recognized a constitutional right to abortion and, in so doing, triggered a political and legal reaction that continues to this day. At least since Ronald Reagan in 1980, Republican presidential candidates routinely have pledged, overtly or obliquely, to appoint Justices who will vote to overturn *Roe*, while their Democratic counterparts have promised to nominate Justices who will uphold that decision. Requirements of judicial ethics prohibit judges from announcing ahead of time how they are likely to rule in some future case, so questioning in Court nomination hearings often employs the general issue of *stare decisis* as a proxy for the specific question of whether the nominee will vote to affirm or to overrule *Roe* (and other politically progressive Court decisions from the 1960s and 1970s).

For its part, the contemporary Court has itself confronted the question of *stare decisis* in a number of cases challenging *Roe* and other progressive decisions. Sometimes the result has been respectful of precedent (and thus frustrating for political conservatives). For example, the Court famously (or infamously, depending on one’s perspective) declined to overrule *Roe* in 1992’s *Planned Parenthood v. Casey*³—a decision much discussed in this volume—despite the recent accession

¹ From the Latin *stare decisis et non quieta movere* (“to stand by things decided, and not to disturb settled points”).

² 410 U.S. 113 (1973).

³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

to the Court of a majority of Republican-appointed Justices. And the Republican-dominated Court subsequently reaffirmed the contested 1966 decision *Miranda v. Arizona*,⁴ which required that criminal defendants be informed of their Fifth Amendment “right to remain silent” in order for confessions to be admissible against them.⁵

But the recent Court has not always been so apparently deferential to the norm of stare decisis. In some other criminal-procedure contexts, the Court has overturned its own relatively recent pro-defendant rulings.⁶ The Court also has overruled politically progressive decisions in areas such as religious freedom and, perhaps most controversially, campaign-finance legislation.⁷ And, as I and others have documented (see Friedman 2010; Peters 2008), the current Roberts Court has been especially slippery about using “stealth overrulings” (or “underrulings”) to gut precedents without formally rejecting them.

In the American legal academy, too, much recent discussion of stare decisis has its roots in *Roe*. The contemporary rise of originalism as a prominent methodology of constitutional interpretation can be traced, as an historical matter, to conservative scholars’ reaction during the 1970s and 1980s to *Roe* and other seemingly nonoriginalist decisions; and with modern originalism has come a body of theory challenging the legitimacy of stare decisis in constitutional cases.⁸ This challenge has spurred attempts by progressive defenders of these decisions to articulate justifications for precedent-following.⁹

Causally speaking, then, American debates about the Court’s use of precedent largely stem from, and tend to be overshadowed by, the political dynamics of *Roe* and other contested progressive rulings. But it would be a mistake to assume that the topic is irredeemably infused with partisan politics, or that it has only parochial significance. Whether and to what extent the Court (a) does and (b) should adhere to its own prior decisions are questions that have broad implications for gen-

⁴ 384 U.S. 436 (1966).

⁵ See *Dickerson v. United States*, 530 U.S. 428 (2000).

⁶ See, for example, *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), to hold that juries may constitutionally consider victim-impact evidence). For an extensive discussion of *Payne*, see Colin Starger’s contribution to this volume (Chapter 1).

⁷ See *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), to hold that, with some restrictions, public schools may pay public schoolteachers to teach in private religious schools); *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 130 S. Ct. 876 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), to hold that legislative restrictions on election-related spending by corporations violate the First Amendment).

⁸ On originalism as a reaction to *Roe* and other Warren Court and early Burger Court decisions, see my discussion in Chapter 9, Part 2.2. For a description of originalists’ “special difficulty” with constitutional stare decisis more generally, see Parts 1 and 2 of that chapter.

⁹ Probably the most prominent example is the work of Michael Gerhardt (e.g., 2011).

eral jurisprudence and for democratic and constitutional theory, implications that potentially echo well beyond the confines of American law and politics.

From the perspective of general jurisprudence or legal philosophy, the Court's practices regarding *stare decisis* invoke persistent questions about the relationship between general legal rules on the one hand and, on the other, correct results in particular cases. *Stare decisis* purports to require that the Court adhere, at least presumptively, to prior decisions it now believes to be incorrect. But what justification might (could) the Court have for doing that—for reaching the wrong result just because some prior iteration of itself thought that result was the right one? The problem is a version of the familiar tension between, as Justice Louis Brandeis influentially put it, the value of law that is “settled” and the value of law that is “settled right.”¹⁰

Larry Alexander, in Chapter 2 of this volume, associates this problem with circumstances involving “legal transitions,” that is, attempts to replace suboptimal legal rules or systems of rules with more-optimal ones. Such problems of transition are endemic in a primarily common-law tradition like those in Britain, the United States, and other former British colonies, in which a significant driver of legal development is case-by-case decisionmaking by courts. But these questions are hardly unique to common-law systems. Indeed, the underlying clash between general rules and particularized justice extends well beyond contexts that can accurately be said to involve legal transitions. A version of it crops up, not just when some authoritative body like the Supreme Court must determine whether to formally and overtly overrule one of its precedents, but anytime a judge or other legal official must decide—perhaps surreptitiously—whether to obey or enforce a valid legal rule or command she believes to be wrong. In this respect, the problem of precedent is closely related to the profound mystery of legal authority, of whether (and when, and why) those subject to the law ever have reason to obey it when they think it will produce injustice.¹¹

As a matter of constitutional and democratic theory, the Court's practices of precedent touch on fundamental issues of separation of powers and democratic legitimacy. American-style judicial review famously presents what Alexander Bickel (1986, 16) called the “counter-majoritarian difficulty”: It begs the question why an elite group of nonelected, life-tenured Justices, supposedly acting in the name of long-dead constitutional Framers, should be given the power to override the products of the majoritarian political process. Many, perhaps most, plausible answers to this question depend at least in part on the idea that the Court will act in a way that might be called *principled*¹²—that it will not decide based solely or pri-

¹⁰ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”). Brandeis's famous aphorism is referenced by several contributors to this volume (see Colin Starger's Chapter 1 and Randy Kozel's Chapter 8), and his influential *Burnet* dissent is discussed at length by Starger (see Chapter 1, Part 2.2).

