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# Incompletely Theorized Agreements: An Unworkable Theory of Judicial Modesty

## **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, May 2008. B.S. Science and Engineering, University of California Davis. First and foremost, I would like to thank Jacqueline Tsu for her loving support and kind inspiration. I am very grateful for my parents and my sister. I would also like to thank Professor Yxta Murray not only for her kindness and intelligence, but also for instilling in me a passion for the law. Professor Charles A. Kelbley for his patience and indispensable guidance on this COmment. Special thanks to the Fordham Urban Law Journal staff.

## INCOMPLETELY THEORIZED AGREEMENTS: AN UNWORKABLE THEORY OF JUDICIAL MODESTY

*Yavar Bathaee\**

Much is expected from the judicial power of the United States. Expected to possess neither force nor will,<sup>1</sup> it must serve as a bulwark for discrete and insular minorities.<sup>2</sup> At the same time, it is expected to give effect to the will of the legislature.<sup>3</sup> The demands on the federal judiciary are far from homogenous, and at times, they are conflicting.<sup>4</sup> A court is expected to do justice yet receives public criticism for engaging in “activism.”<sup>5</sup> Yet, American law finds its roots in a tradition of adjudication that is evolving and flexible: the common law.<sup>6</sup> At the heart of its charge is the obliga-

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\* J.D. Candidate, Fordham University School of Law, May 2008. B.S. Computer Science and Engineering, University of California Davis. First and foremost, I would like to thank Jacqueline Tsu for her loving support and kind inspiration. I am very grateful for my parents and my sister. I would also like to thank Professor Yxta Murray not only for her kindness and intelligence, but also for instilling in me a passion for the law. Professor Charles A. Kelbley for his patience and indispensable guidance on this Comment. Special thanks to the Fordham Urban Law Journal staff.

1. THE FEDERALIST NO. 78, at 41 (Alexander Hamilton) (J.R. Pole ed., 2005).

2. *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938).

3. *See, e.g., Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824) (“Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature . . .”).

4. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), for example, featured a joint opinion by Justices O’Connor, Kennedy, and Souter noting that “[i]t is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution . . . . But of course this Court has never accepted that view,” and Justice Scalia objecting to the constitutionalization of the issue, stating that the case should be resolved, not by the judiciary, but by “citizens trying to persuade one another and then voting.” *Id.* at 847, 979.

5. Countless newspaper articles have rebuked or addressed judicial activism in the federal courts, particularly the Supreme Court. *See, e.g., Adam Cohen, Op-Ed., What Chief Justice Roberts Forgot in His First Term: Judicial Modesty*, N.Y. TIMES, July 9, 2006, § 4, at 11; Morris B. Hoffman, Op-Ed., *Ruling From the Head, Not the Heart*, N.Y. TIMES, Oct. 21, 2005, at A25; Kermit Roosevelt III, Op-Ed., *Is that an Activist Judge?*, L.A. TIMES, Oct. 2, 2006, at 13.

6. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 22-23 (1921) (“The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.”). Justice Cardozo referred to

tion to safeguard the will of the legislature,<sup>7</sup> to ensure the protection of the minority,<sup>8</sup> and resolve particular disputes and redress particular injuries.<sup>9</sup>

It is difficult to imagine a philosophy of law that accommodates such a tension.<sup>10</sup> Jurisprudence compatible with the conflicting demands on the American judiciary must seek minimalism without impotence.<sup>11</sup> Pluralism creates a great amount of political tension<sup>12</sup> and must be confronted with a steadfast rule of law predicated on unshakable principles of adjudication.<sup>13</sup> Yet, such jurisprudence has never emerged.<sup>14</sup> Nor would such jurisprudence obviate the need to confront the very heart of conflict—the clash

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the American tradition of common law as a “strange compound which is brewed daily in the caldron of the courts . . .” *Id.* at 10.

7. See *Osborn*, 22 U.S. (9 Wheat.) at 866.

8. The Supreme Court has protected minorities’ interests in the face of laws seemingly predicated on animus against those minorities. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (protecting homosexuals); *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (protecting the mentally retarded).

9. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (“In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government. An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court’s opinion is careful to show, that is part of the constitutional design.”).

10. Doing so may require that a court split the difference, greatly diminishing the value of adjudication as a means of effecting social change.

11. Sometimes a court requires flexibility to give effect to broader principles, for example, fundamental rights. To some, an appropriate jurisprudence would “determine the ends, goals, and visions of the good life that liberal citizens pursue.” STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 5 (1990).

12. See Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 *GEO. MASON L. REV.* 329, 334 (2007) (“[Pluralism] . . . recognize[s] the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.”) (quoting Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY*, 118, 171 (1969)).

13. When a court finds itself incompetent to resolve a dispute it refrains from adjudication. The political question doctrine, for example, stems from a need for the judiciary to refrain from adjudicating cases where it lacks institutional competence. See Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 *CARDOZO L. REV.* 779, 829 (2006) (“Indeed, the concern about judicial competency in the policy arena is much of what animates the non-justiciable political question doctrine.”).

14. This is based on the postulate that no jurisprudence can provide steadfast rules while simultaneously reserving the flexibility required to do justice.

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1459

of human will. One party's will must displace another's.<sup>15</sup> The less a court pronounces, the less the displacement.<sup>16</sup> Minimalism thus alleviates the tension inherent in adjudication. Nevertheless, a judiciary that employs minimalism to arrive at its decision decides and substitutes its will for that of the parties before it. The extent to which the decision binds the future depends on the scope of the theoretical underpinnings of its decisions. A narrow decision will be relied on far less than a decision that announces a broad principle.

The manner and scope in which a court theorizes is critical. When a court decides a case, it binds future courts and litigants to its decision—but to what extent? Professor Cass Sunstein, recognizing the questionable democratic pedigree of an appointed judiciary,<sup>17</sup> offers a jurisprudence of minimalism to fill the breach. Sunstein's mechanism for theoretical modesty is the "incompletely theorized agreement," the notion that individuals can agree on less theorized principles to resolve cases at hand without resorting to high-level theoretical pronouncements.<sup>18</sup>

This Comment addresses Sunstein's minimalist regime within the context of the Supreme Court's adjudication of constitutional matters. This Comment argues that the less a court is held accountable to precedent, the less viable incompletely theorized agreements become as a means of fostering agreement.

Unfettered by the constraints of inductive comparison, a court is free to theorize. Once theorization has begun, no clear rules exist to terminate the process. Incompletely theorized agreements are, therefore, less viable when the Supreme Court adjudicates consti-

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15. The jurisdictional charter of the federal courts phrases jurisdiction in the terms of a zero sum case or controversy. *See* U.S. CONST. art. III, § 2. A case or controversy, by definition, involves a set of adverse parties. Absent adversity some of the parties may not have standing to sue or the case may not be ripe for adjudication. *See* Marguerite Hogan, Comment, *Standing for Nonhuman Animals: Developing a Guardianship Model From the Dissents in Sierra Club v. Morton*, 95 CAL. L. REV. 513, 516 (2007) (noting that the contemporary view of standing embodies the notion that the parties are adverse on the issues). This is precisely why declaratory judgment actions and preliminary injunctions must be predicated on the threat of suit or harm. *See* *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (noting that declaratory judgment actions must be between parties with adverse legal interests). Absent some adversity of interest between the parties, Article III of the Constitution is not satisfied.

16. Our adversarial process ensures that most of the time for every winner on a legal issue there is a loser.

17. *See* CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 60 (1998).

18. *Id.* at 4-5.

tutional issues because the doctrine of stare decisis is particularly weak when a court is not subject to review by a higher court and is interpreting a foundational document.

Section I describes the derivation and nature of incompletely theorized agreements and the role of analogical reasoning. Section II discusses the weak effect of stare decisis when a high court interprets a supreme constitution. In such cases, the decision whether or not to apply the doctrine of stare decisis requires a fair amount of theorization, and such a decision must be made upon every analogical endeavor. The low-level and mid-level principles that Sunstein urges should replace ambitious theorization often require a fair amount of theorization to apply. The alternative of strengthening the doctrine of stare decisis would confound one of the advantages of incompletely theorized agreements—flexibility. Section II concludes by noting that the stare decisis required to facilitate incompletely theorized agreements results in defeating the benefits of such a regime.

