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# LEGISLATIVE AND EXECUTIVE STARE DECISIS

*Mark Tushnet\**

## INTRODUCTION

This Essay examines practices in the legislative and executive branches that are similar to the practice of stare decisis in the judicial branch.<sup>1</sup> Stare decisis-like practices have several justifications, of which three are relevant here.<sup>2</sup>

First, stare decisis conserves decisionmaking energy.<sup>3</sup> In a large number of situations, a person—judge or legislator—who considers a

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\* William Nelson Cromwell Professor of Law, Harvard Law School. I was aided immeasurably in developing my thoughts on this topic by a conversation with participants in an informal roundtable at Harvard Law School and by comments from Richard Fallon.

1 This Essay is largely descriptive and exploratory, attempting to identify stare decisis-like practices and pulling together observations that have not to my knowledge been seen as related.

2 Two aspects of the judicial practice of stare decisis are irrelevant here. (1) In the courts, stare decisis is an interpretive practice: a court asks what a prior court decision means and, having determined its meaning, asks whether the decision should be followed. Legislative stare decisis is not interpretive; executive stare decisis may be, but its interpretive aspect has the same features as that of the judicial practice, which is the subject of an enormous amount of literature (about determining a precedent's ratio decidendi, about the proper grounds for distinguishing a precedent, and the like). (2) Sometimes the judicial practice of stare decisis is justified as an essential aspect of the rule of law, as the rule of law is institutionalized in courts. It seems obvious to me that stare decisis is not an essential aspect of the rule of law generally: legislatures can radically change the law or repeal entire bodies of law without offending rule-of-law principles. The rule-of-law justification of stare decisis therefore must be confined to the judicial practice. Put another way, for courts stare decisis is a norm, while for legislatures and executive officials it is not. Nonetheless, because the judicial norm rests in part on efficiency reasons, there is a partial analogy between the practices in all three branches.

3 The efficiency justification for stare decisis demonstrates that discussions of stare decisis should not start from the proposition that a decisionmaker has concluded that a prior decision was mistaken and then examine whether or when the

legal or policy question “from the ground up” will reach the same conclusion as those who have already considered the question. Rather than rethinking the question and coming to the same conclusion that everyone else has, the decisionmaker can simply take what others have concluded as a predicate for the decision at hand.

Second, *stare decisis* helps decisionmakers coordinate their action by providing a “focal point” for action.<sup>4</sup> Some problems have multiple equilibria—solutions equally acceptable to all participants. Arguing over which one to choose is pointless and costly. Decisionmakers can avoid such arguments by choosing the one that worked before.<sup>5</sup>

Finally, *stare decisis* also encourages an appropriate humility in decisionmakers about their own capacity to arrive at correct decisions.<sup>6</sup> Suppose one thinks through a problem from the ground up and reaches a conclusion, then observes that others have engaged in the same process and reached a different conclusion. One might then think it reasonable to reexamine one’s own reasoning—itsself an expenditure of decisionmaking energy—to see whether one’s reasoning went off track somewhere. Legislatures (and legislators) and exec-

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decisionmaker justifiably rejects the prior decision. The point of *stare decisis*, in its efficiency aspect, is to keep the decisionmaker from asking whether the prior decision was correct or mistaken. In a sense, *stare decisis* is an “exclusionary” practice, in Joseph Raz’s sense: the mere fact that a prior decisionmaker has arrived at a conclusion blocks inquiry into whether that decision was correct or mistaken. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 39 (1999) (“A second-order reason is any reason to act for a reason or to refrain from acting for a reason. An *exclusionary reason* is a second-order reason to refrain from acting for some reason.”).

4 The “focal point” idea was introduced in THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57–58 (1980).

5 I should report that conversations have convinced me that it is quite difficult to maintain a tight focus on only the efficiency and focal point reasons for judicial *stare decisis*, with the effect that analogous efficiency-based legislative and executive practices are (mistakenly) dismissed as not truly involving *stare decisis*-like practices.

