Stare Decisis in the Second-Best World

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If judges disagree about the proper interpretation of the law, can they find common ground in the treatment of precedent?

The doctrine of stare decisis weighs the value of legal continuity against the value of legal accuracy. But that analysis is complicated by pervasive disputes over the implications of legal error. Likewise, the scope of a precedent's impact in future cases depends on underlying assumptions about the ends and means of legal interpretation. When those assumptions vary among judges, so too will applications of stare decisis.

For stare decisis to promote the continuity and impersonality of law, it requires an analytical framework designed not for an idealized world of interpretive consensus, but rather for a second-best world of interpretive pluralism.

Second-best stare decisis emphasizes doctrinal factors whose content does not depend on adherence to any particular interpretive methodology. The second-best approach also contemplates structural solutions, such as supermajority voting requirements, for promoting collaboration across methodological lines. Finally, second-best stare decisis pursues compromises that emphasize the common ground among competing schools of interpretation. The result is a reconceptualized doctrine of stare decisis that seeks to transcend interpretive disputes and underscore a court's status as a unified institution working across time—an institution that is something different, and something greater, than its individual members.

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INTRODUCTION

Before judges can interpret the law, they must decide what it means to interpret. What is the proper methodology for extracting meaning from a legal source? And what normative bases justify the use of that methodology instead of another? These are deep and complex questions, and jurists have reached different answers. Justice Antonin Scalia recently called it "sort of an embarrassment" that the Justices of the U.S. Supreme Court are not "in agreement on the basic question of what we think we're doing when we

interpret the Constitution."[1] Whether or not Justice Scalia's normative assessment is correct, his factual predicate—that different judges are engaged in very different interpretive undertakings—is sound.

For all their theoretical disagreements, judges of past and present have managed to coalesce around numerous doctrinal and procedural frameworks. Some of the frameworks are issue specific, such as the test for determining whether defamatory speech is constitutionally protected.[2] Other frameworks guide the practice of the courts at a higher level of generality, cutting across substantive lines. Prominent within this latter category is the doctrine of stare decisis.

The Supreme Court has made clear that the doctrine of stare decisis encompasses several discrete considerations, albeit considerations that are applied loosely and flexibly. As for the doctrine's general objectives, the basic idea is to determine whether it is more important for the law to be settled or right.[3] Although judges continue to disagree over the proper application of stare decisis in individual cases, both the doctrinal structure and the animating tension between legal continuity and legal correctness are familiar features of modern jurisprudence.

Yet neither reciting the established stare decisis factors nor acknowledging the choice between continuity and correctness is sufficient to achieve consistent treatment of precedent. The threshold problem is that the value of getting the law right is a deeply controversial proposition. The problem is particularly acute in the realm of constitutional law. Some might ground the value of constitutional correctness in moral or practical considerations. Others might draw on principles of popular sovereignty or the rule of law. These debates carry profound implications for the treatment of precedent because they determine what is at stake in tolerating an interpretive error.

One response is to conceptualize the issue of stare decisis using a particular methodological lens. Such an approach seeks to explain how a judge should treat precedent if she is an originalist, or a common law constitutionalist, or a pragmatist, and so on. That type of analysis is crucial for understanding how precedent operates within various methodological schools. It helps judges (and scholars) who are considering a particular methodology to analyze its panoply of implications and operations. It can also inform arguments for why one methodology is superior to its competitors.

This Article pursues a different sort of project. It contemplates a doctrine of stare decisis designed for judges who disagree with each other on matters of

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1. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10.

2. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

3. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

interpretive philosophy. The objective is to tailor the doctrine of stare decisis to our second-best world of interpretive disagreement.[4]

Without a second-best accommodation, applications of stare decisis reflect deeper disputes over interpretive philosophy. In many cases these disputes remain submerged, as judges focus on elements of stare decisis doctrine that do not depend on assumptions about interpretive methodology.[5] But in other instances, interpretive premises and normative commitments bubble up to the surface. The Supreme Court concluded that retaining a precedent that failed to protect same-sex intimate conduct would "demean[] the lives of homosexual persons."[6] Years later, the Court warned that to continue withholding constitutional protection from corporate electioneering would be to validate a "brooding governmental power" at odds with "confidence and stability in civic discourse."[7] That same case produced a concurrence that chronicles various problems the Court has alleviated through its willingness to depart from precedent.[8] Included on the list is the Court's most heralded reversal-of-course—its repudiation of racial segregation in *Brown v. Board of Education*[9]—which is so widely lauded precisely because the Justices sought to eradicate an insidious harm.

In a world of interpretive consensus, determining the relevance of legal harms would not pose a conceptual problem for the doctrine of stare decisis. Given their agreement about interpretive theory, judges would possess a uniform metric for evaluating precedents' effects. All judges would deem precedents harmful based on some prespecified criterion, be it morality, popular sovereignty, welfare maximization, or otherwise. The judges might not always reach the same conclusions, but they would be speaking the same language.

In the real world of interpretive disagreement, stare decisis operates differently. The proliferation of competing interpretive methodologies makes reaching consensus about the relevance of legal harms more difficult for judges. The prospect of consensus is slimmer still when the judiciary is viewed as an enduring institution whose composition changes over time. By tethering a decision's continued vitality to the perceived gravity of its offenses—a perception that will vary from judge to judge and court to court—the prevailing

4. I am using the term "second-best" in relation to the operation of stare decisis itself. In other words, a world of interpretive pluralism creates challenges for the doctrine of stare decisis that do not arise in a world of interpretive consensus.

5. *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1875–78 (2013).

6. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

7. *See* Citizens United v. FEC, 558 U.S. 310, 349 (2010).

8. *See id.* at 920 (Roberts, C.J., concurring) (noting that if stare decisis were an absolute rule, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants").

9. 347 U.S. 483 (1954).

approach to stare decisis robs precedents of independent value beyond their attractiveness on the merits. The same phenomena of interpretive pluralism and "reasonable disagreement"[10] that threaten the durability of particular decisions serve to destabilize the doctrine of stare decisis in its current form.

The foregoing discussion relates to the issue of *precedential strength*, meaning the degree of deference that a judicial precedent commands. Problems of pluralism also affect the law's evolution in another way. Before a court considers whether a precedent should be overruled, it must determine whether the precedent applies to the case at hand. That inquiry is one of *precedential scope*, which refers to the aspects of a decision that warrant deference in future cases. Though precedential scope is often described in terms of binding "holdings" and dispensable "dicta,"[11] the situation on the ground is more complex. Divisive questions include whether a precedent should receive deference for its articulated rule as well as its application of that rule, what to make of judicial asides, and how future judges should treat an earlier court's expression of its rationale. The answers depend on underlying assumptions about the competence, institutional role, and constitutional authority of the courts. In turn, establishing a consistent account of precedential scope requires doctrinal accommodations that can avoid or overcome interpretive disputes.

This Article proposes an approach to stare decisis that responds to the challenges of interpretive pluralism. In a world of interpretive consensus, all the consequences associated with a flawed precedent could potentially be relevant to its continued vitality. Likewise, consensus about interpretive theory might lead to a stable and uniform definition of precedential scope. But that is not our world. Ours is a world of interpretive disagreement, which calls for a doctrine of stare decisis that takes explicit account of the challenges that methodological disputes pose—"second-best stare decisis," for short. The emphasis is on doctrinal revisions designed to alleviate the problems of interpretive disagreement.

Second-best stare decisis begins by drawing on existing jurisprudence. The essence of stare decisis is a preference for keeping faith with the past, so it is appropriate to take established law as a starting point. Further, by building from current practice, second-best stare decisis avoids the need to create a new doctrine out of whole cloth. At the same time, the second-best approach identifies revisions and accommodations designed to insulate stare decisis from disputes over interpretive philosophy.