Section III addresses the assumption that minimal theorization comports with traditional notions of judicial restraint and Ronald Dworkin's criticism of this theory. A logical effect of this problem is that deferring theorization until necessary means that at some point a court will be justified in engaging in more ambitious theorization. Once the court has begun theorizing, it is difficult to tell at what point the justification ceases and a court has over-theorized. This, in turn, may lead to even broader theorization rather than the minimalism sought in employing incompletely theorized agreements.

In other words, creating a gap between precedent and the point of application will invite a court seeking to create a point of analogy between precedent and a set of given facts to fill the theoretical void. Since it is difficult to determine to what extent theorization is more or less complete, a court will find it quite easy to overstep its bounds once it has begun the process.

While incompletely theorized agreements may not be viable when applied within the context of the Supreme Court's constitutional jurisprudence, the project of judicial restraint is not indefensible. This Comment contends that neither incompletely theorized agreements nor aggressive legal theorization alone are capable of ensuring judicial minimalism and restraint. It is instead precision in theorization rather than the degree of theorization that governs the appropriate role of theorization in matters of constitutional import.

The demands placed on the federal judiciary conflict because the institution was designed to operate in the midst of conflict.<sup>19</sup> Ideas must be able to compete for control of particular cases and controversies until one idea proves more meritorious than the next.<sup>20</sup> Theoretical modesty diminishes the vitality of this process of competition and experimentation.<sup>21</sup> Members of multi-member panels must face the political costs of divergent decisions,<sup>22</sup> and it is the province of a court to constantly question our society's most closely held beliefs.<sup>23</sup> These seemingly negative properties are in fact the cornerstones of our adjudicative process and should neither be dampened nor constrained.

### I. THE INCOMPLETELY THEORIZED AGREEMENT AND THE ROLE OF ANALOGICAL REASONING

Incompletely theorized agreements involve reaching a consensus on more theoretically modest grounds to avoid conflict on broader and more contentious issues.<sup>24</sup> For example, a court can choose to agree that the speech in a given case is not incitement without deciding on a general theory of First Amendment law.<sup>25</sup> Such agreements are incompletely theorized because they need not develop an expansive theory of constitutional law to resolve cases.<sup>26</sup>

Borrowing and inverting John Rawls' overlapping consensus,<sup>27</sup> that is, the notion that individuals can find agreement at higher levels of theoretical abstraction when agreements about particulars are untenable,<sup>28</sup> Sunstein conceives of an agreement that is fueled

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19. The purpose of an independent judiciary confirms this proposition, or else political insulation would be a moot privilege.

20. *CARDOZO*, *supra* note 6, at 40-41 (1921) ("Conflicting principles [are often] in competition for the mastery.").

21. Theoretical modesty in constitutional matters also works in the opposite fashion. By not pronouncing on an issue a court leaves the states to experiment by developing their own unique laws that are tailored to their localities. *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 291-92 (1990) (O'Connor, J., concurring).

22. Some decisions, for example, leave lower courts in disarray and states unsure of the legality of their conduct. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that arbitrary and inconsistent application of the death penalty violates the Eighth and Fourteenth Amendments of the Constitution).

23. If the Constitution embodies our most closely held beliefs, the act of interpreting its provisions must often challenge and refine them.

24. *See* SUNSTEIN, *supra* note 17, at 35.

25. *See* Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741, 744-46 (1993) [hereinafter Sunstein, *Analogical Reasoning*].

26. *See* SUNSTEIN, *supra* note 17, at 36.

27. *See id.* at 46 (citing JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993)).

28. *See id.*

by theoretically modest principles to reach consensus about particulars, rather than seeking an untenable agreement about broad abstract and often controversial principles.<sup>29</sup> Instead of creating a broad theory about the law prior to application, Sunstein's incompletely theorized agreements allow resolutions to develop through "casuistical judgments at the point of application."<sup>30</sup>

One such form of "casuistry"<sup>31</sup> is the process of analogical reasoning.<sup>32</sup> In analogical reasoning, precedent is compared to the case at hand to determine if the two cases deserve like treatment.<sup>33</sup> Ordinarily the process of analogy requires a starting point, especially when two or more judges or justices must agree on what facts are relevant for comparison. Sunstein points to the doctrine of *stare decisis* as the starting point for the process of analogical reasoning. Precedent also binds lower courts to their superiors, leaving them little discretion to deviate from the rules of decision that must be inferred from precedent.

High courts, on the other hand, are far less restrained. The United States Supreme Court discretionarily selects its caseload,<sup>34</sup> and its decisions are unreviewable,<sup>35</sup> including its decisions about whether or not to adhere to precedent. There is limited institutional structure, primarily the constitutional amendment process, to police the doctrine of *stare decisis*. This limited structure weakens the doctrine. *Stare decisis* further erodes with more heated and controversial issues.<sup>36</sup>

Sunstein argues that incompletely theorized agreements are well suited for multi-member institutions because they allow a "convergence on particular outcomes by people unable to reach anything

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29. *See id.* at 35.

30. *Id.*

31. Sunstein defines casuistry "as analysis of cases unaccompanied by rules." *Id.*

32. *See* Sunstein, *Analogical Reasoning*, *supra* note 25, at 745.

33. *Id.* at 743 ("This kind of thinking has a simple structure: (1) *A* has characteristic *X*; (2) *B* shares that characteristic; (3) *A* also has characteristic *Y*; (4) Because *A* and *B* share characteristic *X*, we conclude what is not yet known, that *B* shares characteristic *Y* as well.")

34. *See* 28 U.S.C.A. § 1257 (West 2006) (vesting certiorari jurisdiction over the high courts of the several states).

35. *See* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("The federal judiciary is supreme in the exposition of the law of the Constitution . . .").

36. More settled expectations give rise to a stronger *stare decisis* effect. *See* *Quill Corp. v. North Dakota*, 504 U.S. 298, 331-32 (1992) (White, J., concurring in part and dissenting in part) (noting that a "typically invoked rationale for *stare decisis*" is "an unwillingness to upset settled expectations."). Transitivity, the converse implies a weaker effect.



2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1463

like an accord on general principles,”<sup>37</sup> without questioning each other’s closely held values. This reduces the political cost of arriving at a consensus on controversial constitutional issues.<sup>38</sup>

The United States Supreme Court regularly reexamines its precedent.<sup>39</sup> While “incompletely theorized agreements are well adapted to a system that should or must take precedents as fixed points,”<sup>40</sup> a high court interpreting the supreme law of the land is under no such obligation and is less likely to be compatible with incompletely theorized agreements.<sup>41</sup>

Sunstein also favors a presumption against high-level theories in light of the federal judiciary’s lack of democratic accountability.<sup>42</sup> Sunstein assumes that a system of low-level and mid-level principles will be more advantageous “over more ambitious methods, since ambitious thinkers, in order to reach horizontal and vertical coherence, will probably be forced to disregard many decided cases.”<sup>43</sup> Low-level and mid-level principles, however, may simply defer theorization until deferral is no longer possible and invite an ascent in theoretical ambition. Once this process has begun, it is difficult to determine whether a court has over-theorized.

## II. THE FLAWED ROLE OF STARE DECISIS IN INCOMPLETELY THEORIZED AGREEMENTS

Professor Sunstein asserts that incompletely theorized agreements thrive when there is preexisting consensus on the value of

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37. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1747 (1995) [hereinafter Sunstein, *Incompletely Theorized Agreements*].

38. *See id.* at 1748-49.

39. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2721 (2007); *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“We have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings.”).

40. Sunstein, *Incompletely Theorized Agreements*, *supra* note 37, at 1750.

41. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 J. CONST. L. 155, 156 (2006) (“If all legal reasoning should be instrumentalist, then, it would seem to follow, reasoning about constitutional precedents should focus on policy or a balancing of relevant interests. The . . . shaping idea is the Supreme Court’s well-settled doctrine that it has unfettered power to overrule its own prior decisions.”). *See also* *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Stare decisis is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision . . . . This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.”) (internal citations omitted).

42. *See* SUNSTEIN, *supra* note 17, at 60.

