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Precedent and Disagreement

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INTRODUCTION

Supreme Court justices have fundamentally competing perspectives regarding the best approach to constitutional interpretation. The Court has therefore never adopted one authoritative methodology of constitutional interpretation. Rather, the Court uses different methodologies to decide different cases, justices frequently vacillate in their preferred interpretive methods, and many decisions fail to reflect any foundational approach. Within the bounds of legitimate judicial craft, constitutional interpretation—and legal interpretation more generally—is a methodological free-for-all.

Notwithstanding the Court's interpretive pluralism, justices have consistently embraced the principle of stare decisis, and the presumption that courts will follow applicable precedent is one of the defining features of the American legal system. This practice is widely understood to promote efficiency, stability, and the legitimacy of the judicial system. Yet it is also widely accepted that "[*s*]*tare decisis* is not an inexorable command"[1] and that the obligation to follow precedent is a prudential principle that can be overcome by other considerations, including an overwhelming desire to get things right.[2] Aside from these areas of common ground, however, the Court has never produced a consistent theory of precedent, and there is no dominant understanding of stare decisis or the best way to resolve its seemingly contradictory premises.[3]

Randy Kozel's[4] insightful and provocative new book, *Settled Versus Right: A Theory of Precedent*, argues that the Court's interpretive pluralism has precluded a consistent and uniform doctrine of stare decisis. Justices weigh the benefits of stability against the harms associated with standing by

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1. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

2. *Id.* at 827–30.

3. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988) (recognizing the absence of a prevailing theory).

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an erroneous or flawed decision when evaluating whether to adhere to past decisions. Because justices with competing interpretive perspectives use different metrics to identify and measure the relevant harms (and to determine whether a prior decision was erroneous or flawed in the first instance), a pluralistic Court cannot treat precedent in a consistent or uniform fashion if each justice is left to her own interpretive devices.

Kozel believes that the absence of a consistent and uniform doctrine is particularly problematic because stare decisis is designed to promote the stability and impersonality of law. Yet stare decisis cannot perform these functions if every justice follows a different approach to precedent. Kozel therefore advocates a "second-best" approach that would only allow for the consideration of traditionally relevant factors that can be applied independently of each justice's fundamental methodological and normative commitments in assessing whether to adhere to a mistaken decision.[5] "The pivotal difference between the Court's existing account of stare decisis and this second-best approach is the latter's introduction of doctrinal revisions designed to alleviate the problems posed by interpretive disagreement" (p. 128). This approach would generally preclude justices from considering the substantive harm that would result from continuing to follow a mistaken decision, the persuasiveness of the challenged precedent's reasoning, or the impact of following precedent on the overall coherence of constitutional law.[6] While Kozel recognizes that his proposal would require justices to adhere to decisions they regard as mistaken, he contends that his approach reflects a theoretically neutral compromise that could reasonably be acceptable to justices with fundamentally competing interpretive perspectives.[7]

This Review contends that, far from presenting a neutral theory of stare decisis that should reasonably be acceptable to everyone, Kozel's second-best theory of precedent is deeply normative and inherently controversial. While Kozel acknowledges that his second-best approach "privileges" stability and impersonality (p. 106), his proposal would go a significant step further and generally exclude competing normative values that justices with fundamentally different jurisprudential perspectives could legitimately find dispositive. At the end of the day, most justices would have compelling grounds for rejecting the second-best approach. The proper treatment of precedent should therefore continue to be the subject of reasoned deliberation and ongoing disagreement. Interpretive pluralism is the *first-best world*, and precedent should continue to be used and evaluated in a pluralistic fashion.

This Review proceeds to set forth the outlines of an alternative conception of precedent that is grounded in deliberative democratic theory. This theory accepts interpretive pluralism as a desirable feature of the American constitutional order. It also recognizes that the fundamental purposes of presumptive deference to precedent are to facilitate reasoned deliberation

5. For a concise summary of Kozel's proposed doctrinal reforms, see pp. 128–30. *See also infra* Part I.

6. *See* pp. 114–15, 118–27.

7. *See, e.g.*, pp. 13–18, 130–35.

within the judiciary and to shift responsibility for changing entrenched features of the law to more deliberative or broadly representative institutions of government. Promoting continuity and the impersonality of law are merely side benefits of stare decisis. This theory also recognizes that the law frequently does not provide a single correct answer and that constitutional meaning should be provisional and potentially subject to ongoing contestation. The true purposes of presumptive deference to precedent are therefore served whenever the Court considers and responds in a reasoned fashion to prior decisions, regardless of whether the Court follows or overrules its precedent.

I. Interpretive Pluralism and Second-Best Stare Decisis

Kozel's book is a tremendous resource for thinking about and understanding the use of precedent, regardless of whether one agrees with his normative perspective or his proposal for a second-best approach. He provides a wealth of information about different aspects of precedent, the broad range of purposes that can be served by following it, the legitimacy of stare decisis within the American constitutional system, and the fluctuating and sometimes inconsistent doctrine employed by the modern Court.[8] *Settled Versus Right* is impressive scholarship by any measure, and it should be required reading for anyone who is interested in the concept of precedent.

Kozel is deeply respectful of the integrity of law and the justices of the Court. He believes that widespread allegations that the Court is acting in an unprincipled or political manner when it applies precedent in an inconsistent fashion are misplaced. "The problem," he contends, "is that the modern doctrine of stare decisis is undermined by principled disagreements among justices acting in good faith" (p. 6). And the root of this problem is interpretive pluralism—"a vision of constitutional decisionmaking characterized by the absence of commitment to any particular interpretive theory" (p. 96).

Kozel explains that under the Court's current approach, first-order methodological disagreement among the justices regarding the proper approach to constitutional interpretation will carry over into each justice's decisions regarding whether to follow or overrule a precedent.[9] This naturally occurs because different approaches to precedent tend to correspond with different interpretive methodologies and similar interpretive methodologies will even lead to different approaches to precedent if those interpretive methodologies are premised upon different normative commitments.[10] For example, an originalist is likely to have a different perspective on precedent than a living constitutionalist, and a structural originalist is likely to have a different perspective on precedent than someone who follows originalism based on consequentialist considerations (pp. 62–67). These competing methodological and normative orientations are incorporated into the

8. *See* pp. 19–33, 34–59, 107–39.

9. *See, e.g.*, p. 99.

10. *See* chapter 3.

Court's treatment of precedent under existing doctrine when different justices assign different weights to the amount of harm that would result from continuing to follow a problematic decision and the corresponding benefits that would result from setting things right.[11] Kozel regards this as unacceptable for a legal doctrine that is ostensibly designed to promote the stability and impersonality of law.[12]

One way to fix this problem would be for the justices to adopt a uniform and consistent theory and method of constitutional interpretation.[13] The justices could then proceed to adopt the approach to precedent that corresponded with the Court's chosen interpretive approach. Kozel recognizes, however, that this "first-best" approach to stare decisis is unavailable because the justices will not realistically agree upon or follow a uniform and consistent approach to constitutional interpretation.[14]

Kozel therefore advocates a second-best approach to stare decisis. The key, he explains, is to establish mechanisms for separating the ongoing normative and methodological disagreement in constitutional interpretation from the Court's treatment of precedent so that the former does not infect the latter.[15] Kozel's preferred mechanism for implementing his approach is to reform stare decisis doctrine by allowing justices to consider traditional factors that are relevant for assessing whether to follow or overrule a problematic decision that do not depend on their own fundamental jurisprudential or normative commitments, while generally excluding factors that are inseparable from each justice's individual commitments from the calculus.[16] Under this approach, justices should consider the procedural workability of existing law and the accuracy of its factual underpinnings when assessing whether there is a "special justification" for overruling an erroneous decision, and those factors should be weighed against the disruption that would be caused by rejecting established precedent.[17] Conversely, justices should not ordinarily consider the magnitude of a prior decision's error, the amount of harm that would be caused by adhering to a mistaken decision, or the extent to which overruling a past decision would promote jurisprudential coherence, because those factors cannot be applied independently of a justice's deeper methodological or normative commitments.[18] Kozel acknowledges, however, that justices should be allowed to consider the harm

11. *See* pp. 60–61, 92–99.