6 Sometimes the humility justification for *stare decisis* is escalated into a strong epistemological claim based on Condorcet’s Theorem: the mere fact that a prior decisionmaker has reached a particular conclusion is a reason for believing that the conclusion is correct, if that decisionmaker is even slightly more likely than not to have arrived at the correct answer (and the larger the number of decisionmakers who have reached that conclusion independently—that is, among other things, without themselves relying on *stare decisis*—the stronger the reason for believing that the conclusion is correct). My view is that invoking Condorcet’s Theorem with respect to legal conclusions involves a category mistake, and seeks to capture some of the benefits of science for law’s interpretive practices. For additional criticisms of the use of Condorcet’s Theorem in this fashion, see Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1485–518 (2007).

utive officials might be motivated by these same concerns to adopt stare decisis-like practices, and I believe that they have.

This Essay sketches legislative and executive stare decisis with the aim of raising questions about practices that have been underexamined, at least relative to the judicial practice.

## I. LEGISLATIVE STARE DECISIS

Legislatures do have their precedents, memorialized in manuals setting out the legislatures' rules and how they have been interpreted over time.<sup>7</sup> My interest lies elsewhere—in practices connected to substantive legislation itself, which may be affected by, but are distinct from, the legislature's internal rules of operation. First I discuss the operation of legislative stare decisis in connection with legislation already on the books, and then examine the operation of legislative stare decisis as legislation proceeds through the enactment process.<sup>8</sup>

### A. *Completed Legislation*

A legislature might treat enacted legislation as constraining it for two reasons. First, and most obviously, external constitutional constraints might preclude the legislature from revisiting what its predecessor had done. This would be so, for example, when the prior enactment creates vested rights in individuals, who might claim that legislative revision of the enacted statute violates the constitutional ban on impairing the obligation of contracts (or its analogue for the

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<sup>7</sup> See, e.g., 16 LEWIS DESCHLER & WILLIAM HOLMES BROWN, DESCHLER-BROWN PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661 (2002).

<sup>8</sup> Any account of stare decisis must have a companion account of distinguishing precedents. In an efficiency account, we would need to think about the costs of distinguishing. These costs include the actual effort needed to develop an explanation for the departure from precedent and, probably more important, the risk that the explanation will seem disingenuous to some relevant audience, that is, ginned up merely to justify the action to be taken rather than to provide an honest account of why the present situation is different from the prior one. For comments identifying these costs of distinguishing, see ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY 49 (2007) (observing that “[i]f the interpretive rules are loose, clever readings can narrow or distinguish inconvenient decisions after the fact”); Eric Posner & Adrian Vermeule, *Constitutional Showdowns* 9 (Univ. of Chi. Law & Econ., Olin Working Paper No. 348, 2007), available at <http://ssrn.com/abstract=1002996> (“The ‘civilizing force of hypocrisy’ makes it positively costly for decisionmakers to disavow a principle they relied on to their benefit at an earlier time, although in some cases the benefits of opportunistic disavowals of precedent are worth the cost.”).

national government, the Due Process Clause),<sup>9</sup> or amounts to a taking of property without just compensation.<sup>10</sup>

In some sense, the legislature has no choice about adhering to existing law in these situations.<sup>11</sup> More interesting are situations in which the legislature does have a choice, and chooses not to displace existing law. To see the problem most clearly, consider a parliamentary system with only two parties, and what occurs when legislative control shifts from one party to another. As a matter of pure political power, the new majority could repeal all the laws its predecessor enacted (with which the current majority disagreed, of course). But that never happens. Indeed, and of more interest, sometimes the new majority will not repeal or even amend legislation it opposed when it was the minority party. Perhaps it opposed the legislation because it believed that it would not work well. As the new majority, the party might want to give the legislation a chance, to see if it does indeed work well or badly.<sup>12</sup> Or the new majority may have higher legislative priorities. Were it possible to enact all its favored programs simultaneously, the new majority might repeal the statutes it opposed. That being impossible, the majority will rank its legislative agenda, and a law whose enactment it opposed might be relatively low on the priority list.

These two mechanisms show the efficiency benefits of legislative *stare decisis*. The new majority conserves on legislative effort by refraining from revisiting laws that might turn out to work well, or that are relatively unimportant to it.<sup>13</sup> We might test this account by examining a new majority's treatment of legislation it opposed while in the

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9 Cf. *United States v. Winstar Corp.*, 518 U.S. 839, 843 (1996) (holding preexisting contracts enforceable against the United States government, notwithstanding intervening legislation barring the government from honoring its agreements).

10 Cf. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–30 (2001) (discussing the effect on a Takings Clause claim of the existence of prior legislation limiting the property owner's use of the affected property).