43. Sunstein, *Incompletely Theorized Agreements*, *supra* note 37, at 1750.

prior cases as precedent.<sup>44</sup> By accepting prior cases as unrevisable, a court can employ low-level principles such as analogical reasoning to resolve the case at hand without requiring the court to develop a broader theory or reinvent the wheel by examining the theoretical underpinnings of prior case law.<sup>45</sup> A preexisting consensus that *Brown v. Board of Education*<sup>46</sup> was rightly decided renders the court free to concentrate on whether a similar case is adequately analogous to receive the same treatment. Apart from agreeing on the correctness of precedent, Sunstein notes that courts often take prior cases as correct under the doctrine of stare decisis,<sup>47</sup> thereby providing the beginnings of an incompletely theorized agreement and paving the way for the use of analogical reasoning.<sup>48</sup> For example, one could disagree with the Court's decision in *Lawrence v. Texas*,<sup>49</sup> but nevertheless afford the case stare decisis effect.

Utilizing precedent as a starting point for consensus, however, depends on the existence of either an institutional constraint that forces a judge to accept precedent as a fixed point of validity or a strong stare decisis effect to force a judge to defer to precedent despite her beliefs about its correctness.<sup>50</sup> Constraints that facilitate analogical reasoning or other low-level means of resolving a dispute become anemic when a judge is the final expositor of the law and the law being interpreted is foundational. The Supreme Court, for example, is bound by no other institution when interpreting the Constitution and need not treat adherence to precedent as an "inexorable command."<sup>51</sup>

When stare decisis is weakened even slightly, Professor Sunstein's incompletely theorized agreements face a profound barrier because analogical reasoning would require both a consensus on

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44. See SUNSTEIN, *supra* note 17, at 40.

45. See *id.* ("[T]he principle of stare decisis, which instructs courts to respect precedent, helps produce incompletely theorized agreements, and it helps avoid constant struggle over basic principle. It serves this function precisely because it prevents people from having to build the world again, and together, every time a dispute arises.").

46. 347 U.S. 483 (1954).

47. See SUNSTEIN, *supra* note 17, at 40.

48. See *id.*

49. 539 U.S. 558 (2003).

50. See Sunstein, *Analogical Reasoning*, *supra* note 25, at 778 ("Some of the fixed points in law are precedents reached by others, not judgments genuinely accepted by oneself. These points may be fixed either because the legal culture genuinely renders them unrevisable (for the particular judge on, say, a lower court), or because the principle of stare decisis imposes a strong barrier to revision.").

51. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1465

whether a given precedent is analogous and whether the precedent should be given stare decisis effect at all. Sunstein depends on stare decisis to render analogical reasoning a viable means of achieving incompletely theorized agreements.<sup>52</sup> He notes that analogical reasoning “depends on a degree of commonality.”<sup>53</sup> To begin comparing one case to another, one must agree on the facts relevant for comparison and which cases are analogous.<sup>54</sup> Sunstein notes that because the “[l]aw imposes greater constraints on the analogical process,”<sup>55</sup> individuals are likely to agree that precedent should be respected despite their disagreement with its correctness. Sunstein urges that this phenomenon will occur because “the principle of stare decisis so requires.”<sup>56</sup>

Because Professor Sunstein relies on the doctrine of stare decisis to provide the starting point for proceeding by analogy towards an incompletely theorized agreement,<sup>57</sup> such agreements are vulnerable to criticism on four grounds within the context of constitutional law. First, stare decisis is particularly weak in the Supreme Court because supremacy of an interpreting institution prevents its choice to depart from adherence to precedent from being reviewed.<sup>58</sup> Second, without a strong stare decisis effect, the lower court faces the decision to overrule precedent every time it encounters precedent,<sup>59</sup> which, in turn, requires a consensus on whether the doctrine should be invoked. The decision whether to apply precedent in

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52. See SUNSTEIN, *supra* note 17, at 40 (“[S]tare decisis . . . helps produce incompletely theorized agreements, and it helps to avoid constant struggle over basic principle.”).

53. See Sunstein, *Analogical Reasoning*, *supra* note 25, at 770.

54. See *id.* at 774.

55. *Id.* at 770.

56. *Id.*

57. See SUNSTEIN, *supra* note 17, at 40.

58. Although a court must yield to legislative overrides on non-constitutional matters, constitutional matters become inextricably intertwined with the Constitution itself. See *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 ‘to support this Constitution.’”).

59. Cf. Laurence H. Tribe, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 83 (1997) (questioning how Justice Scalia formulates rules for “selective invocation” of stare decisis) [hereinafter SCALIA, *A MATTER OF INTERPRETATION*].

itself requires a guiding principle.<sup>60</sup> Third, even if the court can establish fixed points of law, the process of analogical reasoning, a principle that Sunstein notes as a viable substitute for more ambitious theorization,<sup>61</sup> does not in and of itself produce theoretically modest outcomes. This is because analogies require the adoption of theory embodied in the precedent or the development of theory to explain precedent prior to engaging in analogical reasoning. Fourth, modifying stare decisis to facilitate incompletely theorized agreements might create inflexibility and rigidity in a court's jurisprudence.

#### A. The Effects of Weak Stare Decisis Doctrine on Incompletely Theorized Agreements and Theoretical Modesty

Stare decisis is by no means completely consistent or even a strong barrier to revision. Justice Scalia, for one, has opined that "the doctrine of stare decisis has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can nowadays simply be overruled."<sup>62</sup> The Supreme Court's jurisprudence supports this proposition.<sup>63</sup>

While stare decisis applies most of the time, even the mode of determining whether to invoke the doctrine provides insight into the viability of stare decisis as a facilitator of analogical reasoning. When a court is bound by a weak form of stare decisis,<sup>64</sup> its decisions to afford precedent stare decisis effect is a pronouncement on the precedent's validity.<sup>65</sup> As Professor Tribe has pointed out in

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60. *See id.*

61. *See* SUNSTEIN, *supra* note 17, at 38 ("People might think that *A* is like *B* and covered by the same low-level principle, without agreeing on a general theory to explain why the low-level principle is sound. They agree on the matter of similarity, without agreeing on a large-scale account of what makes the two things similar.").

62. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 59, at 12.

63. *See* Crawford v. Washington, 541 U.S. 36, 75 (2004) ("Stare decisis is not an inexorable command in the area of constitutional law . . .") (Rehnquist, C.J., concurring); Woodford v. Garceau, 538 U.S. 202, 211 (2003) ("[T]he doctrine of stare decisis is most compelling' when the Court confronts 'a pure question of statutory construction.'" (O'Connor, J., concurring) (quoting Hilton v. S.C. Pub. Ry. Comm'n, 502 U.S. 197, 205 (1991)); Troxel v. Granville, 530 U.S. 57, 92 (2000) ("The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to stare decisis protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance.") (Scalia, J., dissenting); Payne v. Tennessee, 501 U.S. 808, 828 (1991).

64. This is as opposed to a strong form of the doctrine that is manifest in inferior courts.

65. Some cases are ignored rather than explicitly overruled. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944); Plessy v. Ferguson, 163 U.S. 537 (1896).

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1467

another context, even rules about when to invoke the doctrine of stare decisis may depend on personal value judgments.<sup>66</sup>

Absent a principle that imposes a strong stare decisis effect, a judicial decision might incorporate judgments on the validity of precedent itself and, in turn, incorporate theory into a decision arrived at analogically. A simple thought experiment illustrates this point. Consider a provision that states the following: “No dogs shall be allowed in parks.”<sup>67</sup> The court has previously held that a bomb-sniffing dog that entered a park to detect an explosive device did not violate the provision. The issue presented in the current case is whether a seeing-eye dog’s entrance into a park in the course of its duties is similar enough to be afforded the same disposition. The court must first decide whether the bomb-sniffing dog case is precedent creating a stare decisis effect.

The threshold inquiry into whether to afford the bomb-sniffing dog case stare decisis effect illustrates two critical points. First, the degree of theorization already developed in the previous case may dictate whether a judge will overrule or distinguish the case from the one at hand. Second, if the precedent is modestly theorized, the court will have to develop some theory embedded in the precedent that either connects it to the case at hand or distinguishes them from each other. Regardless of which occurs, theory is conserved. If the bomb-sniffing dog case held that the dog did not violate the provision because of the potential loss of human life that would result if the dog was denied the opportunity to detect the explosive, the seeing-eye dog case would not be very analogous because the loss of human life is not at issue. If however, the reasoning were that the dog was allowed in the park because it served some specific purpose or function, then the seeing-eye dog case would be more analogous. As more generalized reasoning is used to explain the holding, the more cases will be analogous.