12. *See* pp. 105–06; *see also* pp. 41–45 (discussing how stare decisis can promote impersonality and constraint).

13. *See* p. 102.

14. *See* p. 106.

15. *See, e.g.*, p. 103.

16. *See* chapter 6. Alternatively, Kozel proposes a structural solution to the problems allegedly posed for precedent by interpretive pluralism, which would require overrulings to receive support from a supermajority of justices. *See* chapter 7.

17. *See* pp. 108–14, 116–18.

18. *See* pp. 114–15, 118–23. Kozel also proposes similar doctrinal reforms that would allegedly make judicial inquiries regarding precedential scope turn on factors that are independent of a justice's fundamental jurisprudential commitments. *See* chapter 8.

that would result from continuing to follow a mistaken precedent in truly exceptional circumstances, because this exception would make his second-best approach more palatable to justices with particularly strong normative or methodological commitments (and perhaps because it could also justify a decision like *Brown v. Board of Education*,[19] which would otherwise seem impermissible under his preferred approach).[20]

With the latter stipulation, Kozel suggests that his second-best approach could reasonably be accepted by justices with fundamentally competing normative and methodological views.[21] The justices could continue to follow their own preferred approaches in cases of first impression and in assessing whether a prior decision was, in fact, erroneous (p. 107). The second-best approach would merely preclude the justices from continuing to adhere to their own normative or methodological preferences in deciding whether to follow or overrule mistaken decisions.[22] While this approach may not be ideal from any justice's perspective, Kozel contends that it is a theoretically neutral compromise that would facilitate collective action by the Court and that such doctrinal reform is essential for stare decisis to fulfill its stated promises of promoting the stability and impersonality of constitutional law.[23] Kozel therefore claims that second-best stare decisis is an approach that all the justices could reasonably find acceptable in our second-best world of interpretive pluralism.[24]

II. Second-Best Stare Decisis as a Contestable Normative Theory

> *Second-best stare decisis makes no effort to squeeze out all the normativity from judging. What it pursues is a common set of metrics that are suitable from a range of interpretive perspectives. . . . The justices will still disagree, but they will disagree in the right way.* (pp. 129–30)

Kozel's proposed theory is built upon a series of related normative propositions, each of which is deeply contestable. Moreover, by placing other potentially competing normative considerations out of bounds, Kozel's theory would require many justices to reach decisions that are contrary to their understanding of the most justifiable result on the merits under the circumstances. Those justices could, in turn, reasonably decline to set aside their most fundamental jurisprudential and normative commitments when deciding cases, particularly when doing so would lead them into what they regard as constitutional error. At the end of the day, second-best stare decisis would

19. 347 U.S. 483 (1954).

20. *See* pp. 122–23.

21. *See* pp. 17–18, 130–35; *see also* pp. 161–71 (discussing how second-best stare decisis could reasonably be accepted by both living constitutionalists and originalists).

22. *See* pp. 14, 129–30.

23. *See, e.g.*, pp. 15, 45–46, 104–06.

24. *See, e.g.*, p. 138 ("The hope is that regardless of their views about the relevance of factors such as moral judgments, Supreme Court justices will accept second-best stare decisis in light of the theory's methodological neutrality.").

only be a compelling option for justices who happen to share both Professor Kozel's fundamental normative commitments and his idiosyncratic priorities—as opposed to a neutral theory of precedent that should reasonably be acceptable to everyone.

A. *Suppressing Interpretive Pluralism*

Kozel's second-best approach is designed to address the problems that are allegedly posed for stare decisis by interpretive pluralism.[25] The ideal solution, Kozel suggests, would be to eliminate fundamental methodological and normative disagreement from constitutional law.[26] But the Court probably *could not* adopt or maintain a consistent approach to constitutional interpretation in the absence of "methodological stare decisis," an idea that is highly problematic for a variety of reasons[27] and that Kozel wisely rejects on the grounds that giving binding legal effect to one interpretive methodology would be asking too much of justices with fundamentally competing views.[28] Kozel also correctly points out that interpretive pluralism is an individual phenomenon as well as an enduring attribute of the Court's collective behavior because some justices decline to follow a consistent approach, preferring instead to use the methodology that leads them to what they regard as the best decision in each particular case.[29]

In the absence of a viable mechanism for eliminating fundamental disagreement from constitutional interpretation, Kozel proposes a "second-best approach" (p. 100). Rather than pursuing the hopeless task of eliminating

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25. *See* pp. 98–99.

26. *See* pp. 92–100 (discussing the methodological disagreement that results from interpretive pluralism in constitutional law and claiming that "[t]he second-best world stands in contrast to an idealized state of affairs in which the Justices largely agree on the appropriate ends and means of constitutional interpretation").

27. *Cf.* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014) (criticizing this concept in the context of statutory interpretation).

28. *See* pp. 153–55 ("Asking a justice to interpret all constitutional provisions using a methodology of which she disapproves . . . is asking too much. It requires extraordinary sacrifice without sufficient return. No justice would make such a pledge, and no justice should."). Kozel rejects both methodological stare decisis and the treatment of *Chevron* deference as binding precedent on the respective grounds that "deference to precedent properly . . . stops short of requiring adherence to broader interpretive philosophies," and "it would be improper to ask a justice to accept a particular method of resolving countless statutory disputes going forward." P. 156. There is a certain amount of hypocrisy in this position, considering that second-best stare decisis would ask the justices "to accept a particular method of resolving countless [constitutional] disputes going forward." P. 156. The most plausible explanation for Kozel's different treatment of these issues relates to his own methodological and normative commitments, which lead him to conclude that the costs of following stare decisis outweigh the benefits in the former contexts. *See* p. 154. While Kozel contends that "it is too much to ask a Supreme Court justice to embrace originalism, or common law constitutionalism, or pragmatism, or any other *–ism* on grounds of stare decisis," p. 156, he would apparently except "Kozel-ism" from this otherwise sound position.

29. *See* pp. 97–98.

interpretive pluralism, Kozel would modify stare decisis doctrine by precluding each justice from assessing the harm that would result from continuing to follow a mistaken decision by her own lights (pp. 101–02). The trick, he suggests, is to specify and adopt a single set of legally relevant factors for assessing whether to follow or overrule a mistaken decision that is independent of each justice's methodological and normative commitments (pp. 128–29).

Kozel maintains that he is not taking a position on the desirability of interpretive pluralism (p. 99). Yet his second-best theory of precedent is explicitly premised on the notion that adoption of a uniform approach to constitutional interpretation is the unattainable, first-best ideal.[30] This suggests an antipathy toward interpretive pluralism that carries forward to his proposed treatment of precedent. Just as various forms of originalism and living constitutionalism each have a corresponding theory of precedent, a critic of interpretive pluralism would likely gravitate toward Kozel's proposed approach to stare decisis. The theory *is* second-best from this perspective in the sense that it does not *eliminate* methodological and normative disagreement from constitutional interpretation, but it does pursue an approach to precedent that *minimizes the impact* of jurisprudential disagreement as much as possible in a world of interpretive pluralism.[31] It is not clear that Kozel's proposed theory is "second best" in the classic sense: he is not addressing one flaw (i.e., interpretive pluralism) by introducing what he would perceive as *another flaw* (i.e., a uniform and consistent approach to precedent), but rather he is evidently seeking to maximize his preferred interpretive values of uniformity and consistency.[32] What is clear, though, is that Kozel's proposed theory of precedent is based on *normative values*—namely, the alleged value of suppressing interpretive pluralism.