11 Sometimes it is claimed that stability as such is valuable, independent of constitutional constraints and the cost of developing a new policy. In the judicial context, the classic statement is from *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."). I am skeptical about this view, at least to the extent that it asserts that an erroneous rule should be adhered to even when it is relatively easy to develop a correct one.

12 And one can imagine this trial period lasting through the next election, in which case—if the party then loses power—the legislation will stay on the books "permanently."

13 This indicates another difference from the judicial practice. Courts do not control their agendas as completely as legislatures do. An institution with greater

minority, and that it specifically criticized in its party platform, at least when such platforms are routinely taken as laying out the legislative agenda the party proposes to pursue if it wins the election.<sup>14</sup> The appropriations process provides another test: do legislatures—or, more precisely, when do legislatures—take the prior year’s appropriation for a particular item or line as the presumptive appropriation for the current year’s? My sense is that the practice of doing so is widespread, and that legislatures focus almost exclusively on new matters within a particular line, but I do not know of any systematic study focusing on this question.

### B. *Super-Statutes and Regular Statutes*

The efficiency account of legislative stare decisis differs from accounts of judicial stare decisis because it gives the prior decision no particular normative weight (beyond the weight attached to simple cost saving). Sometimes, though, enacted statutes are said to have normative weight, such that modifications are generally undesirable without an independent assessment of a specific modification’s merits unless it appears almost on the surface and without requiring much analysis that the modification will improve the statute’s operation.<sup>15</sup> In addition, many statutes can serve as focal points for subsequent legislation on related matters: rather than rethinking how some generic issue should be addressed, legislators can start from the solution their predecessors found for some specific problem in the general area and work outward.

William Eskridge and John Ferejohn describe some statutes as “super-statutes.”<sup>16</sup> For them,

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agenda control may have less need for a stare decisis norm because keeping a matter off the agenda functions to preserve the status quo in the way that stare decisis does.

14 This is the case with the party “manifestos” in Great Britain, for example. The Labour Party’s manifesto for the 1974 election, which it won, stated that a Labour government would “repeal the Housing Finance Act,” which would roll back rent increases, and would “repeal the Industrial Relations Act as a matter of extreme urgency.” Labour Party General Election Manifesto February 1974, in *LABOUR PARTY GENERAL ELECTION MANIFESTOS, 1900–1997*, at 183, 188–89 (Iain Dale ed., 2000). The latter was repealed by the Trade Union and Labour Relations Act of 1974. See OTTO KAHN-FREUND, *LABOUR AND THE LAW* 204 (2d ed. 1977).

15 This formulation assumes that repealing the statute is out of the question, but, with suitable adaptations, the analysis that follows would carry through with respect to repeals as well.

16 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1215–16 (2001).

[a] super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.<sup>17</sup>

Super-statutes have a “gravitational force,”<sup>18</sup> a term that signals the way in which super-statutes resemble precedents.

Consider laws regulating discrimination in employment as an example of super-statutes.<sup>19</sup> When enacted, a particular antidiscrimination law is an accommodation of competing interests: the employee or potential employee’s interest in a fair competition for work, and the employer’s interest in assembling a productive work force. This accommodation may take the form of a broad nondiscrimination norm coupled with provisions understood as exceptions to the norm, such as a rule allowing employment practices that disparately affect a protected class if the practice is justified by business necessity. Over time, the super-statute loses its characteristic as an accommodation of competing interests, and comes to be understood as resting solely on the norm of nondiscrimination, with the exceptions understood to be mere concessions to political reality at the time of enactment.

Super-statutes have a *stare decisis*-like effect,<sup>20</sup> and for normative reasons—not the “rule of law” reasons typically offered to explain the *stare decisis* effects of judicial decisions,<sup>21</sup> but the norm that comes to be taken as a super-statute’s sole normative basis. This is clearest when proposals for revising a super-statute are offered.<sup>22</sup> Proponents

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17 *Id.* at 1216.

18 *Id.* at 1234.

19 My exposition of the idea of super-statutes differs in matters of detail from Eskridge and Ferejohn’s, but I believe that it is both faithful to their insight and an improvement on their exposition.

20 Eskridge and Ferejohn are most interested in the stance courts should take toward super-statutes. See Eskridge & Ferejohn, *supra* note 16, at 1246–63 (discussing interpretive approaches in connection with super-statutes). I confess to some skepticism about their treatment, which does not—in my view—really explain why the purposivism they favor for super-statutes is inappropriate for all statutes.