If the bomb-sniffing dog were allowed to enter the park because it served a specific purpose or function, another case which involves a dog entering a park to entertain children might force the court to go back and overrule its precedent because the holding might have been so broad as to leave too many cases analogous.

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66. See SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 59, at 83.

67. This hypothetical is in honor of H. L. A. Hart’s similar thought experiment about vehicles in the park. See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 607 (1958) (“The insight of this school may be presented in the following example. A legal rule forbids you to take a vehicle into the public park.”).

Importantly, the process of analogy, and certainly the outcome of analogy, depends on the reasoning of each case. In addition, a *stare decisis* effect that is not absolute requires theory about *stare decisis* and the precedent itself to determine whether to invoke the doctrine.

### B. Analogical Reasoning Requires Either *Ex Ante* or *Ex Post* Theorization

Even assuming a modestly theorized precedent, a court will have to provide a minimum amount of theory to explain the precedent before applying it to another case. Failing to articulate a theoretical basis for a modest holding would result in absurd outcomes. It would be absurd to conclude that because the dogs in both cases were German Shepherds and both instances occurred at 5:00 PM that the two cases are analogous. One cannot determine whether the cases are truly analogous without articulating why such factors are important or even relevant.<sup>68</sup> Sunstein recognizes and restates this objection to the use of analogical reasoning instead of more ambitious theorization:

Everything is a little bit similar to, or different from, everything else. Perhaps better: Everything is similar in infinite ways to everything else, and also different from everything else in the same number of ways. At the very least one needs a set of criteria to engage in analogical reasoning. Otherwise one has no idea what is analogous to what.

By themselves, factual situations tell us little until we impose some sort of pattern on them. We say that something is like something else only because we have a principle that tells us so (or because we simply perceive the world this way). If this is true, it might seem better simply to identify the principle and the criteria, if we have them, rather than to proceed through analogies.<sup>69</sup>

The process of analogizing requires minimal consensus as to the relevance and weight afforded to each point of comparison. Sunstein argues that the doctrine of *stare decisis* creates this required consensus, and that courts are one step further in reaching an ultimate consensus based on low-level principles such as analogical reasoning.<sup>70</sup> This, however, does not prove true when one examines the process of analogical reasoning itself. It becomes impossi-

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68. See RONALD DWORKIN, *JUSTICE IN ROBES* 69 (2006).

69. See Sunstein, *Analogical Reasoning*, *supra* note 25, at 774.

70. See SUNSTEIN, *supra* note 17, at 40.

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1469

ble to make analogical comparisons without relying, to some extent, on articulated theory in a prior case or by developing one's own theory about the precedent prior to applying it. The principles and criteria Sunstein refers to are nothing more than theorization in disguise.

Without theorizing, one cannot determine which points in each case are important points of analogy and which ones are collateral. Theory defines the contours of the analogical inquiry. Without first determining which facts were critical to a previous case's outcome, not only can one not decide which facts to compare the next case to, but one will also find it difficult to check the soundness of the comparison.<sup>71</sup> The point of analogical reasoning is to determine, first, whether two situations share similar attributes and, second, to determine whether they should be treated alike because the same underlying principles apply.

Sunstein's response is that "criteria . . . will emerge largely from the process of comparing various cases."<sup>72</sup> If criteria emerge, cohesion with the criteria tells us nothing more than the fact that a present case fits with the rest. A set of criteria that is inductively derived, however, does not determine whether the outcome itself is correct, or whether the pattern, theory, or principle that emerged from the comparison of cases is desirable. Even Sunstein notes that the "criteria will not have any source other than what we think."<sup>73</sup> But what we think can only manifest itself subconsciously in a line of precedent. Ensuring both cohesion and correctness requires analogical adherence to theory and some degree of a priori theorization.

Ronald Dworkin made this point by noting, "analogy without theory is blind."<sup>74</sup> Theory is either embedded in precedent or developed to explain the precedent that facilitates analogical reasoning. The decision to adopt precedent as a fixed point of law is either an adoption of the precedent's theoretical underpinnings or a promise to explain by theorizing why it in fact embodies a principle worth propagating.

Sunstein's assertion that "[p]rinciples are thus both generated and tested through confrontation with particular cases"<sup>75</sup> is certainly true, but not because there is anything special about anal-

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71. See DWORKIN, *supra* note 68, at 69.

72. See Sunstein, *Analogical Reasoning*, *supra* note 25, at 775.

73. *Id.*

74. DWORKIN, *supra* note 68, at 69.

75. Sunstein, *Analogical Reasoning*, *supra* note 25, at 775.

ogy.<sup>76</sup> The theory developed prior to employing the analogy is the genesis of the principles. Analogy generates principles because to employ analogy, one must develop or articulate principles, just as going out into the cold makes one warmer because one must put on a coat, scarf, hat, and gloves prior to doing so. One is warmer not because it is warm outside, but because one is forced to do things that will keep one warm.

It is misleading to say that principles emerge through particular cases because principles can be freestanding but facts are of ambiguous relevance absent principles. Predefined principles determine which facts are relevant and should be used for comparison. Principles also determine whether the ultimate outcome of the analogy is sound. Therefore, principles must be defined a priori, because they do not emerge simply through the analogical process.<sup>77</sup>

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76. Professor Sunstein conversely notes that there “is no special magic in theories or abstractions, and that theories are simply the (humanly constructed) means by which people make sense of their ethical and political worlds.” Sunstein, *Incompletely Theorized Agreements*, *supra* note 37, at 1762. If one accepts this characterization of theory, then there is, in turn, nothing profound about the analogical process either. It too can be characterized as simplistically as Sunstein characterizes theory: as merely the means (humanly constructed, of course) in which people apply their theories to particulars. This line of characterization should be abrogated. One must see theory for what it is: an attempt not only to make sense of our ethical and political worlds, but also to define them.

The process of creating theory, whether right or wrong, begins the normative process. It allows us to determine what fits and what needs to be changed to fit within our theoretical constructs. Ronald Dworkin has criticized a similar notion that language used to express moral reality, in fact, creates moral reality. *Cf.* DWORKIN, *supra* note 68, at 58. Dworkin rejects Judge Posner’s flirtation with the theory that “language creates rather than . . . report[s] our moral universe.” *Id.* Dworkin rejects such a theory on the grounds that such a construct would imply that there is no objective truth in moral matters. Dworkin continues by stating that “if the argument that there is no objective truth about moral matters is sound, its consequence is not that there is nevertheless a truth for our community, but rather that there is a distinct truth for each of us, and we cannot sustain a theoretical approach to adjudication on that basis.” *Id.* at 59. The notion that theory also serves to define our political and ethical worlds in addition to describing them may be vulnerable to Dworkin’s metaphysical critique.

It is true that a divergent theory will not alter the state of one’s political and ethical worlds, but it is also true that by establishing a theoretical benchmark, an ultimate goal of cohesion with a broader theory, one will necessarily begin comparing the current state of affairs with the ideal. In the minimum theory begins a normative analysis that allows actors to identify and correct anomalies. The ultimate picture, once a high degree of theoretical cohesion is achieved, is a picture similar to the theory itself. This is essentially how theory helps shape our moral and ethical worlds, rather than merely help us make sense of them.

77. Men cannot live by induction alone. If neither deduction nor induction alone will suffice, another governing principle of rationality must be at work. *See* Hart, *supra* note 67, at 608 (“In this area men cannot live by deduction alone. And it fol-



Other low-level principles offered by Sunstein will also fail on similar grounds. For example, desuetude is the principle that laws seldom enforced should not stand.<sup>78</sup> While desuetude may not require theorization, it is not a low-level principle but rather representative of a broader theory about the legitimacy of laws that are rarely enforced.<sup>79</sup> Professor Prakash argues that desuetude will often have the unintended consequence of striking down more statutes than contemplated.<sup>80</sup> This might be the result of its theoretical underpinnings. Sunstein refers to utilitarianism and Kantianism as examples of high-level theories,<sup>81</sup> but desuetude can easily be characterized as utilitarianism. Either desuetude cannot be classified as a minimalist principle or no principle can obviate the need for theory. The latter seems more probable in light of the failure of analogical reasoning to provide a minimalist substitute.