¹¹ For a general discussion of this problem, see Peters (2011, 1-12, 33-67).

¹² See, for example, Wechsler (1959).

marily on the personal moral or political views of a majority of the Justices. From one point of view, a willingness by the Court to adhere to past decisions, despite the current view of most Justices that those decisions are wrong, is consistent with, even constitutive of, this element of principle, while a willingness to overturn such decisions is corrosive of it.¹³ To others, however, the Court's failure to interpret the Constitution correctly in the first place represents the crisis of principle, one that can be resolved only by overruling the offending precedent to correct the error.¹⁴ Add to this the fact that the Court's constitutional decisions, unlike its rulings in other legal contexts, cannot be reversed by ordinary legislation and thus will stand—erroneous or not—forever, unless the Constitution is amended (an exceedingly difficult process and thus an exceedingly rare occurrence) or the Court itself overturns them.

These important issues of legal philosophy and democratic theory transcend the nakedly political underpinnings of American debates about stare decisis, enlarging the sphere of their relevance to encompass other legal systems and cultures. Participants in any legal system that allocates substantial authority to the process of case-by-case court decisionmaking should care about whether, when, and why those courts ought to remain faithful to their prior resolutions of similar issues. Even a purely code-driven civil-law culture (a vanishing breed, if ever it existed at all) has adopted a position in normative debates about the propriety of stare decisis—a position denying any judicial obligation to adhere to past decisions. Certainly the normative dynamics of stare decisis are salient in common-law or hybrid systems that rely on courts to do much of the heavy legal lifting.

Moreover, with the international proliferation of bills of rights and constitutional judicial review that echo the American versions in many respects, more and more legal cultures will need to engage with norms of constitutional adjudication, including those governing the durability of judicial constitutional decisions. The U.S. Supreme Court, and the legal and academic professionals that follow it, have been grappling with these issues now for some two centuries. It hardly seems jingoistic to suggest that the participants in other, newer constitutional systems might benefit from the experiences and answers the Court and its observers have to offer, even if the primary benefit turns out to be one of negative example.

My hope as editor of this volume, then, is that it will prove interesting, perhaps even useful, to audiences both in the United States and from other legal systems. (This is the notion behind the book's publication as part of the *Ius Gentium* series.) The volume arose from a live symposium held at the University of Baltimore School of Law in March 2012. Each participant in that symposium has expanded his or her remarks into a chapter in this book, and Randy Kozel, who did not par-

¹³ This sort of reasoning was a central element of the controversial justification of precedent-following offered by several Justices in *Planned Parenthood v. Casey*. See 505 U.S. at 864-69 (plurality opinion of Kennedy, O'Connor, and Souter).

¹⁴ This is the position taken by many constitutional originalists (see my discussion in Chapter 9). It also seems to describe the view expressed by Larry Alexander in Chapter 2.

ticipate in the symposium, also has added a chapter (Chapter 8). In selecting the contributors, I looked first for scholars who I knew would write something original and provocative and write it well. I looked also for a diversity of viewpoints, methodological approaches, and levels of seniority among the contributors. In most cases the authors came first, their particular topics later: I allowed each author to choose what exactly he or she would write about, providing only general guidance where it was requested. I hoped for a series of essays that would fit well together yet stand each on its own as a meaningful contribution to our understanding of the Court's relationship to precedent. I think that is what I got, although of course the reader will have to judge for herself.

The essays begin with Colin Starger's entry in Chapter 1, which sets the stage for what follows by exploring the Court's own "precedent about precedent"—the development of its doctrine regarding whether and when it will adhere to its prior constitutional decisions.¹⁵ Starger explains that, somewhat surprisingly, the Court did not claim to have any doctrine of stare decisis at all for its first twelve or thirteen decades—more than half its history. Prior to the early twentieth century, the Court referred to stare decisis as simply a maxim of good judicial practice rather than something on the order of a presumptively binding legal rule. Using graphical "opinion maps," Starger traces the Court's modern doctrinal approach to constitutional stare decisis back to Justice Brandeis's often-cited dissenting opinion in the 1932 *Burnet v. Coronado Oil* case,¹⁶ in which Brandeis meticulously catalogued previous instances of constitutional overrulings, thus transforming stare decisis from a commonsense question of wise practice to a doctrine-driven matter of legal rules. Starger then illustrates how competing judicial attitudes toward constitutional stare decisis—a "weak" tradition, allowing for overruling solely or primarily on grounds of disagreement with the reasoning of the precedent case, and a "strong" tradition, purporting to require some good independent reason for overruling—each derive rhetorical force from Brandeis's *Coronado Oil* opinion. And