21 See *supra* note 2.

22 Another indication is the way in which statutory revisions aimed at reversing judicial interpretations of super-statutes are sometimes, perhaps often, presented. The new statutes can be styled as “restoration” statutes, rather than mere corrections of erroneous interpretations. An example is the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.).

of revisions do not argue that the accommodation reached in the initial statute should be adjusted, but argue instead that the revisions will do a better job of achieving the statute's (only) normative goal. The revision, it is said, will reduce the incidence of employment discrimination, for example. Or, in connection with an environmental protection super-statute, the revision will lead to larger reductions in environmental degradation, and more quickly, than the initial statute.

Super-statutes gain their status because they simultaneously strengthen the constituency supporting their imputed sole normative goal and weaken the constituency supporting the values accommodated in the original statute. The former is strengthened when it is able effectively to disseminate the view, both to its own members and to the public generally, that the statute should be seen as deeply principled rather than an accommodation of competing interests.<sup>23</sup> More interesting, I believe, is the way in which a super-statute weakens the other side. Supporters of what they present as the statute's sole normative goal get embedded within the side whose interests were accommodated in the original statute.<sup>24</sup> Employers set up compliance offices, which have an interest in advancing the nondiscrimination norm or environmental protection even as they incidentally take the company's business interests into account.<sup>25</sup> Compliance offices can disseminate support for the super-statute's imputed normative goal within the company, thereby weakening the company's willingness to treat that goal as merely one of several to be taken into account.

Regular statutes can also have stare decisis-like effects, basically for efficiency reasons. Consider here a proposal to enact a statute whose provisions could be enforced through direct actions in court or by a new administrative agency.<sup>26</sup> (For concreteness, suppose that the

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23 This effect can be amplified if the constituency supporting the statute is able to achieve legislative victories in relatively quick succession. Even a single victory, and even more so a succession of victories, may demoralize the opposing constituency to the point where it too comes to accept the normative desirability of the super-statute.

24 This distinguishes super-statutes from at least some ordinary statutes, where the "losing" constituency may face external enforcement but need not develop internal bureaucratic structures to avoid liability. Needless to say, this is a matter of degree.

25 For studies of the role of compliance offices, see Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1609–15 (2001); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1547–67 (1992).

26 The example was suggested by the discussion of the jurisdictional dispute over lodging enforcement of some ERISA requirements in either the Department of Labor or the Internal Revenue Service in JAMES A. WOOTEN, *THE EMPLOYMENT RETIREMENT SECURITY ACT OF 1974*, at 250–51 (2004), but is not derived from any specific example. The jurisdictional dispute has too many details to be a useful expository vehicle.



proposal deals with racial discrimination in employment.) Suppose the choice of enforcement mechanism is highly contested at the time of enactment, and that the reasons for each choice are reasonably good and perhaps even in close balance. But, as it happens, the proposal is assigned for committee processing to a committee headed by a powerful legislator who believes that the administrative agency mechanism is preferable.<sup>27</sup> The statute is then enacted, with enforcement by the newly created administrative agency. Later two things happen: the committee chair retires and is replaced by someone with no strong views on the choice of enforcement mechanism, and a proposal is made to extend the nondiscrimination ban to discrimination on the basis of physical disability. Once again the question of enforcement mechanism arises. Legislative *stare decisis* will almost certainly incline the drafters simply to add the new provision to the existing agency's workload.

Note that in the hypothesized situation the costs of choosing judicial enforcement are relatively low, and the choice of agency enforcement is not costless. The courts are already in place, so judicial enforcement creates no net enforcement costs.<sup>28</sup> Drafting a provision assigning enforcement to the courts will be more difficult than simply inserting the words "on the basis of physical disability" into the agency's existing mandate. But, on the other hand, an agency that has been enforcing a ban on race discrimination in employment has no particular expertise in disability discrimination. Still, agency enforcement is, I believe, quite likely to be chosen.

The reason is that agency enforcement is "good enough." The interest groups affected by the racial nondiscrimination provision have found it acceptable, and—in the absence of pretty strong reasons to think otherwise—legislators are likely to think that the interest groups affected by the disability discrimination provision will find it acceptable as well. And moving from one equilibrium to another, even an equilibrium that might in the abstract be better, is costly. The cost barrier need not be large, given the demands on legislators' time, for the prior choice to be followed—which is precisely how legislative *stare decisis* operates.