### C. The Question of Whether or Not to Follow Precedent is Implicit in Every Application of Precedent

When a court faces the option of overruling a case, a threshold inquiry into whether to adhere to precedent is implicit. This is analogous to the implicit search for an exception to the application of a rule.<sup>82</sup> The option not to adhere to precedent creates a point of decision, and such a decision cannot be made without reference to the cases themselves. The court does not merely look to the facts of each case but to their theoretical underpinnings when arriving at its decisions.

An illustrative example arises from the Supreme Court's intergovernmental immunity jurisprudence.<sup>83</sup> The Supreme Court in

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lows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises.”).

78. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27-28 (2003).

79. See *id.*

80. See Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors are Wrong for America*, 106 COLUM. L. REV. 2207, 2216 (2006) (reviewing CASS SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)).

81. See SUNSTEIN, *supra* note 17, at 37 (“We might consider, as conspicuous examples of high-level theories, Kantianism and utilitarianism . . .”).

82. See *id.* at 125 (“Any judgment on this matter depends on a moral or political claim about relevant differences and relevant similarities—between the case where an exception has been or would be found and the case now under consideration.”).

83. Intergovernmental immunity arises in certain realms of regulation in which both the state and federal governments are sovereign and neither can dominate. JETHRO K. LIEBERMAN, *A PRACTICAL COMPANION TO THE CONSTITUTION: HOW*

*National League of Cities v. Usery*<sup>84</sup> stated that even when exercising its commerce power,<sup>85</sup> Congress could not “impair the States’ . . . ability to function effectively in a federal system.”<sup>86</sup> The Court held that the Fair Labor Standards Act<sup>87</sup> “displace[d] the States’ freedom to structure integral operations in areas of traditional governmental functions.”<sup>88</sup> Just nine years later, the Court in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>89</sup> began its analysis of a similarly situated case by examining the workability of the test articulated in *National League of Cities*.<sup>90</sup> In *National League of Cities*, the Court articulated several facts that were germane to the holding in *Garcia*.

The *National League* Court paid particular attention to the fact that minimum wage and overtime laws forced the California Highway Patrol to cut its training time for its officers in half,<sup>91</sup> and that the City of Clovis had to eliminate its internship program.<sup>92</sup> These facts, by themselves, mean nothing. What makes them significant is that they embody a restructuring of traditional government services because of the federal minimum wage and overtime law.<sup>93</sup> The restructuring is significant because the Tenth Amendment prohibits federal intrusion into areas that are traditionally within the purview of the state.<sup>94</sup> The precedent would be indeterminate if the Court simply compared the facts without importing the theories lending significance to the facts and measuring whether the facts in a case before them comported with those theories.<sup>95</sup>

The Supreme Court in *Garcia* could have employed such a factual comparison, but instead, the Court noted that the test articulated in *National League of Cities* had produced uncertainty in lower court application.<sup>96</sup> The Court began to analyze the theory behind the rule itself, just as it would have if it chose to employ an

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THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 236-37 (1999).

84. 426 U.S. 833 (1976).

85. U.S. CONST. art. I, § 8, cl. 3.

86. 426 U.S. at 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

87. 29 U.S.C.A. § 216 (West 2000).

88. 426 U.S. at 852.

89. 469 U.S. 528 (1985).

90. *See id.* at 545.

91. *See* 426 U.S. at 846-47.

92. *See id.* at 847.

93. *See id.*

94. *See id.* at 842 (noting the Tenth Amendment as the source of the limits the courts imposed on the Commerce Clause power).

95. *See* DWORKIN, *supra* note 68, at 69.

96. *See* 469 U.S. 528, 538-39 (1985).

analogical process or other low-level principle of decision. Ultimately, the Court attacked the test itself,<sup>97</sup> which used history to determine whether the regulation impinges on an area of state law traditionally governed by the states, because it would have prevented the states from functioning as legislative laboratories.<sup>98</sup>

**D. The Factors Considered in Determining Whether or Not to Overrule Precedent Require a Court to Examine the Validity and Policy of the Precedent in Question**

The *Garcia* Court overruled *National League*, deciding not to afford it stare decisis effect, and concluded that the *National League* test was unworkable.<sup>99</sup> The test was unworkable because of its stifling effect on state legislative experimentation coupled with vagueness that forced arbitrary line drawing.<sup>100</sup> The Court began by asking whether to afford *National League* stare decisis effect at all based on utilitarian considerations, instead of an analogical analysis of the facts.

The Court considered the practical consequences of employing the *National League* test and the theoretical core that would be binding through stare decisis.<sup>101</sup> The Supreme Court considers specific factors when overruling precedent.<sup>102</sup> These factors force the Court to examine the purpose and effect of precedent.<sup>103</sup> The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>104</sup> noted the following about adherence to precedent:

Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed. Rather, when this Court reexamines a prior holding, its judgment is customa-

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97. *See id.* 545-46.

98. *See id.* at 546 (“The science of government . . . is the science of experiment, and the States cannot serve as laboratories for social and economic experiment if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.”) (internal quotations omitted).

99. *See id.* at 531.

100. *See id.* at 546-47.

101. *See id.* at 546.

102. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

103. *See id.*

104. *Id.*

rily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.<sup>105</sup>

**E. The Decision to Invoke the Doctrine of Stare Decisis Requires Theorization About the Precedents in Question**

A series of prudential considerations are embedded in every decision to afford precedent stare decisis effect (or the decision not to).<sup>106</sup> The prudential concerns focus on the correctness of prior precedent, not just the cost benefit analysis described in *Casey*.<sup>107</sup>

Factors in the stare decisis analysis include the workability of the previous standard and whether time has left the precedent “a doctrinal anachronism discounted by society.”<sup>108</sup> These considerations are embedded in each invocation of stare decisis. Generally, questions of unworkability or obsolescence are forays into the underlying policies of precedent.<sup>109</sup> Determining whether precedent should be considered a point for analogical reasoning necessarily prevents theoretical modesty because the inquiry itself requires theorization.

**F. Stare Decisis Does Not Provide the Necessary Barrier to Revision Required to Reach Incompletely Theorized Agreements Through Analogical Reasoning**

There is no strong presumption that previous cases are to be taken as axioms of law. Prior to analogical reasoning, a court must decide whether it should or should not reexamine the applicability of the precedent; yet a court cannot make a decision on the precedent without first examining the theoretical underpinnings of the precedent. The opportunity for what Dworkin refers to as “justificatory ascent,”<sup>110</sup> occurs every time courts make decisions about invoking stare decisis.<sup>111</sup> When a court is not required to take a precedent as a fixed point, the vital distinction Sunstein makes be-

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105. *Id.* at 854-55.

106. *See id.* at 854.

107. *Cf. id.*

108. *Id.* at 855.

109. These considerations are no doubt also policy concerns. Part of the Court’s charge is to ensure that lower courts have adequate guidance to apply the standards it articulates.

110. *See* DWORKIN, *supra* note 68, at 53.

111. This phenomenon will be discussed in Section IV, *infra*.

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1475

tween legal and moral analogical reasoning dissipates. Sunstein notes that “unlike morality, in which revisability is a key aspect for reflective equilibrium the law tends to fix many particular judgments.”<sup>112</sup> If one agrees that stare decisis is especially weak when a court is the ultimate arbiter on constitutional interpretation, precedent is inherently reviewable through the decision of whether or not to invoke the doctrine of stare decisis at all. It is especially difficult to apply theoretical modesty to constitutional interpretation.

Sunstein asserts that “stare decisis imposes a strong barrier to revision.”<sup>113</sup> Assuming this is true in lower courts, the Supreme Court’s adherence to stare decisis is a matter of policy, not an inexorable command,<sup>114</sup> nor a strong barrier to revision. Absent a strong stare decisis effect, courts lack a baseline of consensus and, in turn, a starting point for the process of analogical reasoning. The necessary commonality that Sunstein requires for analogical reasoning only exists if there is a conscious choice to uphold the theoretical underpinnings of precedent by following its line of reasoning.