That Kozel's second-best approach is based on the normative value of suppressing interpretive pluralism is demonstrated by the fact that eliminating fundamental methodological and normative disagreement from stare decisis doctrine is the defining feature of his proposals.[33] The justices would all be expected to follow a consistent and uniform approach to precedent.[34] His approach is therefore antipluralistic in the sense that it effectively contends "that cases [that are governed by applicable precedent] should be decided in accordance with preexisting commitments to interpretive methodologies

30. *See* pp. 98–100 (describing "the challenges of pluralism," and claiming that "[f]rom the standpoint of developing a workable and coherent doctrine of stare decisis, a world of pluralism is a second-best world").

31. *See* p. 129.

32. *See* pp. 100–02 (explaining that the basic insight of the economic theory of the second best is that "[i]f a system suffers from one flaw, it might make sense to intentionally introduce another imperfection in response to the first").

33. *See, e.g.*, pp. 105, 128.

34. Kozel acknowledges that the Court's precedent on precedent is *not* entitled to stare decisis effect, pp. 172–73, which means that his proposed approach would be optional for each justice in each case. This would significantly limit the capacity of second-best stare decisis to promote the continuity and impersonality of constitutional law.

and underlying normative justifications."[35] Kozel's evident attraction to the normative value of suppressing interpretive pluralism is also suggested by the fact that he never seriously considers the feasibility or potential desirability of an approach to precedent that varies based on the circumstances presented in each case or that involves the use of practical reasoning. In other words, Kozel summarily rejects a pluralistic approach to precedent that may correspond rather nicely with our existing world of interpretive pluralism.

If one truly accepts the value of interpretive pluralism, its continued existence need not pose any special problems for the use of precedent. Rather, one could easily embrace an approach to constitutional interpretation and the use of precedent that is *pluralistic all the way down*. I will have more to say about this approach in Part III, but it would differ from Kozel's proposed treatment of precedent in fundamental ways. First, it would allow each justice to follow an approach that is consistent with her fundamental methodological and normative commitments, provided that the resulting treatment of precedent could reasonably be justified to ordinary citizens and jurists with fundamentally competing views. This approach would allow for substantial variation in the treatment of precedent both as a general matter and in particular cases, but it would certainly not mean that anything goes. For example, the blanket rejection of presumptive deference toward precedent is not a reasonably justifiable position in our constitutional system, as evidenced by the fact that any judicial nominee who took this position would not be confirmed.[36] Similarly, invalidating the use of paper money on the grounds that it conflicts with the original constitutional meaning would not be a reasonably justifiable decision, even for a structural originalist. This suggests that even justices who are otherwise dogmatic fundamentalists regarding constitutional interpretation will not be purists in their treatment of precedent and that stare decisis will necessarily involve at least some practical reasoning.

Second, because most justices embrace interpretive pluralism as an individual matter and therefore make constitutional decisions on a case-by-case basis,[37] they would typically decide whether to follow or overrule a mistaken precedent based on an all-things-considered practical judgment. This means that practical reasoning should be the dominant approach regarding the proper treatment of precedent. This approach would not only properly consider the factual accuracy of a prior decision, its procedural workability, and the disruption that would be caused by overruling it, but this approach

35. *Cf.* p. 98 ("Pluralism denies that cases should be decided in accordance with preexisting commitments to interpretive methodologies and underlying normative justifications.").

36. *See* p. 3 (recognizing that "every sitting justice has acknowledged the importance of deferring to precedent under certain circumstances"); Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2211–12 (2014) (recognizing that no justice has rejected a role for stare decisis in constitutional interpretation and explaining that "nominees to the Supreme Court are regularly and successfully pressed in their confirmation hearings to affirm their commitment to the doctrine of stare decisis").

37. *See* pp. 97–98.

would also consider the quality of a prior decision's reasoning, the amount of substantive harm that would likely result from continuing to follow it, and the extent to which changing course would promote jurisprudential coherence.

The availability of a pluralistic approach to precedent that involves the use of practical reasoning poses serious challenges to Kozel's efforts to remove the justices' fundamental methodological and normative commitments from the application of precedent and to his related efforts to separate assessments of whether a decision was wrong from whether it should be overruled.[38] Justices who engage in practical reasoning will presumptively follow precedent unless they have reason to believe that a prior decision is seriously flawed. Those justices are most likely to conclude that a prior decision is seriously flawed if it was poorly reasoned, is causing significant substantive harm, or is out of step with evolving constitutional norms, as well as if the decision was based on erroneous or outdated factual premises or has proven unworkable. If a prior decision raises sufficient red flags, the justices are likely to invest the time and effort required to formulate a view on the merits of the relevant constitutional question and to consider whether the earlier decision should be followed or overruled. But each of these determinations is likely to be informed at least in part by the same considerations that persuaded the justices to take a closer look at the legal question in the first place, as well as by the potential disruption that would be caused by a change in the Court's understanding of the Constitution.

Justices who engage in practical reasoning all the way down cannot realistically be asked to set aside their fundamental methodological and jurisprudential commitments during certain phases of one highly integrated decisionmaking process. Kozel's second-best approach to precedent tends to presume that constitutional questions have a single correct answer and that the requisite inquiries into the best understanding of the Constitution and whether an erroneous decision should be overruled can easily be segregated in a formalistic fashion.[39] But for justices who engage in practical reasoning, the various aspects of the requisite inquiries will routinely bleed into one another. For this reason, a pluralistic approach to precedent would place less emphasis on trying to establish a single set of uniform doctrinal rules for following or overruling erroneous decisions and would instead place greater emphasis on encouraging the justices to follow their core obligation under the principle of stare decisis to consider and respond in a reasoned fashion to prior judicial decisions.

B. *Privileging Continuity and Impersonality over Other Normative Values*

Kozel does not seek to suppress interpretive pluralism out of disrespect towards competing methodological or normative commitments. He contends, however, that a pluralistic approach to the treatment of precedent

38. *See* p. 122.

39. *See, e.g.*, p. 23.

must be rejected if stare decisis is to achieve its purposes of promoting stability and the impersonality of law.[40]

In a sense, the privileged status of continuity and impersonality in Kozel's second-best approach is both explicit and obvious. He openly asserts that "[t]his book develops a theory of precedent designed to enhance the stability and impersonality of constitutional law" (p. 6). He contends that if theories of stare decisis are derived from broader theories of constitutional interpretation, the durability of precedent will tend to track whichever methodological or normative perspective predominates.[41] "Once that happens, stare decisis loses the ability to bring together judges of different predilections and to imbue constitutional law with a sense of continuity that transcends interpretive debates" (p. 61). Accordingly, "[t]he driving objective of second-best stare decisis is the separation of precedent from interpretive theory in a way that transcends the identities of individual judges" (p. 103). Kozel maintains that "[u]ntangled from debates over interpretive theory, second-best stare decisis embodies a fundamental commitment to continuity and impersonality—a commitment to the rule of law rather than the rule of men and women" (p. 106). Indeed, he concludes that "the virtues of deference often justify the tolerance of error, so long as stare decisis is applied in a manner that is consistent, impersonal, and—to the greatest extent possible—independent of disputes over interpretive philosophy" (p. 103).