¹⁵ This phrasing of Starger's—"precedent about precedent"—may itself become a fixture of the Court's stare decisis doctrine. In April 2013, Starger posted an abstract of what is now his Chapter 1 on SSRN (www.ssrn.com), an online scholarship database popular with American law professors. In his abstract, Starger referenced *Payne v. Tennessee*—a centerpiece of his analysis—and asked, "does the Court's contemporary 'precedent about precedent' have genuine precedential value?" Two months later, in June 2013, near the close of its Term, the Supreme Court decided *Alleyne v. United States*, 133 S. Ct. 2151, which overruled a 2002 decision in holding that a fact that increases a defendant's mandatory minimum sentence is an element of the crime that must be proven to a jury. In dissent, Justice Samuel Alito cited *Payne* several times and closed his opinion with the following sentence: "The Court's decision creates a precedent about precedent that may have greater precedential effect than the dubious decisions on which it relies." 133 S. Ct. at 2173 (Alito, J., dissenting). (Justice Sonia Sotomayor liked this "precedent about precedent" trope so much—though she didn't think much of Alito's deployment of it—that she repeated it in her *Alleyne* concurrence when replying to Alito's arguments. 133 S. Ct. at 2166 (Sotomayor, J., concurring).) It's hard to avoid the comforting conclusion that (at least some) Supreme Court Justices really do pay attention to (at least some) legal scholarship after all.

¹⁶ 285 U.S. at 405 (Brandeis, J., dissenting).

while most observers look to the plurality opinion in 1992's *Planned Parenthood v. Casey* as the definitive contemporary exploration of stare decisis by the Justices themselves, Starger identifies opposing opinions in a lesser-known case decided a year earlier, *Payne v. Tennessee*,¹⁷ as the source of many of the arguments wielded by adherents of both the weak and the strong traditions on the recent and current Court.

Starger concludes with the suggestion that the function of the Court's "precedent about precedent" is more rhetorical than constraining. Justices—sometimes even the same Justice in different cases—seem to adopt the weak or strong approaches to stare decisis in an unprincipled, results-driven manner. Starger does not find this particularly troubling: He thinks consistency in even a single Justice's stare decisis jurisprudence is too much to expect, given the need to balance continuity with change on a case-by-case basis. This (admittedly tentative) position is questionable; to acknowledge that the force of precedent should vary with context is not to endorse a general approach to stare decisis that morphs to suit a Justice's preferred substantive results.

Nonetheless, in surveying the Court's own professed doctrine of constitutional stare decisis—and exposing the soft spots and fissures in that doctrine—Starger's analysis lays a useful foundation for both the normatively and the descriptively focused chapters that comprise the remainder of the book. Chapters 2 and 3 directly confront some of the major normative issues. In Chapter 2, Larry Alexander mounts a forceful (though somewhat qualified) normative attack on stare decisis in constitutional cases. Alexander begins with the (admittedly debatable) premise that a Justice ought not disobey the Constitution itself solely on the ground that she believes implementing the Constitution will produce a morally incorrect or suboptimal result. Assuming this is so, he asks, how could it then be the case that a Justice should obey prior Court decisions that in effect disobey the Constitution by incorrectly interpreting it? One common answer is that the Court's interpretations of the (written) Constitution are, or can become, themselves part of the (legally binding) Constitution, by virtue of widespread and sustained public acceptance of those interpretations. If this is so, then by obeying an earlier Court decision that meets the relevant criteria of public acceptance—however erroneous it may be as an interpretation of the previously existing Constitution—a subsequent Court is in fact obeying the Constitution as it now exists. Alexander is skeptical of this answer, however, because it seems to rely on public acceptance of an erroneous Court interpretation *with knowledge that the interpretation is erroneous*, a criterion Alexander thinks rarely will exist.

A second common answer is that overruling (some) erroneous constitutional precedents would upset the expectations of those who have reasonably relied on those precedents, with possibly disastrous results. (Alexander posits the example of the *Legal Tender Cases*, which held in 1871, arguably incorrectly, that the Con-

¹⁷ 501 U.S. 808 (1991).

stitution permits the government to issue paper money.¹⁸ Imagine a Court decision overturning that precedent more than 100 years later.) Alexander doubts that obeying an erroneous precedent to avoid disastrous consequences is different in kind from disobeying the Constitution itself to avoid an unjust or otherwise “infelicitous” result. And he argues that even if the fact of reliance on an erroneous precedent makes a sufficient moral difference, the Court could minimize or eliminate the harm to reliance interests by simply delaying the implementation of its overruling decision for long enough to allow the system to adjust (e.g., by weaning itself off paper money) or, more likely, to allow for a formal constitutional amendment pursuant to Article V to ratify the otherwise erroneous precedent. Only if the uncertainty caused even by a delayed overruling would be sufficiently catastrophic, Alexander suggests, does the Court have good reason to adhere to an erroneous precedent.

Alexander then turns his attention to the arguments against overruling made by the plurality in *Planned Parenthood v. Casey*, focusing in particular on the two most controversial of those arguments. “[P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion,” the *Casey* plurality asserted,¹⁹ and overruling *Roe* would harm these reliance interests. But Alexander does not think this sort of “reliance” should be taken seriously, particularly when pitted against the importance of interpreting the Constitution correctly. Nor does he agree with the *Casey* plurality’s suggestion that harm to the Court’s own authority, which might flow from the public’s perception of too-frequent overrulings, is sufficiently weighty to overcome the harm caused by erroneous constitutional interpretations.²⁰

Alexander’s arguments might be challenged on a number of points. It is not self-evident, for example, that erroneous Court interpretations of the Constitution must be understood by the public to be erroneous (and be accepted anyway) in order to become authoritative. Perhaps the public (or the body of legal officials—whichever group within American society has the authority to determine what counts as law) has implicitly authorized the Court to render authoritative constitutional decisions even if those decisions are, as an interpretive matter, incorrect, so long as the decisions meet certain other criteria—substantive acceptability to a large majority of the public over time, for example. If this is the case, then subsequent Courts would have reason to obey erroneous prior interpretations that meet the public-acceptance test.