Absent a baseline agreement about whether a precedent should receive stare decisis effect, theorization is required to establish a prior case as a fixed point of law. As this Comment mentioned above, theory is required to analogically connect two cases;<sup>115</sup> the theory is either implicit in the precedent or created to explain the precedent. Moreover, theory is required to decide whether precedent is unworkable or whether it should receive stare decisis effect at all.<sup>116</sup>

For Professor Sunstein’s incompletely theorized agreements to play a viable role in constitutional jurisprudence, the doctrine of stare decisis itself must be treated as a fixed point.<sup>117</sup> Stare decisis must be an inductive base case, an axiom of law. It must provide the initial point of consensus to pave the way for low-level principles to fuel incompletely theorized agreements.

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112. See Sunstein, *Analogical Reasoning*, *supra* note 25, at 778.

113. *Id.*

114. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

115. See *supra* Section II.C.

116. See *supra* note 82 and accompanying text.

117. See SUNSTEIN, *supra* note 17, at 40.

**G. Strengthening Stare Decisis to Accommodate Incompletely Theorized Agreements May Constrict the Judiciary's Ability to Interpret the Constitution**

Strengthening stare decisis to accommodate incompletely theorized agreements might create unduly harsh rules, a lack of judicial flexibility, and absurdly broad exceptions to narrowly applicable rules. This is because strong stare decisis effect would require greater adherence to theorized precedent. Sunstein, however, describes these effects as the product of excessive theorization: "A completely theorized judgment would be unable to accommodate changes in facts or values. If the legal culture really did attain a theoretical end-state, it would become too rigid and calcified; we would know what we thought about everything. This would deserve posterity."<sup>118</sup>

While this may be true of complete theorization, theoretical ambition may have the opposite effect. Incompletely theorized agreements require strong stare decisis effect.<sup>119</sup> Sunstein notes that "stare decisis . . . helps produce incompletely theorized agreements . . . because it prevents people from having to build the world again, and together, every time a dispute arises."<sup>120</sup> The same force that establishes the fixed points that Sunstein needs in order to employ a low-level principle of decision also binds the hands of the court.<sup>121</sup> Whereas, in the midst of weaker stare decisis effect, ambitious theorization can be easily revised because barriers to revision are lax.<sup>122</sup>

Sometimes the correct decision cannot be reached analogically. This is particularly true if at some point in the analogical chain one decision was erroneously theorized (even if it was modestly theorized).<sup>123</sup> Ambitious theorization with few barriers to revision will allow a court to simply discard the bad theory and develop a new one.<sup>124</sup>

To facilitate incompletely theorized agreements in constitutional law, the effect of stare decisis would have to become rigidly strong. Such a congealed stare decisis effect is likely to be untenable. Given the finality of law, it is far more realistic to ambitiously theo-

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118. *Id.* at 41.

119. *See supra* note 50 and accompanying text.

120. SUNSTEIN, *supra* note 17, at 40.

121. *See id.* at 41.

122. *See* DWORKIN, *supra* note 68, at 70.

123. *Cf.* SUNSTEIN, *supra* note 17, at 17.

124. *See* DWORKIN, *supra* note 68, at 70; SUNSTEIN, *supra* note 17, at 54.

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1477

size while maintaining a weaker stare decisis effect. Sunstein's criticism of theory producing rigidity<sup>125</sup> only holds if one assumes the existence of stare decisis effect strong enough to mobilize incompletely theorized agreements.

Dworkin points out that "theoretical explicitness may make it easier to identify mistakes, and may also facilitate large-scale changes when the declared theories of the past are themselves identified as mistakes . . . for example, of the precedents of the *Lochner* era."<sup>126</sup>

Theory provides a framework for evaluating whether or not a particular case fits with other cases addressing similar issues.<sup>127</sup> If justice demands an outcome contrary to theory, then the theory must be wrong. Otherwise, the theory will attempt to subsume the case at hand into its synthesized scheme of cases.<sup>128</sup> When employed in conjunction with the weak stare decisis effect typically found in the jurisprudence of a high court, an erroneous theory can easily be revised and an error more easily detected.

Incompletely theorized agreements, therefore, rely on a strong stare decisis effect that would be imprudent or even perhaps untenable when a court is a high court with constitutional supremacy. Moreover, the imposition of strong stare decisis effect would be devastating to the court's ability to modify erroneous theorization. For incompletely theorized agreements to play a role in constitutional interpretation, the theory must be reconciled with the weak stare decisis effect inherent in the final exposition of the law.

### H. The Problem of Theoretical Ascent

At some point, after examining a string of cases developed and resolved analogically, a pattern is likely to emerge.<sup>129</sup> Sunstein refers to the search for such a pattern as the phenomenon of "conceptual ascent."<sup>130</sup> One reason to search for broader principles in case law is to check the validity of the precedent.<sup>131</sup> Sunstein notes that "there is a problem of explaining our considered judgments about particular cases, in order to see whether they are not just a

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125. See SUNSTEIN, *supra* note 17, at 41.

126. See DWORKIN, *supra* note 68, at 70.

127. See *id.*

128. See *id.*

129. See SUNSTEIN, *supra* note 17, at 51.

130. See *id.*

131. See *id.*

product of accident, and at some point the law will want to offer that explanation.”<sup>132</sup>

The greatest danger in proceeding by theoretically modest analogical reasoning is the possibility that the agreement reached is erroneous, truncated, or merely accidental.<sup>133</sup> To safeguard against this error, Sunstein argues that a “distinguished judge . . . will experience a kind of ‘conceptual ascent,’ in which the more or less isolated and small low-level principle is finally made part of a more general theory.”<sup>134</sup> The role of theorization in Sunstein’s model of incompletely theorized agreements is, therefore, an afterthought.

This ascent in theorization is a natural product of inductive reasoning. Individual cases are examined in order to develop a broader principle.<sup>135</sup> What Sunstein fails to realize is that the broader principles do not naturally emerge from the case law, but are developed incrementally with each analogy between cases. The distinction between theory as the progeny of analogy and as vehicle of analogy appears to be splitting hairs; within this distinction lies a subtle point about the whole endeavor of theoretical modesty. Importantly, if theorization is inevitable, a workable jurisprudence must entertain a certain amount of theorization rather than sustain the illusion that low-level principles are in fact doing most of the heavy lifting. Determining at what point to theorize is a crucial inquiry that resolves the dispute between proceeding by theoretically modest or robust inductive reasoning.

A common objection to a presumption in favor of theoretical modesty is that one cannot determine, in advance, the level of theorization required to resolve a given case.<sup>136</sup> Dworkin articulated this objection by noting that one cannot limit the scope of inquiry in advance and, in turn, cannot predict when and to what extent a justificatory ascent<sup>137</sup> (a phenomenon similar to conceptual ascent) occurs.<sup>138</sup>

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132. *Id.*

133. *See id.*

134. *Id.*

135. *See id.*

136. *See* DWORKIN, *supra* note 68, at 55 (“We can all think of other decisions in which judges found themselves drawn upward in a justificatory ascent they may not have anticipated when they began to think about the case at hand.”).

137. *See id.* at 53, 55.

138. *See id.* at 68 (“[One] can set no a priori limit to the justificatory ascent into which a problem will draw them.”).



### III. THEORETICAL MODESTY AND THE PHENOMENON OF CONCEPTUAL ASCENT

This section will examine two problems. First, the difference between conceptual ascent as a natural by-product of the inductive process and the development of theory as one proceeds by analogy. Second, that Dworkin's critique of Sunstein's regime of theoretical modesty<sup>139</sup> is not necessarily fatal to the project of judicial minimalism, particularly in matters of constitutional law.

#### A. Conceptual Ascent as a Natural By-product of Inductive Reasoning

Eventually a line of analogy forms a larger picture: analogous points become illustrative of a broader theory.<sup>140</sup> The very nature of inductive reasoning, which proceeds by examining particulars to develop the general,<sup>141</sup> is amenable to theorization after a series of specific data points are available for analysis. Sunstein refers to this process as conceptual ascent.<sup>142</sup> Some characterize the phenomenon as the mode "by which a relatively particularized issue or principle is made part of a more general theory."<sup>143</sup>

The relevant question is whether this is the proper point of theorization or whether one should theorize between cases to establish an analogy between them. Dworkin recognized a principle problem with treating analogy as a means of avoiding theorization.<sup>144</sup> "[A]nalogy is a way of stating a conclusion, not a way of reaching one, and theory must do the real work."<sup>145</sup> He explores this concept by noting:

Would holding the drug manufacturers all liable be more like holding people liable who actually do cause damage or more like seeking out people who had nothing to do with an accident at all and making them pay its costs? Is burning your own flag more like making a speech on Hyde Park Corner or assaulting people with offensive insults? . . . We cannot even begin to answer those questions without a deep expedition into theory: without asking basic questions about the connection between

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139. *See id.* at 66-72.