To his credit, Kozel acknowledges that his second-best theory of precedent is not "value-free" (p. 15). He recognizes that his proposed approach "privileges" the values of "impersonality and continuity" and is therefore "unmistakably normative" (p. 106). Kozel also points out that these particular values have been accepted by numerous justices over the years from "across the philosophical spectrum," and he suggests that his proposed approach could therefore potentially "draw together judges who might otherwise be inclined to disagree" (p. 106).

Kozel is undoubtedly correct that nearly everyone accepts the values of continuity and impersonality to some degree, and these are legitimate considerations that should inform the Court's treatment of precedent (p. 15). The problem, however, is that Kozel takes things one step further when he suggests that the Court should promote continuity and impersonality to the *exclusion* of other potentially competing normative values, including persuasive reasoning, jurisprudential coherence, and prevention of serious substantive harm (p. 13). While virtually everyone accepts the values of continuity and impersonality to a point, the justices should not necessarily be willing to privilege those normative values over the need to make what they perceive as the most justifiable decision on the merits of each case, as second-best stare decisis would require.

Thus, Kozel's proposed approach also privileges the values of continuity and impersonality in a subtler and substantially more profound sense. In

40. *See, e.g.*, pp. 8–9, 11, 105–06, 175.

41. *See* p. 61.

particular, second-best stare decisis excludes all the relevant normative considerations except the ones that Kozel favors, pursuant to an approach that he characterizes as "fundamentally neutral."[42] While Kozel's proposed approach may be neutral vis-à-vis foundational or comprehensive theories of constitutional interpretation,[43] it is hardly neutral regarding its controlling normative values. Consider, for example, the perspective of an advocate of interpretive pluralism. In evaluating the proper treatment of precedent, such a justice would likely consider a wide variety of factors, and different factors would likely play a different role or have a different resonance in different cases. It would not be unusual, however, for a justice to privilege her desire to prevent serious harm in a compelling case over the benefits that might otherwise be provided by promoting stability and the impersonality of law. And, as explained above, some of the same considerations could inform a justice's conclusions regarding both whether the existing precedent is flawed and whether it should be followed or overruled. By forcing her to bifurcate these inquiries and set aside her most strongly held normative commitments, second-best stare decisis would require this justice to deviate from her preferred methodology, and it would also privilege stability and impersonality over her preferred normative values. In other words, second-best stare decisis would force this justice to privilege Kozel's preferred methodological and normative commitments over her own. The same would be true of the adherents of originalism, living constitutionalism, and other foundational or comprehensive theories, who would be required to prioritize the values of stability and impersonality over their own preferred jurisprudential commitments.[44]

Kozel argues that deference to precedent can only bolster stability and impersonality if precedent can sometimes require a justice to accept an outcome that conflicts with her view of the best understanding of the Constitution and thereby serve as a meaningful constraint.[45] He suggests that justices must set aside their own methodological and normative commitments for precedent to perform this constraining function.[46] If each justice can follow her own approach to precedent by weighing the costs and benefits of following a mistaken decision by her own lights, then precedent cannot compel the justices to accept outcomes that conflict with their own jurisprudential commitments by reaffirming decisions they believe are wrong. Kozel therefore advocates a uniform and consistent doctrine of stare decisis that is independent of the justices' competing methodological and normative commitments.

42. *See, e.g.*, pp. 15, 46, 116, 138.

43. *See, e.g.*, pp. 15, 46, 116, 138.

44. *See* pp. 122, 161–71.

45. *See* pp. 11–13, 30.

46. *See, e.g.*, pp. 32–33, 121–22.

Kozel's second-best approach implicitly incorporates a rule-based model in which the constraining effect of precedent stems from its status as a binding source of legal authority.[47] Precedent can thus "constrain a later court to decide a case in a way that it believes is incorrect at the time it decides it."[48] As explained above, however, Kozel believes that precedent can only serve this function if stare decisis doctrine is revised to eliminate factors that turn on the fundamentally competing perspectives of individual justices. This approach can be contrasted with a natural model in which the Court makes what it regards as the best decision on the merits and the existence of "binding precedent" is merely one factor that can be entitled to greater or lesser weight depending on the circumstances.[49] Courts under the natural model should consider the costs and benefits of following or overruling applicable precedent, but they are *not* required to deviate from what they regard as the most justifiable decision in any particular case based on precedential authority. While a natural model of precedent is far more pragmatic in orientation than a rule-based model, precedent can still serve as a meaningful constraint because justices will, in many cases, naturally reach an outcome that differs from what they would have decided in a case of first impression based on the existence of precedent that is directly on point. Even when the Court concludes that existing precedent is flawed and that overruling a previous decision will result in the most justifiable outcome on the merits, the Court is still constrained by a presumption in favor of following precedent.[50] In particular, the Court is obligated by the principle of stare decisis to consider and respond in a reasoned fashion to the prior decision in this situation. This means that the justification that the Court provides for its decision will be different, and presumably more thoughtful and robust, than it would have been had the Court decided the same issue in the same fashion in a case of first impression. Indeed, the core obligation imposed by stare decisis under the natural model is to consider and respond in a reasoned fashion to existing precedent. This model therefore emphasizes the deliberative value of precedent rather than its authoritative nature.

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47. *See, e.g.*, p. 33. For illuminating discussions of the "rule" and "natural" models of precedential constraint, see Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) [hereinafter Alexander, *Constrained by Precedent*]; Larry Alexander, *Precedential Constraint, Its Scope and Strength: A Brief Survey of the Possibilities and Their Merits*, *in* 3 ON THE PHILOSOPHY OF PRECEDENT 75 (Thomas Bustamante & Carlos Bernal Pulido eds., 2012) [hereinafter Alexander, *Precedential Constraint*]. Kozel's proposed approach departs from Alexander's "rule model of precedent," Alexander, *Constrained by Precedent*, *supra*, at 9, in certain important respects, but they share the conception of precedential constraint described above.

48. Alexander, *Precedential Constraint*, *supra* note 47, at 77.

49. *See id.* at 75–76; Alexander, *Constrained by Precedent*, *supra* note 47, at 5–17, 48–56, 62–64. Just as Kozel's proposed theory departs from Alexander's strict rule-based model, I do not endorse every aspect of Alexander's conception of the natural model. Nonetheless, these two models are rivals (with Kozel falling into one camp and myself favoring the other), and they can be used effectively to highlight our competing views and the underlying normative values at stake.

50. *See* Alexander, *Constrained by Precedent*, *supra* note 47, at 6–7.

There is little doubt that rule-based models of precedent are more constraining than natural models[51] and thus promote greater continuity and impersonality. Their relatively formalistic nature and the greater limits they seemingly place on judicial discretion make rule-based models well suited to promote legalistic or autonomous conceptions of the rule of law.[52] Kozel therefore emphasizes the virtues of his second-best theory in promoting precisely these rule-of-law values.[53] Natural models of precedential constraint sacrifice a certain amount of stability and impersonality in favor of promoting other normative values. Specifically, natural models do a better job of facilitating meaningful participation and opportunities for democratic contestation by the parties to adjudication. These models also do a better job of facilitating not only reasoned deliberation and independent judgment by courts but also the related obligation of public officials to justify their decisions in a manner that could reasonably be accepted by people with fundamentally competing views. These principles are central components of *responsive conceptions of the rule of law*.[54] The crucial point for present purposes is that selecting an appropriate model of precedential constraint and a corresponding vision of the rule of law is a contestable normative choice, rather than a theoretically neutral decision.