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27 The committee chair's reasons for preferring the agency mechanism are irrelevant: they could be "merely" political, or the chair might be persuaded by the reasons offered in support of the agency mechanism.

28 I assume that the cost of judicial enforcement is no greater than the cost of agency enforcement.

### C. *The Enactment Process*

The phenomenon of interest here is this: there is often a long period between the introduction of a legislative proposal and its adoption—"long" here meaning a period over the course of which there are several intervening elections and changes in the legislature's composition. (For expository purposes, assume that the proposal is for a "liberal" reform.) The proposal's proponents negotiate over statutory details at each legislative session and resolve some contentious issues. So, for example, a proposal might have ten contentious provisions, and negotiation over the first three produces a compromise in the first legislative session. Then an election intervenes. Assume that the proposal's proponents gain support in the election.<sup>29</sup> When the legislature convenes next, the proposal's proponents take the first three issues to be settled—this is what I refer to as legislative stare decisis—and negotiate over the next two or three issues. After several elections in which the proposal continues to gain support, the legislation is enacted with the first three provisions being the ones negotiated and compromised out in the first legislative session, the next two being the ones negotiated and compromised out in the second, and so on down the line.

Note the possibility that the legislation actually adopted could be much less liberal than a parallel proposal introduced *ab initio* in the final legislative session: the ten contentious issues might all be resolved in the liberal direction by the final legislature, whereas legislative stare decisis leads to the adoption of a statute with several less liberal provisions in it. That is the puzzle of legislative stare decisis: with the proposal having gained support in the intervening election, why do its supporters refrain from reopening compromises already reached?<sup>30</sup>

I have found it difficult to locate in the literature on how statutes are adopted crisp examples of this form of legislative stare decisis. Sometimes the accounts deal with enactments within a single legislative period.<sup>31</sup> Sometimes they deal with extremely complex statutes, and the author focuses on the many moving parts rather than on a

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29 The analysis is basically the same if the proponents lose ground, but the exposition would get both complicated and tedious, so I omit it here.

30 I put aside the possibility that in the first session compromises were reached to avoid a veto and the increment of supporters in the second session is not large enough to overcome a veto.

31 See, e.g., ERIC REDMAN, *THE DANCE OF LEGISLATION* (1973) (discussing the enactment process for a statute introduced and adopted within a two-year period).

particular provision as it gets modified.<sup>32</sup> Still, one can glean some hints from accounts that center on other matters. So, for example, it seems to me that Kate Stith and Steve Koh's detailed presentation of the development of the Federal Sentencing Guidelines statutes indicates that the legislation became increasingly punitive and retributivist at a rate slower than the rate at which Congress became increasingly committed to a punitive and retributivist theory of sentencing.<sup>33</sup>

Perhaps legislative *stare decisis* is an illusion. The second legislature can destabilize compromises already reached not by directly revisiting them, but by adopting new provisions that effectively reopen the settled issues. Stith and Koh provide an example.<sup>34</sup> The sentencing reform proposal that passed the Senate in 1978 provided that the sentencing judge should "'consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant,'" and directed the sentencing commission to consider the relevance of a large number of personal characteristics in setting the guidelines.<sup>35</sup> Two years later the proposal was amended.<sup>36</sup> Now the commission was directed to ensure that the guidelines be "'entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders,'" and that they "'reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.'" <sup>37</sup> The 1978 provision survived, but, as Stith and Koh observe, the new provisions certainly licensed, and perhaps encouraged, the commission to adopt guidelines that limited the sentencing judge's discretion more substantially than the 1978 provision would have on its own.<sup>38</sup> This is an example where legislative *stare decisis* may have operated with respect to a particular provision but not with respect to the policy embodied in that provision.

Legislative *stare decisis* might operate indirectly. Summarizing interim developments in the enactment of the Employment Retirement Income Security Act (ERISA) of 1974,<sup>39</sup> Professor Wooten

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32 See, e.g., WOOTEN, *supra* note 26.

33 See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (examining the legislative history behind the Sentencing Reform Act of 1984).

34 See *id.* at 249–51.

35 *Id.* at 249 (quoting S. 1437, 95th Cong. § 101 (1978)).

36 See *id.* at 250.

37 *Id.* (quoting S. 1722, 96th Cong. § 125 (1980)).