140. *See* SUNSTEIN, *supra* note 17, at 51.

141. *See* RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 48-49 (3d ed. 1997).

142. *See* SUNSTEIN, *supra* note 17, at 51.

143. Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1656 (2000).

144. *See* DWORKIN, *supra* note 68, at 69.

145. *See id.*

causation and responsibility, or why the liberty of speech is of special importance, or how the intrinsic value of human life is best understood and expressed. Sunstein understands this.<sup>146</sup>

Dworkin notes that “the method of analogy requires recourse to general principles.”<sup>147</sup> Sunstein’s rejoinder is that when doing so, one can resort to mid-level principles rather than high-level theories.<sup>148</sup> But how can one determine what principles are mid-level and what principles are high-level?<sup>149</sup> It is this problem that provides the basis of perhaps the most devastating criticisms of proceeding by modestly theorized analogy. If one cannot tell the difference between a high-level principle and a lesser-theorized principle, how does one limit the amount of theorization in advance? In Dworkin’s own words, requiring one to make a distinction between such principles requires one to impose an “a priori constraint on legal reflection.”<sup>150</sup> This legal reflection is what Dworkin refers to as justificatory ascent.<sup>151</sup>

This difficulty in setting a priori limits to the phenomenon of justificatory ascent counsels against using theoretically modest analogies to connect cases. Many think that proceeding by analogy limits judicial discretion.<sup>152</sup> Judicial restraint may require that a court theorize no more than required to resolve a case, but theoretical modesty may leave a court no choice other than to impose some theory on minimally defined precedent to proceed by analogy. Once a court begins to theorize, the risk of judicial indiscretion is at its greatest.

Dworkin’s statement, that one cannot predict the scope of theorization required to resolve a case before inquiry,<sup>153</sup> points out this very problem.<sup>154</sup> When a court’s precedent is theoretically impoverished, a foray into theorization is to some extent justified. The less theory that is embedded in the precedent, the more theorization is required to enable analogical reasoning.

Because the lack of theorization along each point of precedent requires a court to identify which points of comparison are impor-

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146. *Id.*

147. *Id.*

148. *See id.*

149. *See id.* (“[I]s a political theory explaining why speech is particularly important a ‘mid-level’ theory or something higher or lower?”).

150. *See id.* at 68.

151. *See id.*

152. *See* SUNSTEIN, *supra* note 17, at 45.

153. *See* DWORKIN, *supra* note 68, at 53-54.

154. *See id.*

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1481

tant and why,<sup>155</sup> employing analogical reasoning, while seeking to apply lower-level principles, invites and perhaps defers theorization when each case is applied as precedent. Theorization upon occasional conceptual ascent defers theorization to another court. By the time the need for conceptual ascent arises, the justification for broader theorization is so great it becomes difficult to tell whether a court has overstepped its bounds.

The Supreme Court's substantive due process jurisprudence illustrates this point. When a court attempts to search for a fundamental right or liberty interest under the Due Process Clauses of the Fourteenth or Fifth Amendments,<sup>156</sup> it is faced with a decision about how it should articulate the fundamental right.<sup>157</sup> The scope of the right determines whether the court finds a derivative of that right in a potentially analogous case. When a court proceeds by modestly defining the fundamental right or liberty interest in question, it defers theorization until conceptual ascent is necessary.

For example, the Court's narrow definition of rights in *Griswold v. Connecticut*<sup>158</sup> and *Eisenstadt v. Baird*<sup>159</sup> left a fairly large gap between a fundamental right to birth control and a fundamental right to an abortion.<sup>160</sup> To make the cases analogous, theoretical

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155. See *supra* note 33 and accompanying text.

156. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.

157. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."); *Roe v. Wade*, 410 U.S. 113, 130 (1973) ("We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, and that it was resorted to without scruple. The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.") (internal citations omitted).

158. 381 U.S. 479 (1965).

159. 405 U.S. 438 (1972).

160. The court's description of the relation between *Griswold*, *Eisenstadt* and *Roe* illustrates this point. The Supreme Court in *Lawrence v. Texas* noted:

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973).

As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the

ascent is necessary. One must characterize the precedent as establishing a right to reproductive autonomy or the right to decide whether to “bear or beget a child”<sup>161</sup> rather than a right to birth control. Refusing to articulate the right broadly in the precedent led to the highly theorized decision in *Roe v. Wade*.<sup>162</sup> *Roe* established a theorized right to reproductive autonomy, and installed a rigid trimester system to govern the right it established.<sup>163</sup>

The same highly theorized right in *Roe* became an even more theorized fundamental right in *Planned Parenthood v. Casey*. Although *Casey* arguably curtailed the right in *Roe*,<sup>164</sup> it is not a more theoretically modest decision. *Casey* established the following characterization of the right to reproductive autonomy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>165</sup>

The same language was quoted in *Lawrence v. Texas* as creating a liberty interest to sexual or perhaps even personal autonomy.<sup>166</sup> The point of discretion was between *Griswold* and *Roe*. Courts are better off dealing with the scope of the right they contemplate while deciding the case and articulating specific limits at that time. This is a more effective means of limiting judicial discretion down the road. Awaiting conceptual ascent does not promote judicial re-

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Court held the woman’s rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

539 U.S. 558, 565 (2003). The Court characterizes the right as protecting a right to “spatial freedom” and the ultimate abortion right derived from the cases in *Roe* as a right to “make certain fundamental decisions affecting her destiny . . . .” *Id.*

161. *Eisenstadt*, 405 U.S. at 453.

162. 410 U.S. 113 (1973).

163. *See id.* at 161-66.

164. *See* Joseph F. Kobylka, *Tales From the Blackmun Papers: A Fuller Appreciation of Harry Blackmun’s Judicial Legacy*, 70 MO. L. REV. 1075, 1116 (2005).

165. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

166. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

2007] *INCOMPLETELY THEORIZED AGREEMENTS* 1483

straint but produces large analogical gaps between precedents that create the opportunity for a later court to theorize. A court's power over its successor courts terminates upon articulating its reasoning for deciding a case.<sup>167</sup>

Articulation and theorization do not have to be ambitious but should be precise. The argument, that a court narrows the possibility of judicial activism by narrowing the right it finds in the Constitution, is fallacious. While a narrow but well-defined right is less likely to receive expansive application in later cases, simply defining a right in its most particular form may invite theoretical ascent further down the road. Justice Scalia subscribes to this fallacy. In *Michael H. v. Gerald D.*,<sup>168</sup> Justice Scalia describes a presumption against generality when addressing the problem of multiple descriptions inherent in a search for a fundamental right.

We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent . . . .

Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference—or at least to announce . . . some other criterion for selecting among the innumerable relevant traditions that could be consulted—is well enough exemplified by the fact that in the present case . . . both [Justices] appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving

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167. Anything short of what is necessary to the outcome of the case becomes mere dicta.

168. 491 U.S. 110 (1989).

judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.<sup>169</sup>

Justice Scalia calls for the most specific formulation of the fundamental right possible.<sup>170</sup> A court faced with a modestly theorized precedent that found a fundamental right in other contexts will find it improbable that the most specific characterization of the right it is searching for will match up with the particulars of prior cases. The assumption is that by reading fewer rights into the Due Process Clause, a court is exercising judicial restraint or at least protecting against judicial activism. Should the court decide, however, that the case at hand warrants constitutional protection, it will have to begin conceptual ascent to analogize between a theoretically modest precedent (or history and tradition) and the case at hand.<sup>171</sup>

Once the process of conceptual ascent begins, it becomes difficult to curtail the principles that the court can legitimately attach to precedent when construing them. Dworkin notes that Sunstein requires that courts utilize mid-level or low-level principles rather than employing high-level principles. But Dworkin's principal objection to this rejoinder is that the lines between low-level, mid-level, and high-level principles are fuzzy.<sup>172</sup> A court cannot, therefore, decide ahead of time what kind of principles it will resort to because the court will often find it difficult to identify whether it has crossed the line between theoretical minimalism and ambition. This inability to limit the scope of legal reflection ahead of time poses the greatest criticism to Professor Sunstein's presumption against high-level principles. Sunstein notes that "[t]he presumption against high-level theories is an aspect of the ideal of the rule of law to the extent that it is an effort to limit the exercise of discretion at the point of application."<sup>173</sup>

The point of application is where a court must either apply the theory articulated in precedent or develop its own theory if the decisions of its predecessor courts are theoretically modest.<sup>174</sup> If there is a sufficient gap in theorization between what the precedent has articulated and what is required to resolve the case at hand, the

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169. *Id.* at 127.