The Supreme Court seems to have made a normative choice in favor of a natural model of precedential constraint and a responsive theory of law in this particular context. Judicial pluralism has resulted in a natural model of precedent for the very reasons that Kozel explains. This model is operationalized by the Court's proclaimed authority to overrule previous decisions whenever it is capable of providing "a special justification" (p. 23). Kozel correctly recognizes that the Court's omnipresent authority to overrule its past decisions is problematic for the operation of rule-based models of precedential constraint and autonomous visions of the rule of law.[55] That explains his central preoccupation with trying to tame the circumstances under which the Court can overrule itself by adopting a uniform and consistent set of strict doctrinal rules. Rather than posing an existential crisis, however, the Court's discretion to overrule itself in compelling circumstances is an essential component of natural models of precedential constraint and responsive theories of the rule of law. These observations are especially true in a world of interpretive pluralism, where different justices adhere to fundamentally competing methodological and normative perspectives.

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51. *Id.* at 50–51.

52. For influential discussions of legalistic or autonomous conceptions of the rule of law, see Philippe Nonet & Philip Selznick, Law and Society in Transition: Toward Responsive Law 53–72 (1978), and Judith N. Shklar, Legalism: Law, Morals, and Political Trials (2d ed. 1986). *See also* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209, 250–60 (2015).

53. *See, e.g.*, pp. 104–06.

54. *See* Nonet & Selznick, *supra* note 52, at 73–113; Staszewski, *supra* note 52, at 250–60.

55. *See* p. 25.

* * *

Kozel's approach is ultimately designed to eliminate fundamental legal disagreement regarding the proper treatment of precedent in each case. Yet he can only achieve this result by suppressing interpretive pluralism and privileging continuity and impersonality to the exclusion of other normative values. His proposed approach would force justices—who would otherwise place overriding significance on persuasive reasoning, legal coherence, or the prevention of substantive harm—to reach decisions that are contrary to their considered judgment of the best course of action on the merits under the circumstances by taking their preferred normative values off the table. While his second-best approach *would* allow a justice to consider the substantive effects of following precedent in "exceptional cases" where she viewed a decision as "extraordinarily harmful" from her own particular perspective,[56] this is merely the exception that proves the rule. In ordinary cases, the justices would be required to set aside their fundamental jurisprudential commitments in an effort to manufacture legal agreement and thereby promote the normative values favored by Kozel. His second-best approach therefore fails to "steer clear of contestable interpretive and normative commitments,"[57] and it is not a model that should reasonably be acceptable to justices with fundamentally competing jurisprudential views.

III. Toward a Deliberative Democratic Theory of Precedent

> *The problem is that the modern doctrine of stare decisis is undermined by principled disagreements among justices acting in good faith.* (p. 6)

Kozel's effort to develop a consistent and uniform doctrine of stare decisis—a doctrine that would suppress interpretive pluralism and privilege continuity and impersonality to the exclusion of other normative values based on a formal conception of the rule of law—is fundamentally misguided. The Court's treatment of precedent should instead continue to facilitate and embrace "principled disagreements among justices acting in good faith" (p. 6). This means that a theory of precedent should not focus primarily on whether the justices follow or overrule prior decisions[58] but rather on whether the justices satisfy their core obligation to consider and respond in a reasoned fashion to relevant precedent. The proper role of precedent is not to require justices to reach decisions they believe are wrong but rather to facilitate reasoned deliberation about the best understanding of the Constitution and to transfer responsibility for reconsidering settled questions to

56. *See* pp. 14, 122–23.

57. *See* p. 16 ("[T]he doctrine of stare decisis must be grounded in considerations that steer clear of contestable interpretive and normative commitments.").

58. Perhaps not surprisingly, "[h]ow and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence." Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Const. Comment. 257, 261 (2005).

other lawmaking bodies. This Part begins the process of developing a deliberative democratic theory of precedent that comports with these views.

The central purposes of republican democracy are to promote the collective interests of the people and to protect their liberty from the possibility of domination by private actors or the state.[59] These goals can be accomplished, in part, by holding elections and providing other mechanisms to ensure that the government is responsive to the perceived interests of the people.[60] The satisfaction of these goals also depends, however, on mechanisms that require public officials to consider and respond in a reasoned fashion to the interests and perspectives of everyone who will be affected by a decision—and that allow individuals or groups to challenge public decisions on the grounds that their positions were not given adequate consideration.[61] Deliberative democratic theory therefore maintains that the exercise of governmental authority is only legitimate if public officials adequately consider everyone's interests and perspectives and if they give reasoned explanations for their decisions that could reasonably be accepted by people with fundamentally competing views.[62]

When Alexander Hamilton defended the proposed Constitution's establishment of an independent judiciary, he claimed that courts "should be bound down by strict rules and precedents" in order "[t]o avoid *an arbitrary discretion*."[63] While Hamilton's position arguably aligns stare decisis with traditional conceptions of the rule of law,[64] the use of precedent can also be understood to promote liberty as nondomination and thereby bolster the democratic legitimacy of judicial authority. From a deliberative democratic perspective, a duty to consider and respond in a reasoned fashion to precedent provides a structural safeguard against the possibility of arbitrary domination by the state, which is analogous to other structural safeguards that are provided to prevent arbitrary governmental action in the legislative and administrative-rulemaking contexts.[65]

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59. *See generally* Philip Pettit, Republicanism: A Theory of Freedom and Government (1997).

60. *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* Democracy's Value 163, 173 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

61. *See id.* at 178–80.

62. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* The Good Polity: Normative Analysis of the State 17 (Alan Hamlin & Philip Pettit eds., 1989).

63. The Federalist No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

64. *See* p. 42 (citing The Federalist, *supra* note 63); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 9–10 (2001) (discussing Hamilton's conception of "arbitrary discretion" in the context of antebellum views of stare decisis).

65. *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 Iowa L. Rev. 849, 891–92 (2012) (discussing structural safeguards in the legislative and administrative rulemaking processes that are designed to promote deliberative democracy). *See generally* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985) (recognizing that the legislative and administrative rulemaking processes are designed to promote civic republican values).

The role of precedent in facilitating reasoned deliberation is widely recognized in traditional legal scholarship and is also consistent with leading historical studies of the principle of stare decisis. For example, Frank Cross and Stefanie Lindquist have recognized that the "analogical reasoning" routinely used by courts to ascertain the significance of an earlier decision "is the classical reasoned decisionmaking that forms the basis of the legal process model."[66] Similarly, Justice Stevens has pointed out that the Court's decisionmaking process "invariably involves a study and analysis of relevant precedents," which provides "the basis for analysis and discussion" during conference deliberations and also creates the analytical framework for most of the Court's opinions.[67] Polly Price's historical analysis of the use of precedent in the United States found that although views on the extent to which precedent is "binding" have varied considerably over time, the core idea that the judiciary must seriously consider how a similar case was decided in the past as a prerequisite to making a new decision has consistently been accepted.[68] Moreover, while courts could potentially distinguish or overrule precedent under varying standards throughout American history, they were consistently expected to provide reasoned explanations for those decisions.[69] These core ideas suggest that the central role of precedent is—and perhaps always has been—to perform a deliberative function.