38 See *id.* at 251.

39 Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2000)).

observes that the developments allowed the statute's proponents "to secure legislation that included everything that had been in [the immediately preceding version] and more."<sup>40</sup> The idea here is that legislators do not use their enhanced political power to reopen settled issues, but rather use it to obtain new provisions.

A first stab at an answer focuses on the legislature's median voter. By assumption, the median voter's position has moved in the direction of support for the proposal. This might make compromises possible on issues that could not have been resolved in the first legislative session, which would explain why the new legislature takes up new issues. Unfortunately, though, the very same movement should make it possible to reopen the *old* issues as well. The change in the legislature's composition does not explain the choice between moving on and rethinking seemingly settled issues.

A second possibility is that the old and the new issues do not actually lie along the same dimension. That is, the new median voter might support the proposal's enactment overall, but also prefer the settled provisions to any alternatives because the former position rests on a judgment about overall soundness while the second rests on a judgment about something independent of overall soundness.<sup>41</sup>

A third possibility is that the new legislature simply has limited resources. Enacting the statute will require specifying an outcome for all ten contentious issues. The time it takes to reopen and then resolve settled issues cannot be devoted to resolving the remaining unsettled ones.<sup>42</sup> In this aspect legislative stare decisis serves efficiency goals.<sup>43</sup>

A final explanation for legislative stare decisis is norm-based. Legislative stare decisis might be an expression of a reciprocity norm. Legislators never know whether, with respect to any specific proposal they favor, the median voter's position will move toward them or away from them. Legislative stare decisis allows everyone to keep the bene-

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40 WOOTEN, *supra* note 26, at 190.

41 For example, the median legislator might support some prison reform proposals because on balance they are good policy, but also might support some federalism-related compromises reached in the prior session. The thought here is that the merits of prison reform as such are independent of federalism-related concerns.

42 The resources might include political capital as well as time.

43 Initially, I had thought that this explanation could be supported by noting that the prior compromise appeared to have been acceptable to the proponents' constituents in the first round, and so should be presumptively acceptable to them in the second. On reflection, I think otherwise, largely because the shift in the median voter's position means that the body of the constituents has changed, and the new constituents might not think the prior compromise acceptable.

fit of the gains they achieve in the first legislative session, no matter what happens in the intervening election.

One additional point deserves note. Sometimes legislative stare decisis might be perverse from the point of view of the proposal's supporters in the short run. Suppose in the first legislative session one relevant committee was controlled by a hardline opponent of the proposal, whose views were substantially more conservative than that of the median legislator in that session. To move the proposal through this committee's "vetogate,"<sup>44</sup> the supporters made quite large concessions, even though had it been possible to get a vote from the entire legislature on the question at issue, the legislature would have supported a more liberal outcome. Now suppose that in the new legislature the prior committee chair was no longer in a position to block the proposal's movement.<sup>45</sup> The prior compromise did not represent the views of the first session's median legislator, much less that of the current session's. For that reason, reopening the settled issue ought not consume many legislative resources. I do not know whether legislative stare decisis operates fully or in weak form in this setting; case studies would be especially useful here.

## II. EXECUTIVE STARE DECISIS

Stare decisis in the executive branch is a somewhat more examined phenomenon, perhaps because it is practiced by agencies—the Office of the Solicitor General and the Office of Legal Counsel (OLC)—with which legal academics are more familiar. The basic idea is straightforward: after a change in administration, these agencies will reassert the positions taken in the prior administration, even when the new administration's policy positions are significantly different from those of the prior administration.<sup>46</sup>

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44 See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 677 n.13 (defining a vetogate as "a place within a process where a statutory proposal can be vetoed or effectively killed").

45 The chair might have lost the position because party control of the legislature changed, because the chair retired or was defeated for reelection, or for many other reasons.

46 I note that under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the decision by an agency to interpret a statute differently from the way in which the statute was interpreted under a prior administration receives deference from the courts. See *id.* at 842–45. To that extent, executive stare decisis properly has a smaller effect than judicial stare decisis. Note, though, that sometimes the courts will insist on a decent substantive explanation by the agency for its change of position, going beyond reference to the new administration's policy preferences. See, e.g., *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That insistence can induce some degree of executive stare decisis, where the

I suggest that the practice of executive stare decisis can be understood by identifying these agencies' clients. They include the present administration (and executive agencies within the administration), "the law," and—for OLC—the office of the presidency. And importantly, they also include the courts—for the Solicitor General—and other executive branch agencies—for OLC.