Alexander also downplays the possible significance, to normative evaluations of *stare decisis*, of uncertainty and disagreement about constitutional interpretation. It is this line of argument that Deborah Hellman takes up in Chapter 3. Hellman contends, against conventional wisdom in legal-philosophy circles, that

¹⁸ 79 U.S. 457 (1871).

¹⁹ 505 U.S. at 856.

²⁰ See 505 U.S. at 861-69.

judges have *epistemic* reasons to adhere to precedent—reasons to follow a precedent on the basis that doing so is more likely than not doing so to generate a correct decision. Most theorists have rejected epistemic justifications of stare decisis on one or both of two grounds. The first has to do with the conceptual mechanics of epistemic authority. Suppose a judge believes that the correct result in the case she must decide is *X*. But suppose she is faced with an on-point precedent that clearly dictates a different result, *Y*. And suppose she believes that the judge that decided the on-point precedent is a better (more accurate) decisionmaker than she is. (Imagine an inexperienced jurist faced with a precedent decided by Holmes or Cardozo.) The judge may then have reason to change her mind and reach result *Y* rather than result *X* in her case. The reason would be that someone she recognizes as an epistemic authority—the *éminence grise* who decided the precedent case—has declared *Y* to be the correct result. In this scenario, precedent has made a difference—but in a persuasive way, not in an authoritative one. The judge has reached a result consistent with the precedent, not because she believes she must follow the precedent despite her disagreement with it, but because (thanks to her respect for the wisdom of the precedential judge) she no longer disagrees with it. The judge has not really *obeyed* the precedent at all; and thus the principle of stare decisis itself is doing no real work.

Hellman argues, however, that a judge may have epistemic reasons to *act* in obedience to a precedent, even if she lacks reason (at least decisive reason) to *believe* the precedent is correct. The legal system of which the judge is a part may conclude that judges are more likely, on the whole, to make correct decisions by following precedent than by relying solely on their own judgment, and it may establish a rule or other norm of precedent-following as a result. An individual judge may then have reasons (of professional ethics or separation of powers) to follow the rule dictated by her legal system and thus obey a precedent with which she disagrees in substance. Indeed a judge's recognition of her own fallibility may give her reason to obey a precedent with which she disagrees, even absent a systemic rule requiring her to do so. These kinds of reason would be *epistemic* reasons, in the sense that they are based on the premise that judges are more likely to reach correct results by following precedent than by not doing so.

Hellman also takes issue with the second common objection to epistemic justifications of stare decisis, which is in essence a normative one. Even if epistemic reasons to follow precedent can exist as a conceptual matter (the objection goes), there is no good cause to think that precedents actually *are* more likely to be correct than the unfettered judgment of the individual judge. After all, precedential cases were themselves decided by (fallible human) judges; and often they were decided many years ago, under moral assumptions (about gender roles, for instance, or racial hierarchy) that now seem benighted. Why should the present-day judge subordinate her own best judgment to that of some earlier, morally backward court?

Hellman's answer to this challenge is ingenious and largely original. The primary epistemic value of precedent, she suggests, lies not in the supposed epistem-

ic authority of the precedential decisions themselves, but rather in the checking function served by the *process* of engaging with precedent. A presumptive norm of precedent-following counterbalances the natural human tendency toward overconfidence by requiring judges to take opposing arguments (those of the precedential courts) seriously and to articulate good reasons for their disagreement with those arguments. Judges are more likely to generate correct results under a norm of stare decisis, not because the precedents themselves are likely to be correct, but because the exercise of grappling with the precedents is likely to enhance the quality of judges' decisionmaking. More conventionally (and more tentatively), Hellman also suggests that the precedents themselves *are* relatively likely to be correct—not because the judges that decided them are smarter than subsequent judges, but rather because precedents tend to be the products of a gradual, collective, Burkean, common-law process of testing and refinement over time.

Hellman thus offers the framework of a response to Alexander's skepticism about stare decisis. Alexander looks in vain for a convincing reason to prefer wrongly-decided precedents over correct interpretations of the Constitution. But Hellman points out that which constitutional interpretations are correct and which are not, like most issues judges face, is almost always a matter of uncertainty and contestation. Deference to precedent might be a reasonable response, at a systemic level and perhaps on an individual level, to these persistent facts of uncertainty and disagreement.

Hellman's defense of stare decisis is hardly unassailable, of course. On the conceptual level, the strength and, ultimately, the existence of an epistemic reason to follow precedent is vulnerable to the very problem of disagreement that grounds that reason in the first place. A judge who disagrees strongly with the merits of a precedent has, on that basis, grounds to doubt the epistemic value of the precedent; strong enough disagreement might justify (or seem to justify) rejecting the precedent altogether. (This problem affects epistemic justifications of authority more generally, and indeed I deploy it in Chapter 9 as part of my attack on what I call "Moral Guidance" accounts of constitutional authority.)²¹

On the normative level, it isn't clear how squarely Hellman's defense fits the unusual context of constitutional decisionmaking by the Supreme Court. Supreme Court Justices tend to arrive on the Court with reasonably well-formed notions about the law, and the constitutional cases they decide tend to carry a strong political valence. Against this backdrop, is it realistic to think that the requirement of engaging with precedent often will trigger the kind of judicial self-reflection and second-guessing that can materially improve the Court's decisionmaking? Or are Justices more likely to pay rhetorical lip service to stare decisis while actually deciding cases on ideological grounds, as Starger suggests in Chapter 1 (echoed by Neal Devins in Chapter 5 and Frederick Schauer in Chapter 6)? Nor is it obvious that Hellman's quasi-Burkean "many minds" argument for the merits of precedent

²¹ See Chapter 9, Part 7.3.

carries the same force when applied to the relatively small sample size of the Court's constitutional case law.