Until recently, however, the strength of the connection between precedent's role in facilitating reasoned deliberation and the principles of deliberative democracy has gone virtually unnoticed. Matthew Steilen has remedied this deficiency by arguing that common law adjudication can achieve democratic legitimacy pursuant to principles of deliberative democratic theory in a manner similar to the enactment of legislation because both processes provide meaningful opportunities for participants to exchange reasons about appropriate collective courses of action.[70] While Steilen does not focus primarily on the role of stare decisis in promoting the democratic legitimacy of adjudication, he recognizes that arguments from precedent will routinely form the backbone of the dialogue between courts and litigants in a common law system and that courts will frequently justify their decisions by discussing the holdings and rationales of previous cases and providing a

66. Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. Rev. 1156, 1163 (2005).

67. John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 4 (1983).

68. *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. Rev. 81, 84–85 (2000).

69. As William Cranch wrote in the preface of his reports of early Court decisions, "Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public." 5 U.S. (1 Cranch) iii–iv (1804) (preface by William Cranch), *quoted in* Price, *supra* note 68, at 91–92; *see also* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 Am. J. Legal Hist. 28, 47, 52 (1959) ("[S]tare decisis requires that a court consider prior decisions and then choose whether to follow, distinguish, or overrule them. Merely to ignore a prior decision is hardly to heed the summons of the policy of stare decisis.").

70. *See* Matthew Steilen, *The Democratic Common Law*, 2011 J. Juris. 437.

reasoned analysis of their implications for the present dispute.[71] "This assessment is carried out in a public setting in which the reasons offered should be *common*—i.e., reasons that the judge and the litigants reasonably believe will be persuasive to others."[72]

Other important contributions to the scholarship on precedent in recent years have recognized stare decisis's capacity to facilitate the type of reasoned discussion that could potentially legitimize judicial decisionmaking from a deliberative perspective without explicitly invoking deliberative democratic theory or focusing directly on questions of democratic legitimacy. For example, Deborah Hellman has argued that judges are likely to make better decisions in a legal system that attributes some weight to precedent because "a presumptive obligation to follow precedent can force a judge to confront opposing arguments and articulate strong reasons for disagreeing with them, thus improving her own decisionmaking."[73]

Similarly, Amy Barrett has recognized that presumptive reliance on precedent "promotes doctrinal stability while still accommodating pluralism on the Court."[74] She explains that while stare decisis is widely understood "to guide a justice's decision whether to reverse or tolerate error," the principle sometimes "functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution."[75] Stare decisis performs this function by facilitating reasoned deliberation about the substantive merits of the relevant issues and the practical value of standing by earlier decisions.[76] Barrett explains that stare decisis promotes stability by creating a rebuttable presumption in favor of preserving the status quo, while simultaneously allowing disputes that involve fundamental differences of opinion to be aired in a manner that "is both realistic about, and respectful of, pluralism" on the Court and in society at large.[77] Presumptive reliance on precedent "helps the Court navigate controversial areas by leaving space for reargument despite the default setting of continuity."[78] The ability of litigants and the Court to contest existing precedent "enables a reasoned conversation over time between justices—and

71. *See, e.g.*, *id.* at 448–49, 478–79.

72. *Id.* at 453.

73. Deborah Hellman, *An Epistemic Defense of Precedent*, *in* Precedent in the United States Supreme Court 63, 63, 70–74 (Christopher J. Peters ed., 2013).

74. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1711 (2013).

75. *Id.*

76. *See id.* at 1722–23 (recognizing that overruling a prior decision requires a heightened burden of justification because "in a system of precedent, the new majority bears the weight of explaining why the constitutional vision of their predecessors was flawed and of making the case as to why theirs better captures the meaning of our fundamental law"); *see also* Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 Const. Comment. 123, 123 (1985) (recognizing the *dialogic* nature of stare decisis).

77. Barrett, *supra* note 74, at 1723.

78. *Id.* at 1724.

others—who subscribe to competing methodologies of constitutional interpretation."[79]

It is important to recognize that stare decisis facilitates reasoned deliberation in the foregoing manner regardless of whether the Court follows or overrules a previous decision, and this effect is *even more pronounced* when the Court transparently overrules precedent.[80] Accordingly, the practice of presumptively following precedent can perform its more important legitimizing functions without a uniform or consistent doctrinal test for ascertaining whether to overrule a prior decision. Indeed, a sufficient degree of flexibility may be necessary for the use of precedent to perform its central legitimizing functions from a deliberative democratic perspective.

Of course, it may seem odd to tout presumptive reliance on precedent as a mechanism for promoting reasoned deliberation when stare decisis also *undermines* thoughtful discussion or dialogue in certain circumstances. Stare decisis is undoubtedly a mixed bag from the perspective of deliberative democratic theory, which emphasizes that legal and policy choices should be provisional and that decisionmakers should be willing to consider changing their minds based on new information or arguments.[81] This theoretical perspective would also suggest, however, that the use of precedent can be greatly improved and rendered more legitimate when certain conditions are met. These conditions would include a practice of "mindfully extending" precedent to similar cases or controversies, the ability to distinguish situations that are different in relevant ways from previously decided cases, the authority to overrule prior decisions in appropriate circumstances, and the ability to dissent from today's decisions on the grounds that previous decisions either should or should not have been followed. These basic conditions improve the quality of the deliberations that are facilitated by the use of precedent and limit the extent to which stare decisis undermines or forecloses reasoned deliberation under circumstances of profound disagreement.

This is not the proper venue for fully explicating all the contours of a deliberative democratic theory of precedent or discussing all of its potential ramifications. My largest and most central point is that the use of precedent should be analyzed and calibrated through the lens of deliberative democratic theory. While I will leave most of the remaining work for future projects, there are several additional aspects of a deliberative democratic theory of precedent that are significant for present purposes. These more nuanced features of the theory would (1) distinguish between entrenched precedent and prior decisions that are plausibly subject to contestation, (2) recognize that fundamental jurisprudential commitments can potentially satisfy the principle of reciprocity and therefore be treated as legitimately

79. *Id.* at 1737.

80. *See id.* at 1729 ("Reversal because of honest jurisprudential disagreement is illegitimate only if it is done without adequate consideration of, and due deference to, the arguments in favor of letting the precedent stand.").

81. *See* Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? 110–19 (2004) (discussing the importance of provisionality to deliberative democracy).

inalienable, and (3) offer a more systemic view of stare decisis's impact on reasoned deliberation. These features ultimately suggest that even the aspects of stare decisis that limit reasoned deliberation or the likelihood of reaching consensus within the Court can be understood to promote democratic legitimacy from a broader deliberative perspective when certain conditions are met.

Discussions of stare decisis often fail to recognize that precedent routinely operates along two distinct tracks, where certain legal principles are treated as "given" and the dispute ultimately turns on other questions that are treated as reasonably subject to dispute. The firmly established legal principles are frequently derived from precedent, and because they have effectively become entrenched, no one seeks to contest them. It is precisely these entrenched legal principles that are removed from the decisionmaking agenda, and they are no longer the subject of serious deliberation, even though reasonable minds could potentially differ on their validity or whether they provide the best solution to a problem. Scholars have referred to entrenched precedent of this nature as "super precedent."[82]

While entrenched precedent seems at first glance to conflict with deliberative democratic theory, a closer examination of its workings suggests that this conclusion would be overly simplistic. For starters, entrenched precedent helps to define the relevant questions at issue in a dispute in a reasonably manageable fashion and avoids the need to repeatedly debate first principles. Some previously decided questions must be treated as given to make reasoned deliberation within a single case or controversy possible. Moreover, super precedent only becomes entrenched through a broader deliberative process that effectively reflects the electoral dimension of republican democracy.[83] Entrenched precedent is therefore potentially compatible with deliberative democratic theory—especially if other mechanisms of contestatory democracy remain available to challenge those decisions in other venues, as is ordinarily the case.[84]

Of course, a great deal of precedent is *not* deeply entrenched, and those decisions are therefore readily contestable and more easily subject to change through adjudication. The questions remain how this second tier of precedent should operate and, in particular, when the Court should be willing to overrule its prior decisions. This is Kozel's primary focus, and it is a problem that would be handled very differently from a deliberative perspective. A deliberative democratic theory of precedent would embrace interpretive pluralism and recognize that a more vibrant constitutional dialogue occurs

82. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); *see also* Barrett, *supra* note 74, at 1734–37 (discussing the mechanics of "super precedent").