OLC's use of stare decisis in connection with the office of the presidency is reasonably straightforward. When the client is identified as an office, as distinct from the present occupant of the office, the fact that the present occupant has particular views about the presidency's legal and constitutional status and power is no more than a tactical consideration, something OLC must deal with as it seeks to define the status and power of the presidency as such.<sup>47</sup> Otherwise OLC takes itself and its predecessors as seeking to articulate principles that transcend specific administrations, in just the way judges guided by stare decisis see themselves and their predecessors as engaged in a common enterprise.

Where the client is "the law," executive stare decisis is more complicated. The reason is suggested by an analogy to the *Chevron* doctrine in administrative law. Justice Stevens' opinion in *Chevron* concludes by noting that determining what the law means (in the administrative law setting) implicates a combination of technical competence and political responsiveness.<sup>48</sup> For agencies, the technical competences are associated with substantive matters such as nuclear power or occupational safety and health. For the Solicitor General and OLC, technical competence lies in determining what the law is. In a modestly post-legal realist world, the occupants of those offices know that determining what the law is, is not *merely* a matter of technical competence. As in the *Chevron* context, what they say the law's content is, is properly affected by the administration's policy views.

Why, though, is that content not *fully* determined by the administration's policy views? That is, why is there some pull from the posi-

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costs of explaining the change of are larger than the benefits (economic or political) the new administration anticipates from changing position.

47 Conversations with those who have worked at OLC have persuaded me that OLC's adherence to prior OLC interpretations does *not* vary significantly depending on whether the question involved is one that is likely or unlikely to come before the courts. OLC, that is, acts "as a court" for nonjusticeable questions, and in doing so adheres to stare decisis.

48 *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests . . . . In contrast, an agency . . . may . . . properly rely upon the incumbent administration's views of wise policy to inform its judgments.").

tions taken by a prior administration with different policy views and, therefore, with a different view of what the law is?

The answer, I suggest, lies in credibility. The legal views provided to the Solicitor General and OLC can affect their audiences in the courts and other executive branch agencies only if those views add something to what the courts and the agencies could have come up with on their own. Consider first executive branch agencies.<sup>49</sup> They are under no obligation to seek the views of OLC about the lawfulness of their policy initiatives.<sup>50</sup> And, they can see themselves as just as competent as anyone else at determining what the administration's policy preferences are. They will seek out OLC's advice only if they believe that OLC will provide them with a more disinterested view of the law's content than they receive from within. Executive stare decisis can provide the required assurance of disinterestedness.

In some ways the argument with respect to the Solicitor General is even more straightforward. The Solicitor General offers views on the law's content to the courts. But, after all, the courts themselves are technical specialists in the law. In addition, even in a moderately post-legal realist world where the courts acknowledge that policy views shape the law, judges are unlikely to think that the policy views of the present administration ought to carry any special weight (as such) in defining the law's content.<sup>51</sup> What, then, can the Solicitor General provide the courts? He could provide a more efficient way of getting into the law, particularly where the law is highly technical. But judges will accept the efficiency gains only if they believe them to be not undercut by an overly interested—that is, policy-driven—analysis.

Evidence that the Solicitor General practices executive stare decisis so as to preserve the Office's credibility is of course hard to come by. Credibility is a major theme in social scientific and journalistic accounts of the Office,<sup>52</sup> but evidence beyond the anecdotal is essen-

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49 My argument here reproduces that of Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 734 (2005) ("OLC . . . inevitably faces clients urging constitutional interpretations most hospitable to government. To the extent that the OLC successfully uses doctrinally based arguments to resist those pressures, it exercises a court-derivative form of independence . . .").

50 They can, for example, rely entirely on the advice they receive from the agency general counsel.

51 The parenthetical qualification is designed to signal the possibility that particular judges might have policy views that coincide with the views of the present administration.