While neither Alexander's nor Hellman's arguments is airtight, however—as if any position on this nuanced and contentious question could be—their chapters helpfully join, and frame, the overarching normative debate about the propriety of *stare decisis* in the Court's practice. In Chapter 4, Maxwell Stearns brings to that debate a straightforward descriptive insight: The easier it is to *create* a precedent, the easier it will be to *overrule* that precedent. Stearns takes issue with the conventional wisdom among many American public-law scholars that the Court's justiciability doctrines—standing requirements and similar limitations on who may bring a constitutional challenge and when the challenge may be brought—are indefensible impediments to the creation of valuable constitutional precedents. Justiciability requirements limit litigants' ability to time constitutional challenges to coincide with sympathetic membership on the Court or other favorable conditions. Stearns points out, however, that if these litigation-timing impediments were relaxed, the resulting precedents would become less valuable, as they would themselves be more vulnerable to subsequent carefully timed challenges aimed at overruling them. Litigants bringing constitutional claims would get favorable rulings at a lower cost, but those rulings would in effect be worth less. Stearns thus suggests that justiciability barriers may actually be a good thing for litigants seeking valuable constitutional precedents. And he goes a step further, proposing that the Court itself should be more reluctant to overrule precedents that were, for justiciability reasons, more difficult to obtain.

Stearns might be stretching an “is” into an “ought” with this final suggestion. The fact that the durability of precedent depends to some extent on the sturdiness of justiciability barriers as a *descriptive* matter does not seem to imply any particular approach to *stare decisis* as a *normative* matter. Stearns's analysis certainly might give us (normative) reason to oppose the relaxation of justiciability doctrines: If we want Court decisions to be relatively durable, we ought to continue making it difficult to “time” those decisions to the happenstance of an ideologically favorable Court. (Of course, some litigants might prefer the inverse tradeoff: an easier-to-obtain decision that also is shorter-lived.) But it's far from clear that Stearns's analysis identifies a (normative) reason for the Court itself to respect precedent. After all, the Court's treating the difficulty of obtaining a precedent as a reason not to overrule it would seem to produce a windfall for the litigants who obtained that precedent: They would be getting the benefit of both the (new) justiciability barriers to the Court's reconsideration of the precedent and the (original) justiciability barriers to getting the precedent in the first place. Shouldn't the former be enough?

Indeed, one might reasonably derive a very different normative message from Stearns's penetrating descriptive analysis. If justiciability requirements make it hard to obtain a Court decision—including a decision overruling a prior decision—what then is the necessity of additional barriers to overruling? Perhaps the practical obstacles to overruling (including the difficulty, given justiciability doc-

trines, of timing a challenge to coincide with an ideologically sympathetic Court) are sufficient to foster consistency, predictability, and other rule-of-law values without a supplementary norm of stare decisis.²²

Stearns's analysis thus provides a useful segue to the chapters that follow. His empirical focus on the process of constitutional litigation writ large presages both Neal Devins's essay in Chapter 5, which examines the relationship between ideological coherence on the Court and respect for stare decisis, and Frederick Schauer's contribution in Chapter 6, which suggests that the realities of adjudication inevitably obscure the Court's actual practices regarding stare decisis. And by placing stare decisis within a larger context that also features other prominent adjudicative norms, Stearns foreshadows the themes of Chapters 7 through 9, each of which engages the relationship between the Court's approach to stare decisis and its methodologies of constitutional interpretation.

In Chapter 5, Devins uses the insights of social psychology and the evidence of history to support the somewhat intuitive proposition that "coherent" Supreme Courts—those featuring a majority of Justices who agree on crucial issues—are far more likely to overrule precedents, and to aggressively attempt to create broad precedents, than are "incoherent" Courts. Devins explains the social-psychology dynamics that contribute to the formation (or absence) of coherent Court majorities. He then surveys three historical periods to illustrate the divergent behavior of coherent versus incoherent Courts. The post-1936 New Deal Court (1937-1953), Devins shows us, was highly coherent on most issues (thanks to a flurry of appointments by Roosevelt) and thus ambitious in both overturning precedent and establishing broad holdings intended to bind future Courts. The Warren Court (1953-1968) was mostly incoherent and cautious before 1962, dominated (at least in national-security cases) by the centrist Justices Felix Frankfurter and John Marshall Harlan II, but became coherent thereafter with the appointments of Justices Arthur Goldberg (replaced a few years later by Abe Fortas) and Thurgood Marshall, generating most of its still-influential decisions during that period. In contrast, the Rehnquist Court (1986-2005) was incoherent on most issues, controlled (like the early Warren Court) by two centrist swing Justices (Sandra Day O'Connor and Anthony Kennedy). This incoherence helps explain the Rehnquist Court's failure, previously discussed, to overrule *Roe* and *Miranda*, and its relatively minimalist rulings on religious freedom, affirmative action, and other con-