170. *See id.*

171. *See, e.g., id.*

172. *See* DWORKIN, *supra* note 68, at 69.

173. *See* SUNSTEIN, *supra* note 17, at 45.

174. Courts will sometimes begin interpretation by collecting prior precedent. *See, e.g.,* Clay v. United States, 537 U.S. 522, 528-29 (2003).

court must theorize at the point of application. Creating gaps that invite theorization for the purpose of avoiding unwarranted theorization is a contradiction.

### **B. Is the Inevitability of Justificatory Ascent Fatal to Sunstein's Regime of Theoretical Modesty?**

The notion of justificatory ascent appears to be Dworkin's analogue to conceptual ascent. Justificatory ascent occurs when one needs to examine precedent or establish vertical and horizontal cohesion in the law prior to resolving the case at hand.<sup>175</sup> Dworkin's principal argument is that one cannot draw a line in the spectrum of theorization, after which, a court can go no further. In other words, courts proceed in a theoretically modest fashion because the problem at hand dictates the degree of theorization required. Dworkin notes this objection rhetorically: "[W]hich 'theoretical' issues should [a judge] decline to consider, and why are these more or differently theoretical? On what different, and less 'completely' theoretical basis should he decide?"<sup>176</sup>

If a judge cannot differentiate between what is to be characterized as more completely theorized and less completely theorized, then the judge cannot determine where to stop in advance. In addition, a judge might not be able to predict to what extent a legal issue will require theorization. A judge may not be able to determine whether she is employing high-level or low-level theories with certainty. Also, determining the degree of theorization required to resolve a case may not be possible until the inquiry has begun.

It is not difficult, however, to make the assumption that conceptual or justificatory ascent is inevitable. If a court chooses to proceed by analogical reasoning and only modestly theorizes each case until it becomes necessary to provide more, then it will find a large amount of theorization at the point of application. This may lead to unfettered discretion in developing theory.

On the other hand, if a court confronts the need to theorize at the point of application in each case, the court might resolve the case with less theorization than necessary because after a certain point more theory may seem irrelevant.<sup>177</sup> For example, if a court

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175. See DWORKIN, *supra* note 68, at 54-55.

176. See *id.* at 68-69.

177. See Scott J. Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389, 399 (1997) ("[J]udges rarely proffer general theories to support their rulings because such theories are scarcely relevant in adjudication.") (reviewing SUNSTEIN, *supra* note 17).

resolves a case on a theory of equal protection, then utilitarianism or Kantianism may seem far less relevant to the inquiry.<sup>178</sup>

If a court defers theorization until conceptual ascent is absolutely necessary, a court will undergo a theoretical ascent until it can provide the necessary analogical connection between cases. This process may result in the court overshooting by developing far more theory than is required to resolve the case.<sup>179</sup> Whereas, if the court theorized at the point of application, equilibrium is likely to form in which additional theorization would be of no use.

Moreover, a court can constrain the mode of inquiry and the mode of articulation in advance, which may be conducive to theoretical modesty.<sup>180</sup> For example, by confronting the need to theorize by defining constitutional rights with particularity, the court delineates the extent of the right derived or the constitutional provision construed.<sup>181</sup> A court should articulate its reasons clearly. By narrowing the proposition for which a case stands, its scope is subject to narrower interpretation when it is used in a later case as precedent.

Incompletely theorized agreements coupled with a presumption against high-level theories will leave each analogy under theorized. When conceptual ascent occurs, judicial discretion in construing precedent is at its peak.<sup>182</sup> Although incompletely theorized agreements, when coupled with such a presumption, do not fit well within the realm of constitutional interpretation, the project of theoretical modesty is not indefensible. Theorization at the point of application may facilitate theoretical modesty in the long run,<sup>183</sup> and such theorization may comport with judicial minimalism, an attribute especially suited to a federal judiciary of limited jurisdiction.<sup>184</sup>

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178. *See id.* at 400 (“But is it a violation of the categorical imperative to prevent someone from suing a sitting president for sexual harassment? It would be futile for a judge to invoke *Foundations of Metaphysics of Morals* to answer that question.”).

179. *See* DWORKIN, *supra* note 68, at 69.

180. *See, e.g., supra* note 136 and accompanying text.

181. *Id.*

182. This is a direct product of not knowing, a priori, how much theorization is required to solve a particular problem.

183. This reduces the likelihood that a court will over-theorize in one swath of theorization.

184. *See* SUNSTEIN, *supra* note 17, at 45.



#### IV. CONCLUSION

This Comment illustrates some barriers to Sunstein's presumption against high-level theories and incompletely theorized agreements in constitutional law, particularly in decisions by the United States Supreme Court. Incompletely theorized agreements cannot rely on stare decisis to facilitate the use of analogical reasoning or other low-level principles to resolve cases. Establishing the strong stare decisis effect required to form the initial point of consensus about precedent to begin the process of analogical reasoning would require theorization about when to invoke the doctrine at all.

Supremacy allows the high court greater liberty to abrogate precedent when it finds it unworkable or unsound.<sup>185</sup> Each decision to apply precedent embodies a decision not to overrule it. This point of decision requires consensus. Sunstein's theory, which assumes certain fixed points that are created by stare decisis effect or institutional constraints,<sup>186</sup> fails when the possibility of revision occurs at every point of application. Moreover, if the court were to strengthen stare decisis, its hands would be tied when confronted with a minute error in a line of precedent.<sup>187</sup> Greater theorization coupled with a weak stare decisis effect would provide the court with more flexibility.

At some point the court will have to experience conceptual or justificatory ascent.<sup>188</sup> While applying precedent to the case before it a court engages in legal reflection to explain its precedent.<sup>189</sup> Whether the court waits to develop theory after conceptual ascent becomes necessary, or whether it theorizes in advance, is crucial when seeking to curtail judicial discretion. Because deferring theorization creates a greater justification to begin theorizing when a large gap exists between the precedent and the case at hand,<sup>190</sup> and because it is difficult to determine whether a judge uses more or less theorized principles,<sup>191</sup> the potential for judicial indiscretion is greater under Sunstein's incompletely theorized agreements. Moreover, a judge cannot predict when, and to what extent, justifi-

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185. Absent supremacy the Court would be bound by a higher court or a co-equal branch's interpretation of the Constitution.

186. See SUNSTEIN, *supra* note 17, at 17.

187. Even Sunstein acknowledges that the fixed points of law that analogical reasoning is predicated on could be erroneous. See *id.*

188. See *id.* at 51.

189. See *id.* at 45.

190. To facilitate analogy there must be a broader theory to connect the incongruent facts of different cases.

191. See DWORKIN, *supra* note 68, at 69.

catory ascent will be necessary.<sup>192</sup> This problem makes it difficult to draw lines in advance that a court will refuse to go past once it begins its inquiry.

Incompletely theorized agreements are not viable in a jurisprudential climate of weak adherence to precedent and few a priori limits on the scope of inquiry afforded a case. Theoretical modesty, however, is not indefensible. By confronting the need to theorize at the point of application in each case, a court minimizes the justification to theorize in a later case. A court should therefore define its holdings with particularity rather than force a successive court to impose its own theory.<sup>193</sup> While incompletely theorized agreements are useful in other contexts, they provide far less utility when the Supreme Court decides matters of constitutional import. Many of the institutions that make such agreements work are not in full force when the Court interprets a foundational document, especially when the Court's decisions are unreviewable.

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192. *See id.* at 55.

193. *See* Hart, *supra* note 67, at 610 (“Logic only tells you hypothetically that if you give a certain term a certain interpretation then a certain conclusion follows. Logic is silent on how to classify particulars—and this is the heart of judicial decision.”).