52 See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE* 7 (1987) ("Lawyers who have worked in the SG's office like to say that the Solicitor General avoids a conflict between his duty to the Executive Branch on the one hand, and his respect for Con-

tially absent. The most widely reported instance of political intervention modifying the Solicitor General's position occurred in the *Bakke* case.<sup>53</sup> Solicitor General Wade McCree and his staff drafted an amicus curiae brief arguing that the University of California's admission policy was unconstitutional, but that better designed programs could properly take race into account.<sup>54</sup> After the brief's contents became known to advocates of affirmative action and within the President's cabinet, a discussion at a cabinet meeting led McCree to redraft the brief to present a stronger argument favoring affirmative action programs.<sup>55</sup> The controversy within the administration spilled over into the press, so there is some possibility that some Justices knew of the shifts in the administration's position.<sup>56</sup> Yet, the Justices almost certainly had strong views on the merits of the case entirely independent of what they heard from the administration, so identifying any significant effects from what might have been characterized as a politicized legal position seems impossible.

Catherine Sharkey reports another suggestive anecdote, in a less highly charged setting and with some evidence that credibility actually did matter.<sup>57</sup> An important issue in food and drug law over the past decade has been whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>58</sup> preempts state common law causes of action.<sup>59</sup> In 2000, during the Clinton administration, the United States twice filed amicus briefs in lower courts taking the position that

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gress or his deference to the Judiciary on the other, through a higher loyalty to the law."); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. SCI. Q. 505, 509–10 (1998) (offering a skeptical view of the claim that the Solicitor General is distinctively successful in the Supreme Court, but emphasizing the importance of the credibility of repeat litigators such as the Solicitor General).

53 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). For accounts of the controversy from various perspectives, see GRIFFIN B. BELL WITH RONALD J. OSTROW, *TAKING CARE OF THE LAW* 29–32 (1982) (by the Attorney General at the time of the controversy); JOSEPH A. CALIFANO, JR., *GOVERNING AMERICA* 236–42 (1981) (by a cabinet member who strongly criticized McCree's original brief); JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE* 162–71 (1979) (by a journalist and a scholar).

54 See BELL WITH OSTROW, *supra* note 53, at 29–30.

55 See *id.* at 30–32.

56 See *id.* at 30.

57 See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. (forthcoming 2008) (manuscript at 151–54), available at <http://ssrn.com/abstract=1101448>.

58 7 U.S.C. §§ 136–136y (2000 & Supp. IV 2004).

59 See Sharkey, *supra* note 57 (manuscript at 151–54).



FIFRA did not preempt the claims at issue.<sup>60</sup> In 2003, during the Bush administration, the Solicitor General changed positions, saying that it had “‘properly reconsidered and disavowed its prior position.’”<sup>61</sup> Sharkey observes that the Supreme Court rejected the Solicitor General’s position, specifically noting the Solicitor General’s changed position.<sup>62</sup>

Just as it is difficult to determine the weight of stare decisis in the courts, so too for executive stare decisis—and largely for the same reason: both judicial and executive stare decisis sensibly allow for departures when circumstances change. Even if we assume that a mere change in administration is not one of the circumstances justifying departures from stare decisis, such a change gives executive officials a motivation for searching for, and finding credible, *other* grounds for distinguishing their predecessors’ views from the ones they assert today. Still, depart too often or too far from what executive officials have said the law requires, and executive officials are likely to find relevant audiences increasingly skeptical about their claims that they are saying what the law is, rather than merely putting into legal form the current administration’s policy positions.

### III. CONCLUSION

The other contributions to this Symposium deal with stare decisis outside the courts in terms framed by judicial opinions: What weight, if any, should legislators and executive officials give to the constitutional interpretations proffered by the courts? Does that weight vary depending on circumstances or by constitutional issue? I hope to have shown that the Symposium topic can profitably be considered somewhat differently, by identifying some of the ways in which legislators and executive officials take as precedents legal interpretations proffered by their own predecessors. I have also tried to sketch some reasons for legislative and executive practices of stare decisis. It

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60 *See id.* (manuscript at 153). The Solicitor General must approve the filing of such amicus briefs. *See* 28 C.F.R. § 0.20(c) (2007) (stating that the “determin[ation] whether a brief *amicus curiae* will be filed by the Government . . . in any appellate court” is “assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned”).

61 Sharkey, *supra* note 57 (manuscript at 154) (quoting Brief for the United States as Amicus Curiae Supporting Respondent at 20, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (No. 03-388)).

62 *See id.* (manuscript at 152–54); *see also Bates*, 544 U.S. at 449 (“The notion that FIFRA contains a nonambiguous command to pre-empt the types of tort claims that parallel FIFRA’s misbranding requirements is particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today.”).

should be clear, though, that my examination is no more than a preliminary inquiry into a topic that, I believe, deserves more scholarly attention.

