

# Precedent and Jurisprudential Disagreement

Amy Coney Barrett\*

## Introduction

Over the years, some have lamented the Supreme Court's willingness to overrule itself and have urged the Court to abandon its weak presumption of stare decisis in constitutional cases in favor of a more stringent rule.<sup>1</sup> In this Article, I point out that one virtue of the weak presumption is that it promotes doctrinal stability while still accommodating pluralism on the Court. Stare decisis purports to guide a justice's decision whether to reverse or tolerate error, and sometimes it does that. Sometimes, however, it functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution.<sup>2</sup> Because the justices do not all share the same interpretive methodology, they do not always have an agreed-upon standard for identifying "error" in constitutional cases. Rejection of a controversial precedent does not always mean that the case is wrong when judged by its own lights; it sometimes means that the justices voting to reverse rejected the interpretive premise of the case. In such cases, "error" is a stand-in for jurisprudential disagreement.

The argument proceeds in three parts. After Part I explains the general contours of stare decisis, Part II develops the thesis that, at least in controversial constitutional cases, an overlooked function of stare decisis is mediating jurisprudential disagreement. Identifying this function of stare decisis offers a different way of thinking about what the weak presumption accomplishes in this category of precedent. On the one hand, it avoids entrenching particular resolutions to methodological controversies. This reflects respect for pluralism on and off the Court, as well as realism about the likelihood that justices will lightly let go of their deeply held interpretive commitments. On the other hand, placing the burden of justification on those justices who would reverse precedent disciplines jurisprudential disagreement lest it become too disruptive. A new majority cannot impose its vision with only votes. It must defend its approach to the Constitution and be sure enough of that approach to warrant unsettling reliance interests. Uncertainty in that regard counsels retention of the status quo.

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\* Professor, Notre Dame Law School.

1. See *infra* notes 22–24 and accompanying text.

2. Cf. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 537 (1999) ("Anyone who cares about constitutional law confronts a large and proliferating number of constitutional theories, by which I mean theories about the nature of the United States Constitution and how judges should interpret and apply it.").

Insofar as it keeps open the prospect of overruling, the weak presumption undeniably comes at a cost to continuity. Part III observes, however, that less rides on the strength of stare decisis than is commonly supposed. Discussions of stare decisis tend to proceed as if horizontal stare decisis—the Court’s obligation to follow its own precedent—is the only mechanism for maintaining doctrinal stability. Other features of the system, however, also serve that goal, and may well do more than horizontal stare decisis to advance it. In particular, the prohibition upon advisory opinions, the obligation of lower courts to follow Supreme Court precedent, the Court’s certiorari standards, its rule confining the question at issue to the one presented by the litigant, and the fact that the Court is a multimember institution whose members have life tenure are all factors that work together to contribute to continuity in the law. To be sure, overruling precedent is disruptive. But some instability in constitutional law is the inevitable byproduct of pluralism. Were there greater agreement about the nature of the Constitution—for example, whether it is originalist or evolving—we might expect to see greater (although of course still imperfect) stability. In the world we live in, however, that level of stability is more than we have experienced or should expect in particularly divisive areas of constitutional law.

#### I. The Doctrine of Stare Decisis

Stare decisis is a many-faceted doctrine. It originated in common law courts and worked its way into federal courts over the course of the nineteenth century.<sup>3</sup> By the twentieth century, the doctrine had become a fixture in the federal judicial system.<sup>4</sup> That is not to say that its shape was then or is now fixed. On the contrary, the strength of stare decisis is context dependent.

Stare decisis has two basic forms: vertical stare decisis, a court’s obligation to follow the precedent of a superior court, and horizontal stare decisis, a court’s obligation to follow its own precedent.<sup>5</sup> Vertical stare decisis is an inflexible rule that admits of no exception.<sup>6</sup> Horizontal stare decisis, by contrast, is a shape-shifting doctrine. For one thing, its strength

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3. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1065 (2003) (describing the development of stare decisis in the federal judicial system).

4. See Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008) (asserting that “by 1900 the Supreme Court had settled into the practice of citing and relying upon its precedents as modalities of argumentation and sources of decision”).

5. Barrett, *supra* note 3, at 1015.

6. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

varies according to the court in which it is invoked.<sup>7</sup> It is virtually nonexistent in district courts, which do not consider themselves bound to follow their own prior decisions.<sup>8</sup> It is a virtually absolute rule in courts of appeals, which prohibit one panel from overruling another, allowing only the rarely seated en banc court to overrule precedent.<sup>9</sup> In the Supreme Court, stare decisis is a soft rule; the Court describes it as one of policy rather than as an “inexorable command.”<sup>10</sup> The strength of horizontal stare decisis varies not only by court, but also by the subject matter of the precedent. The Supreme Court has divided precedent into three categories, and courts of appeals have generally followed suit.<sup>11</sup> Statutory precedents receive “super-strong” stare decisis effect, common law cases receive medium-strength stare decisis effect, and constitutional cases are the easiest to overrule.<sup>12</sup> Its rationale for giving constitutional precedent only a weak presumption of validity is that while Congress can correct erroneous statutory interpretations by passing legislation, the onerous process of constitutional amendment makes mistaken constitutional interpretations difficult for the People to correct.<sup>13</sup>

As this discussion reflects, there is nothing inevitable about the shape of stare decisis. It is a judge-made doctrine that federal courts have given varied force in varied contexts. This Article is concerned with the force that stare decisis should have in one particular context: when a Supreme Court justice confronts constitutional precedent with which she disagrees. To be sure, stare decisis does far more than simply constrain judging. Precedent influences the decision in every case insofar as it gives a justice a way of thinking about the problem she must decide.<sup>14</sup> Justices can more easily apply

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7. Barrett, *supra* note 3, at 1015. In addition to the variations described in the text, both vertical and horizontal stare decisis are dependent upon jurisdictional lines. District courts need only obey decisions of the court of appeals in the circuit in which they sit, and courts of appeals are not bound by the decisions of their sister circuits. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 516–18 (2000).