²² Of course, a cynic might respond that a Court (or individual Justice) that is inclined to ignore stare decisis to achieve results it desires will also be inclined to ignore justiciability barriers to those results. Such a Court or Justice would find ways around justiciability requirements in order to decide cases involving challenges to disfavored prior decisions, and then would find ways around stare decisis norms in order to overturn those decisions. Justiciability doctrines would not be sufficient to protect rule-of-law values against this kind of results-driven behavior; but neither would a stare decisis norm. It may nonetheless be the case, however, that other practical obstacles to overruling—including the fact of relatively infrequent turnover in the Court's membership—would continue to serve the rule-of-law values even in the face of purely results-driven behavior by the Court.

troversial topics. Finally, Devins offers a preliminary assessment of the Roberts Court (2005-present) as similarly incoherent and thus for the most part similarly cautious and modest.

On its surface, Devins's study suggests that *stare decisis* exerts very little actual normative constraint on the Court. If the Justices really felt constrained by precedent, after all, their patterns of overruling would not seem to depend so heavily on extraneous factors such as substantive ideological coherence among the Court's membership. Digging a little deeper, however, reveals some interesting nuance in the descriptive conclusions one might draw from Devins's essay. Incoherent Courts seldom directly overrule precedent; but, as Devins notes, they sometimes engage in "stealth overrulings," that is, decisions that contradict the logic or reasoning of a precedent or severely restrict its scope without formally overruling that precedent.²³ This suggests at least that *stare decisis* exerts a sort of *in terrorem* influence on the Justices, causing them to be wary of being *seen* to overrule precedents (if perhaps not of actually overruling them). And Devins's analysis reveals an intriguing *ex ante* attitude toward the effects of precedent on the part of both coherent and incoherent Courts. Coherent Courts attempt to establish broadly binding precedents; incoherent Courts avoid doing so by rendering minimalist decisions. A Court that believed *stare decisis* to be unconstraining would hardly consider the potential precedential effects of its own rulings on future Courts.

One comes away from Devins's essay, then, with a sense that most Justices' (or at least the typical Justice's) normative attitudes toward precedent are complex and ambivalent. Frederick Schauer's contribution in Chapter 6 is unlikely to dispel this impression. Schauer is interested in whether we can reliably know, as a descriptive matter, just what the Justices' normative attitudes toward precedent really are. Considerable political-science research over the past two decades suggests that the Court is driven primarily by results-oriented ideology, by social-psychology dynamics (like those explained by Devins), or by some similar *mélange* of "attitudinal" factors, and virtually not at all by allegiance to *stare decisis*. Schauer points out, however, that these studies all share a fundamental weakness: They examine only the cases the Court actually decides, which, it turns out, are unlikely to be cases in which a *stare decisis* norm might matter. If it were true that the Court actually adhered to *stare decisis* (and if this adherence were generally known), then cases challenging precedents would rarely come before the Court: Thanks to the "selection effect," disputants would not think it worthwhile to bring such presumptively hopeless cases in the first place, or (more rarely) they would bring them unsuccessfully and not appeal them, or (more rarely still) they would appeal them but not seek review by the Court. The cases that made it to the Court, then, would almost exclusively be close cases—cases in which there is no on-point precedent, or in which the applicable precedents cut in opposite directions. And these are precisely the kinds of cases in which a *stare decisis* norm, if it ex-

²³ Devins cites Friedman (2010) and Peters (2008), which (as mentioned above) both explore this phenomenon of "stealth overruling" or "underruling."

isted, would have the least effect (and thus would not be revealed in empirical studies).

Schauer thus concludes that if there is a meaningful stare decisis norm on the Court, it would not show up in empirical research; or, to put it another way, the political-science consensus that there is no such norm cannot be trusted. And Schauer notes a further complexity: The selection effect he discusses itself relies on the existence of information about the Court's attitudes toward stare decisis. If the selection effect is to winnow away cases governed by on-point precedents, then litigants, their lawyers, and lower-court judges must believe that the Court is in fact unlikely to overturn those precedents. But, since empirical research seems incapable of revealing whether the Court actually respects stare decisis, these participants (and thus the selection effect) are operating without good information about the likely consequences of their decisions. The phenomenon Schauer portrays approaches the status of paradox: The selection effect renders it impossible to know whether the Court adheres to stare decisis, but that same selection effect depends for its operation on a widespread belief that the Court adheres to stare decisis.

Schauer concludes by suggesting a way around the near-paradox: The Court could deliberately signal its respect for stare decisis, by (for example) frequently accepting cases that challenge precedents with which a majority of the Court is known to disagree and then affirming those precedents. Schauer asserts, however, that the Court has not done this and seems unlikely to—a conspicuous failure that, like the celebrated dog that didn't bark, itself strongly implies that the Court doesn't really respect stare decisis after all.