83. *See* Gerhardt, *supra* note 82, at 1207–20 (explaining that while super precedent often begins with a single decision, the underlying principle or practice can only become entrenched over time as a result of a broader process in which public and private actors overwhelmingly accept the decision and use it as the foundation for subsequent courses of action).

84. *See infra* text accompanying notes 106–108.

when the justices are allowed to base their decisions on fundamentally competing methodological and normative commitments. Deliberative democratic theory would thus endorse an approach to precedent that is *pluralistic all the way down*.[85] Under this approach, justices could reach decisions that are consistent with their fundamental jurisprudential commitments, provided that the resulting treatment of precedent could reasonably be justified to people with fundamentally competing views. Most justices would, in turn, evaluate the proper treatment of contested precedent in each case through the use of practical reasoning, which would typically include a consideration of the quality of a prior decision's reasoning, the amount of substantive harm that would result from continuing to follow a mistaken precedent, and the extent to which changing course would promote jurisprudential coherence, as well as the factors that are embraced by Kozel's second-best approach.

A deliberative democratic theory of precedent would also adopt a natural model of precedential constraint whereby the justices would be encouraged to reach what they regard as the best decision on the merits in each particular case, provided that they consider and respond in a reasoned fashion to the relevant aspects of prior decisions.[86] While the latter obligation imposes a meaningful constraint, it does not require the justices to reach decisions they believe are fundamentally wrong. This model of precedential constraint is designed to promote a responsive vision of the rule of law,[87] and it recognizes the importance of independent judgment in furthering this ideal.[88]

Perhaps most fundamentally, a deliberative democratic theory of precedent would reject artificial efforts to manufacture legal agreement by eliminating the normativity that is properly associated with the application of precedent in each particular case. Deliberative democratic theory aims to reach legitimate collective decisions in a state of disagreement; it does not seek to eliminate fundamental disagreement.[89] The animating goal of deliberative democracy can be achieved if public officials make the most justifiable decisions on the merits under the circumstances presented in each case

85. *See supra* text accompanying notes 36–39 (describing such an approach).

86. *See supra* text accompanying note 49.

87. *See supra* text accompanying note 54.

88. *See* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1988 (2015) (recognizing that independent judgment can be understood as a constitutive element of the rule of law).

89. *See* Amy Gutmann & Dennis Thompson, *Democratic Disagreement*, *in* DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT* 243, 255 (Stephen Macedo ed., 1999) ("[T]he persistence of moral disagreement forms the basis for much of the argument for the need for deliberative democracy, which in our view is as much concerned with living with continual conflict as with trying to resolve it" (internal quotations and citations omitted)); Stephen Macedo, *Introduction* to DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT*, *supra*, at 9 ("Moral accommodation requires no sacrifice of integrity. In the face of disagreement, citizens should 'affirm the moral status of their own political positions.'" (quoting AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 81 (1996))).

and if they provide reasoned explanations for those decisions that could reasonably be accepted by people with fundamentally competing views.[90] Forcing the justices to abandon their most fundamental jurisprudential commitments when they apply precedent would not only be contrary to principles of deliberative democratic theory; it would make deliberative democracy impossible.

The lingering challenge, however, is for deliberative democracy and related theories of precedent to develop coherent and workable principles for ascertaining which jurisprudential and normative views are reasonably capable of being accepted by citizens or jurists with fundamentally competing views and, therefore, which jurisprudential or normative views satisfy the principle of reciprocity.[91] In other words, we must determine which jurisprudential and normative views are *justifiably inalienable* for citizens or jurists who are committed to fair terms of cooperation in our first-best world of interpretative pluralism.

While I cannot fully resolve this challenge here, I would like to make a few preliminary observations. First, if the principle of reciprocity were used to exclude the application of foundational or comprehensive theories of constitutional interpretation from judicial review, deliberative democracy would lose its second-order status because the theory would no longer be compatible with a variety of more comprehensive political or legal theories.[92] That does not mean that a particular foundational or comprehensive theory of constitutional interpretation could not violate the principle of reciprocity and be precluded from use on that basis, but mainstream versions of constitutional originalism and living constitutionalism do not appear to fall into that category.[93] Although the persuasiveness and desirability of these competing theories is, of course, a legitimate subject of ongoing debate, it seems fair to say at this time that both originalism and living constitutionalism are supported by reasons that could reasonably be accepted by people with fundamentally competing views.

Second, the question of whether any foundational or comprehensive theory of constitutional interpretation satisfies the principle of reciprocity may be the wrong place to focus. Deliberative democracy seeks to facilitate

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90. *See* Gutmann & Thompson, *supra* note 81, at 3–4 ("Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives. . . . In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return.").

91. For a discussion of the principle of reciprocity and its centrality to deliberative democracy, see *id.* at 98–100.

92. *See id.* at 13 (explaining that deliberative democracy is a second-order theory that is compatible with a variety of fundamentally different first-order conceptions of government).

93. It is possible, however, that *some components* of foundational or comprehensive theories might fail to satisfy this principle. For example, rejecting the principle of presumptive deference to precedent would not be reasonably justifiable from a deliberative perspective for reasons explored in the preceding section. *See also supra* note 36 and accompanying text (explaining that judicial nominees are routinely pressed to express their allegiance to stare decisis during confirmation hearings).

the most justifiable decisions on the merits in any particular case, and it therefore tends to focus on the routine operations of government.[94] In other words, deliberative democracy is focused on the weeds (or what Gutmann and Thompson call "middle democracy")[95] rather than on the clouds. The relevant question, then, would be whether any particular decision was legitimate from this theoretical perspective, which would turn both on the results as well as on more nuanced methodological considerations. From a methodological perspective, the question would be whether the plain meaning of the text was a legitimately relevant consideration in this case, not whether constitutional originalism is a legitimate foundational theory in general. Similarly, the relevant question would be whether prudential or ethical considerations were legitimately relevant in this case, not whether a comprehensive theory of constitutional interpretation that incorporated those modalities was legitimate in general.[96] This form of analysis helps to explain why most justices are pluralistic in their reasoning and why their methodological orientation legitimately varies on a case-by-case basis. This form of analysis also helps to explain why jurists and scholars who are most attracted to deliberative democracy tend to be the biggest advocates of interpretive pluralism.

Some deliberative democratic theorists have alluded to the possibility that the use of precedent should be understood as a midlevel principle that connects a decisionmaker's fundamental jurisprudential commitments to her decisions in particular cases.[97] From this perspective, the justices would be required to provide reasoned explanations for the outcomes of particular cases, which would enable interested members of the public to assess whether those decisions were reasonably justified based on principles of deliberative democratic theory and, thus, democratically legitimate. The justices could, however, generally rely on their own fundamental methodological or normative commitments in making their decisions. The Court's work could therefore be informed by, and perhaps consistent with, a variety of jurisprudential perspectives (the rough equivalent of "comprehensive moral doctrines" in this context), and its (legitimate) decisions could routinely involve incompletely theorized agreements by justices with fundamentally competing perspectives. Moreover, the use of precedent would function in practice as a means of connecting the justices' fundamental jurisprudential perspectives with their decisions in particular cases, while simultaneously requiring them to seriously consider alternative perspectives.