8. See Barrett, *supra* note 3, at 1015 & n.13 (“As a general rule, the district courts do not observe horizontal stare decisis.”).

9. See *id.* at 1015 (suggesting that courts of appeals feel the restrictions imposed by horizontal stare decisis more strongly than do district courts or the Supreme Court).

10. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

11. See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321 & nn.20–22 (2005). As I have discussed elsewhere, the categories make much less sense at the circuit level, whatever their merit at the Supreme Court. *Id.* at 327–51.

12. *Id.* at 321 & n.22.

13. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.”).

14. See Barrett, *supra* note 3, at 1068 (“[J]udges do not decide cases in a vacuum; rather, precedent always affects the way they view the merits.”). In this regard, stare decisis promotes efficiency. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921), for

the Constitution's broad language because precedent offers them a framework for doing so; Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>15</sup> is a notable example. Decided cases enable the justices to reason by analogy, and the doctrine itself is a reference for arguments grounded in other modalities like text, structure, ethics, prudence, and history.<sup>16</sup> Because of these and many other contributions, stare decisis can fairly be characterized as the workhorse of constitutional decisionmaking.<sup>17</sup> The doctrine has its greatest bite, however, when it constrains a justice from deciding a case the way she otherwise would.<sup>18</sup> In this situation, a justice must decide, to paraphrase Justice Brandeis, whether it is better for the law to be settled or settled right.<sup>19</sup> This is the decision upon which this Article will focus.

Scholars have a range of views about how the Court should behave when deciding whether to overrule constitutional precedent. Those who favor weak stare decisis tend to do so because of their methodological commitments. Thus, some living constitutionalists have argued for freedom to overrule lest precedent hinder progress,<sup>20</sup> and some originalists have argued for freedom to overrule lest doctrine trump the document.<sup>21</sup> Those

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the proposition that “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it”).

15. See 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring) (articulating a three-part framework for evaluating presidential assertions of power).

16. Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982) (describing the modalities of constitutional argument).

17. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 65 (2008) (“The extreme frequency with which the justices cite, or ground their opinions in, precedent establishes precedent as a, if not the, principal mode of constitutional argumentation.”). For an excellent catalogue of the many contributions other than constraint that stare decisis makes to constitutional law, see *id.* at 147–76.

18. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 139 (1997) (“The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) (“The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.”).

19. See *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.”).

20. For example, Justin Driver argues that common law theories of constitutional adjudication risk overemphasizing the importance of stare decisis, for judges should feel free to “cast aside their predecessors’ outmoded thinking.” Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2012); see also *id.* (“Living constitutionalism, properly conceived, must create significant leeway for judicial interpretations that deviate from even well-settled precedents.”).

21. Some originalists insist that the Court may never follow precedent that conflicts with the Constitution’s original meaning. See, e.g., Randy E. Barnett, Response, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (describing himself as a “fearless originalist[]” because he is willing to reject stare decisis when it would require infidelity to the text); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 25–28 (1994) (arguing that it is unconstitutional to

who favor more robust stare decisis tend to do so because of the values the doctrine serves, including judicial restraint,<sup>22</sup> the rule of law,<sup>23</sup> and the legitimacy of judicial review.<sup>24</sup> Here, I develop an account of weak stare decisis, but it is not grounded in the claim that any particular methodological commitment demands that approach. Instead, I argue that the variety of such commitments on the Court makes a more relaxed form of constitutional stare decisis both inevitable and probably desirable, at least in those cases in which methodologies clash.

Before I develop this argument, a word of clarification is in order. Studies of stare decisis sometimes describe the way the doctrine restrains the Court as an institution,<sup>25</sup> but I will view the problem from the perspective of an individual justice. Each justice doubtless takes into account the interests of the institution in deciding whether overruling is appropriate. At least before it issues a decision, however, the Court does not have an institutional view about whether the precedent under consideration is right or wrong. Assessment of a precedent's consistency with the Constitution can depend upon a justice's interpretive commitments; the question for a justice who disagrees with a prior decision is whether the constraint of precedent overrides those commitments. Thus, while stare decisis serves institutional interests, this Article treats its tether as operating upon the individuals rather than the entity.

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adhere to precedent in conflict with the Constitution's text). Other originalists concede that the Court may do so in rare circumstances. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 834 (2009) ("Under our consequentialist approach, the goal is to use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (characterizing himself as a "faint-hearted originalist" because of his willingness to follow some precedents that may conflict with the Constitution's text).

22. *See, e.g.*, Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977, 981 (2008) ("A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy.").

23. *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 159 (2006) (advancing a neoformalist argument as to why "the Supreme Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions").

24. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) (arguing that the Court should follow precedent even when overruling it would not unduly disrupt societal expectations or institutions in order "to demonstrate—at least to elites—the continuing legitimacy of judicial review").

25. *See, e.g., id.* at 755 n.184 (explaining that the author "focuses on stare decisis in terms of the Court rather than in terms of the obligation of an individual member of the Court towards precedent").