Schauer's argument from the selection effect is a powerful rejoinder to the too-easy conclusions of many academics (mostly, but not exclusively, political scientists) that the Court's invocation of stare decisis is nothing but a smokescreen for results-oriented decisionmaking. I suspect, though, that there is more (and more-accurate) information available about the Court's actual practices regarding stare decisis than Schauer acknowledges, if not of the type or the level of certainty that the political-science research implies. The Court does sometimes overrule its prior decisions (even relatively recent ones), and it does sometimes affirmatively decline to overrule its decisions, as in *Casey*. These overt acts of overruling or not overruling provide some direct evidence of the Court's views about stare decisis. Their existence, moreover, means that the selection effect does not weed out every case controlled by an on-point precedent. And yet there are many precedents that are rarely or never challenged: decisions that are longstanding and well-established, even if they remain controversial in certain quarters (1966's *Griswold v. Connecticut*,²⁴ recognizing a constitutional right to use contraceptives, comes to mind), and (at the other end of the spectrum) recent decisions with no intervening

²⁴ 381 U.S. 479 (1965).

change in the Court's ideological makeup (such as 2010's *Citizens United*).²⁵ The conjunction of these phenomena suggests that lawyers, litigants, and lower-court judges share a general professional sense that the Court will respect some sorts of precedents and may be willing to rethink others. Like many things about the law, the constraining effects of precedent may flow less from formally stated norms than from informal conventions and understandings.

Schauer, Devins, and Stearns each grapple in different ways with empirical questions about the Court's relationship to *stare decisis*. The book's final three chapters reassert a normative focus, one that encompasses perhaps the most vigorous debate about precedent in current American legal scholarship: its compatibility with certain approaches to constitutional interpretation, in particular originalism. Participants in this debate usually assume that interpretive methodology trumps *stare decisis*, so that one's views about constitutional *stare decisis* must follow from one's views about constitutional interpretation rather than the other way around. In Chapter 7, Chad Oldfather cleverly subverts this typical assumption by imagining a world in which *stare decisis* norms apply *to* interpretive methodologies—that is, in which the Court is required to give precedential effect, not merely to the result of a prior constitutional decision, but also to whatever method of interpretation the prior Court used to reach that decision.

This is not in fact the world in which the actual Court operates, and Oldfather's thought experiment suggests a good reason why. A regime of "methodological *stare decisis*," Oldfather explains, would commit the Court to following the same interpretive approach in some very broad swath of cases—perhaps every single case involving constitutional interpretation (that is, every constitutional case) or, only slightly less broadly, every case involving the interpretation of some subset of constitutional provisions that can meaningfully be distinguished from some other subset (e.g., structural vs. rights provisions). Of course there are institutional impediments to such a broad methodological commitment, most prominently persistent disagreement within the Court itself (and sometimes within individual Justices) about which methodology is the best or correct one. And there are serious structural impediments as well, as Oldfather points out. Committing to a single interpretive methodology, once and for all, as the result of a single case would place enormous pressure on the Court to get it right in that case, something the Court is extraordinarily unlikely to do. Normally we expect courts deciding issues of first impression to consider carefully the likely impact of their decisions on future similar cases, but the set of "future similar cases" in the context of constitutional interpretation will be much too large for this task to be feasible. The Court, then, is very likely to get the methodological choice wrong, or at least to be perceived by future Courts as having gotten it wrong, which will put substantial pressure on

²⁵ I put aside precedents that, like *Brown v. Board of Education*, 347 U.S. 483 (1954), are so universally accepted today as correct that no one, or at most a lunatic fringe, would want to challenge them.

these future Courts to overrule the methodological precedent—thus undermining the supposed rule-of-law values thought to justify stare decisis.

The absence of a norm of stare decisis with respect to interpretive methodologies, Oldfather thus concludes, is not surprising and probably is a good thing. (Oldfather draws a contrast with the application of stare decisis to other aspects of constitutional methodology often referred to as “decision rules”—doctrinal heuristics for applying the Constitution to particular cases, such as the familiar “tiers of scrutiny” in equal-protection and due-process jurisprudence. Because these decision rules can be cabined within the boundaries of particular constitutional provisions, Oldfather explains, they do not pose the structural problem of radically unpredictable consequences that interpretive stare decisis would present.)

We might wonder whether Oldfather is being a bit too pessimistic about the feasibility of a clause-driven approach to interpretive methodology—an approach by which the Court would settle on fixed interpretive methodologies, but could choose different methodologies for different constitutional provisions (e.g., originalism for the Due Process Clause, living-constitutionalism for the Free Speech Clause, and so on). Clause-bound interpretative stare decisis might not pose significantly greater foreseeability problems than tiers of scrutiny and other provision-specific decision rules. Of course, many Justices (such as Justices Thomas and Scalia on the current Court) probably would deny the propriety of divvying up interpretive methodologies among different parts of the Constitution; originalists, at least, tend also to be universalists.

In any event, if Oldfather is right about the unworkability of a unitary approach to interpretive methodology, then his conclusions dovetail with those of Randy Kozel in Chapter 8 to suggest that the Court will not soon endorse either an overarching interpretive philosophy or a comprehensive approach to stare decisis. Kozel argues that the questions of interpretive methodology and stare decisis are unavoidably bound together: One’s preferred interpretive method will affect one’s conclusions about whether and when to follow precedent. Some aspects of the precedent question clearly are independent of interpretive method, such as the benefits of continuity (on the one hand) and the costs of incoherence in the law (on the other). Kozel asserts, however, that other aspects of the question depend for their resolution on a choice of interpretive method. Many originalists, for example, see nonoriginalist interpretation as, in essence, disobedience to the Constitution, and as such they contend that incorrect precedents must be overruled regardless of the rule-of-law costs of doing so. Other originalists distinguish between nonoriginalist precedents, accepting that some (those that err on the side of giving democratic government too much power, for example, or those that have attained supermajoritarian approval) need not or should not be overruled despite their incorrectness. And of course many nonoriginalists—such as those who take a common-law approach to the development of constitutional law—consider (some) Court decisions to be part of the meaning of the Constitution itself, even if those decisions are inconsistent with the original meaning of the document. The ques-

tion of the costs of following precedent thus often turns, Kozel argues, on the question of which interpretive methodology one adopts.