94. *See* Amy Gutmann & Dennis Thompson, Democracy and Disagreement 12–13 (1996).

95. *Id.*

96. *See* Philip Bobbitt, Constitutional Fate (1982) (describing the legitimate modalities of constitutional argument).

97. *See* Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. Pol. Phil. 64, 71 (2010) ("[I]n deliberating to an incompletely theorized agreement, the parties offer mutually acceptable justifications regarding outcomes and sometimes even regarding the midlevel principles (such as precedent) that generate those outcomes.").

In sum, the Court's *outcomes* require justification, and precedent is the midlevel principle or mechanism (or set of considerations) that connects legitimate outcomes with the more comprehensive jurisprudential views of the decisionmakers. This will only work, however, if the use of precedent is pluralistic all the way down and the justices are allowed to use precedent in a flexible manner that is compatible with their broader jurisprudential commitments.

Third, the Court must be able to consider the substantive impact of its decisions when the justices apply precedent in ordinary cases to facilitate the contestatory and agonistic features of deliberative democracy.[98] Some deliberative democratic theorists have acknowledged that in the absence of unanimity, political and legal decisions are necessarily coercive, even if those decisions comport with the ideal requirements of deliberative democratic theory.[99] Jane Mansbridge has therefore explained that "[r]ecognizing the need for coercion, and recognizing too that no coercion can be either incontestably fair or predictably just, democracies must find ways of fighting, while they use it, the very coercion that they need."[100] Mansbridge argues that the development of oppositional discourses is essential for this purpose,[101] and her argument highlights several of the most central features of agonistic democratic theory,[102] including a "recognition of the need for and value of vigorous dissent, the necessity of providing a variety of mechanisms for individuals and groups to challenge the validity of public decisions, and an understanding that all legal and policy decisions should be viewed as provisional."[103] Not only are these principles "fully compatible with the best understanding of deliberative democracy,"[104] but they would be promoted by a deliberative democratic theory of precedent. Indeed, presumptive deference toward precedent, combined with the ability to overrule decisions that are no longer justified on the merits based on the circumstances presented in each particular case, would appear to be an ideal way "of fighting, while they use it, the very coercion that [the justices] need."[105]

Finally, it is important to keep in mind that the ability to contest existing precedent (whether deeply entrenched or not) is not limited to adjudication and that social movements and other activists can sometimes use

98. For a discussion of agonistic democratic theory and how its central principles can be synthesized with deliberative democracy, see Glen Staszewski, Obergefell *and Democracy*, 97 B.U. L. Rev. 31, 92–101 (2017).

99. *See* Jane Mansbridge, *Using Power/Fighting Power: The Polity*, *in* Democracy and Difference: Contesting the Boundaries of the Political 46–66 (Seyla Benhabib ed., 1996).

100. *Id.* at 46.

101. *See id.* at 56–59.

102. *See generally* Chantal Mouffe, The Democratic Paradox (2000); Law and Agonistic Politics (Andrew Schaap ed., 2009); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism*, 66 Soc. Res. 745 (1999).

103. Staszewski, *supra* note 98, at 96.

104. *See id.* at 96–98.

105. Mansbridge, *supra* note 99, at 46.

litigation losses (and especially *adverse* precedent) to mobilize for change through the political process.[106] Stare decisis is rarely absolute, and binding precedent in one institution can frequently be reconsidered, overruled, undermined, or ignored by decisionmakers in other institutions. Accordingly, a deliberative democratic theory of precedent must necessarily be systemic in nature.[107] We need to think about how stare decisis influences or controls the dialogue within an institution *and* how it transfers legal or policy issues to other institutions and shapes the dialogue there. Litigation can be used to strengthen a social movement and build support for its cause, even—and perhaps especially when—interest groups suffer high-profile losses in court. Indeed, unsuccessful litigation—and the existence of adverse precedent—can help to shift public opinion in favor of reform and can persuade political officials to change the status quo and effectively overrule judicial precedent. While these opportunities are not as robust in the constitutional arena, where decisions are more difficult to amend politically and constitutional amendments are virtually impossible, the Court has taken this fact into account by suggesting that constitutional stare decisis should be weaker than deference to precedent in common law areas or questions of statutory interpretation.[108] Deliberative democratic theory ultimately suggests that the use of precedent should be designed to promote robust deliberation within each institution and that when issues are authoritatively settled, they should be transferred to other venues with greater deliberative capacity or lawmaking authority for potential entrenchment or reversal, or perhaps merely for a continuation of the deliberative process.

Conclusion

Neil Walker has recently recognized that constitutionalism and pluralism appear to have an inherently "conflicted" relationship.[109] Constitutionalism presumes that a society's basic institutional arrangements and most fundamental normative values can be codified into law. Pluralism, in contrast, emphasizes the multiplicity and diversity of relevant values and recognizes the need to accommodate fundamentally competing views and perspectives in ways "that are not reducible to a set ranking or any other

106. *See* Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941, 969–1011 (2011).

107. *Cf.* Jane Mansbridge et al., *A Systemic Approach to Deliberative Democracy*, *in* Deliberative Systems: Deliberative Democracy at the Large Scale 1, 1–26 (John Parkinson & Jane Mansbridge eds., 2012); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 Ann. Rev. Pol. Sci. 497, 513–16 (2008).

108. *See* p. 27. *But cf.* pp. 25–28 (suggesting the conventional wisdom may be unwarranted).

109. *See* Neil Walker, *Constitutionalism and Pluralism: A Conflicted Relationship?*, *in* Handbook of Global Constitutionalism 433 (Anthony F. Lang, Jr. & Antje Wiener eds., 2017).

general ordering formula."[110] Whereas "[t]he formal promise of constitutionalism typically sounds in singular terms," the accompanying ideas "of unity, closure and hierarchical organisation of the duly constituted 'body politic' implicit in the idea of constitutional achievement are at odds with those of diversity, unsettlement and heterarchical accommodation we associate with the condition of political pluralism and its management."[111] Walker contends that a constitutional project's success "in fashioning and sustaining a polity depends on how acutely it comprehends and how effectively it addresses that basic plurality and variety, notwithstanding constitutionalism's own formal singularity and unity."[112] He astutely observes that "[b]y exploring [the] disjunction, and its associated tensions, [between the formal unity and material pluralism of constitutionalism,] we can capture much of the distinctive promise, limitations and challenges of the constitutional method today."[113]

Kozel's second-best theory of precedent embraces the formal promise of constitutionalism and thus proposes reforms to stare decisis doctrine that would promote the unity, singularity, and closure that are celebrated by this particular constitutional vision. In the process, his proposed theory would suppress interpretive pluralism and privilege the values of continuity and impersonality over competing normative values. His approach would also manufacture legal agreement by stripping the application of precedent of its normativity in particular cases. While Kozel presents his second-best approach as a fundamentally neutral compromise, his theory would privilege his own normative values over competing views and perspectives.

There is, however, an alternative understanding of precedent that would strike a more normatively desirable balance between the formal unity and material pluralism of constitutionalism. This alternative approach recognizes that the primary functions of precedent are to facilitate reasoned deliberation about the most justifiable resolution of constitutional problems and to shift authority for contesting the entrenched features of law to more broadly representative institutions. This Review has therefore begun the process of developing a deliberative democratic theory of precedent.

110. *Id.* at 433 (citing Victor M. Muñiz-Fraticelli, The Structure of Pluralism 11 (2014)).

111. *Id.*

112. *Id.*

113. *Id.*