As Kozel notes, an important consequence of this interdependence between interpretive methodology and stare decisis is the impossibility of a coherent approach to stare decisis on a methodologically pluralistic Court. Justices disagree amongst themselves about proper approaches to constitutional interpretation, and some individual Justices even claim to reject allegiance to any particular interpretive methodology at all. This fact of interpretive pluralism, which seems likely to remain the rule into the indefinite future, probably explains why the Court focuses almost entirely on interpretation-independent considerations (such as reliance, workability, and the Court's reputation for principle) when it discusses stare decisis in decisions like *Casey*.

Kozel thus suggests that the Court will not settle on a comprehensive approach to stare decisis unless its members agree on a unitary approach to constitutional interpretation. And Oldfather offers reasons why the Court is unlikely to commit to a unitary interpretive approach. The upshot is a sense of pessimism (if that isn't too strong a word) that the Court will ever adopt coherent approaches to either constitutional interpretation or constitutional stare decisis.

My own contribution in Chapter 9 continues the general project begun by Kozel of drawing normative connections between constitutional interpretation and stare decisis. I don't agree with Kozel on every point: I am not convinced, for instance, that an assessment of the costs of stare decisis, properly understood, depends in part on the interpretive methodology one favors. Those originalists who equate nonoriginalist interpretation with constitutional disobedience (termed "structural" originalists by Kozel) reject allegiance to nonoriginalist precedent in all or nearly all circumstances, not because anything in their methodology requires them to do so, but rather because they have made a judgment that constitutional obedience is imperative no matter what its costs. This is a judgment about a duty to obey constitutional law, not about how constitutional meaning should be identified. For their part, "living constitutionalists" who think that some nonoriginalist precedents nonetheless comprise part of constitutional meaning do not favor allegiance to "incorrect" constitutional decisions as a result; they simply disagree with originalists regarding what a "correct" decision is. One's theory of interpretation *qua* theory of interpretation cannot tell us, without more, how that theorist should feel about stare decisis.

I think Kozel is quite right, however, to suggest that we look beneath both interpretive methodologies and approaches to stare decisis for their normative underpinnings. I take up this task in Chapter 9, arguing that interpretive methodologies and approaches to stare decisis both must stand or fall as implications of some foundational theory of constitutional authority—of why the Constitution deserves our obedience in the first place. I begin by deconstructing the claim made by some originalists (the "structural" originalists described by Kozel) that their preferred methodology is especially incompatible with constitutional stare decisis. This "special difficulty with precedent," I contend, can be explained (if at all) only by

reference to an account of the Constitution's binding authority. I then assess four existing accounts of constitutional authority to determine whether any of them implies both originalism and a distrust of stare decisis. While three such accounts—which I term, respectively, the Values Imposition, Consent, and Moral Guidance accounts—can in theory support originalism and motivate a rejection of stare decisis, I argue that none of these accounts is both normatively and descriptively plausible. A fourth account, Dispute Resolution, appears more plausible, but I contend that it implies neither strong originalism nor a rejection of stare decisis. I conclude that neither thoroughgoing originalism nor a strong distrust of precedent is supported by a plausible account of constitutional authority.

To put the point slightly differently: I argue in Chapter 9 that a convincing theory of why the Constitution binds us implies at least an openness to the possibility that the Court should itself be bound, if only presumptively, by its prior decisions. Constitutional authority permits constitutional stare decisis (and, not incidentally, rejects robust originalism in constitutional interpretation). These conclusions will be controversial, and I'm certain my arguments have many weaknesses. A disadvantage—or perhaps an advantage—of editing a volume to which one also contributes a chapter is the practical impossibility of critically assessing one's own entry. I won't even attempt the task, leaving it instead to the reader, whom I hope will benefit from this collection of essays as a whole despite the undoubted flaws in my contribution to it.

* * *

The efforts and encouragement of many people made this volume possible, and I am grateful to all of them. A succession of three Deans at the University of Baltimore School of Law—Philip Closius, Michael Higginbotham, and Ronald Weich—provided material and monetary support in various forms for the book and the live symposium from which it arose. The members of several faculty committees approved summer stipends that were used in part to prepare this book. Of course the book would not exist without the outstanding efforts of its contributing authors, most of whom also spoke at the symposium. My UB colleagues Kimberly Brown, Nienke Grossman, and Michael Meyerson generously agreed to moderate panels at that symposium, and Laurie Schnitzer did much of the heavy logistical lifting for the event. Participants in a faculty workshop at UB, particularly José Anderson, John Bessler, Kim Brown, Gregory Dolin, Garrett Epps, and Colin Starger, offered helpful comments on my chapter; John Bessler and Mortimer Sellers deserve my thanks for organizing the workshop. At a Constitutional Law Colloquium at the Loyola University School of Law in Chicago, I received invaluable feedback and advice on my then-nascent chapter from Ian Bartrum, Randy Kozel, Lee Strang, and Rebecca Zietlow. I also am grateful to the aforementioned Tim Sellers for agreeing to include the book in the *Ius Gentium* series that he edits for Springer, and to Neil Olivier and Diana Nijenhuijzen at Springer

for their editorial guidance. Perhaps the most crucial contribution to this book was that of Emily Kolas (UB Class of 2013), who almost singlehandedly citechecked and formatted the text, much of it after her graduation and while she was studying for the Bar. And as always, I am profoundly thankful for the love and support of my wife, Trish Webster, and of our families.

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