On the issue of precedential strength, second-best analysis offers two mechanisms for addressing the challenges of pluralism. The first solution

10. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 109 (1997) ("The phenomenon of reasonable disagreement provides a potent reason for maintaining the principle of stare decisis in constitutional adjudication.").

11. *See, e.g.*, BLACK'S LAW DICTIONARY 1102 (8th ed. 2004) (defining obiter dictum as a "judicial comment . . . that is unnecessary to the decision in the case and therefore not precedential").

focuses on the content of stare decisis *doctrine* by reconstructing it around considerations that operate independently of interpretive methodology. Familiar considerations such as procedural workability, factual accuracy, and reliance expectations can be redefined to reduce their dependence on interpretive theory, making them suitable for judges across the methodological spectrum.[12] At the same time, the second-best approach recognizes that some factors which might be relevant under conditions of interpretive consensus—including jurisprudential coherence, flagrancy of error, and a precedent's perceived harmfulness—cannot function against the backdrop of pluralism.

As an alternative to this doctrinal approach, second-best analysis offers a *structural* response to pluralism: a requirement that overrulings receive support from a supermajority of judges on a given court. The structural response increases the likelihood that decisions to overrule will rest on factors that bridge methodological divides; the greater the number of votes required to achieve a particular result, the better the chances that some votes must come from judges who disagree with one another on matters of interpretive theory. Unlike the doctrinal version of second-best stare decisis, the supermajority requirement does not promote judicial impersonality by encouraging a judge to subordinate her views to those of her predecessors. Nevertheless, the simplicity of the supermajority requirement makes it worthy of consideration by those who see value in legal continuity but who have reservations about the efficacy or wisdom of altering the content of stare decisis doctrine.

Second-best stare decisis also suggests a revised approach to defining a precedent's scope of applicability. Existing practice supports the principle that judicially articulated rules of decision warrant deference in future cases. Much the same is true of the principle that judicial asides and hypotheticals do *not* warrant deference. Given their widespread acceptance, these norms can help define precedential scope in the second-best world. As for an opinion's stated rationale for reaching a particular result, second-best stare decisis counsels an intermediate response that infuses reasoning with binding force, but only to the extent that it illuminates the opinion's rule of decision. The goal of this compromise is to emphasize areas of common ground and reduce the impact of interpretive disagreement in determining a precedent's forward-looking effect.

The Article begins in Part I by examining the implications of interpretive disagreement for the doctrine of stare decisis. Part II considers three potential responses to pluralism but suggests that none is suited to the challenges of pluralism in the specialized context of stare decisis. In Part III, I introduce a theory of second-best stare decisis for a pluralistic world. Part IV considers the issue of precedential strength. It starts by proposing a doctrinal revision

12. *Cf.* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1737 (2013) (recognizing the value of stare decisis in facilitating "reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation").

designed to minimize the influence of factors that are enmeshed with debates over interpretive philosophy. As an alternative, it evaluates a structural approach to precedential strength whereby no overruling can occur without a supermajority vote. Though the two alternatives differ dramatically in their approach, their common objective is limiting the role of interpretive philosophy in triggering the reconsideration of established law. Part V extends this second-best analysis to the definition of precedential scope by identifying areas of common ground within the existing practice and suggesting areas for compromise where no common ground exists. Given that a court is both a unified institution and an aggregation of individuals, Part VI describes the reasons why any judge might be willing to apply second-best stare decisis, especially when it requires retaining a precedent she finds to be problematic.

Along the way, my focus will be the U.S. Supreme Court. I have chosen to feature the Supreme Court due to the extensive attention its approach to precedent has received (and continues to receive) in the case law and academic literature. Notwithstanding that focus, much of my analysis can extend to any court that recognizes a rebuttable presumption in favor of following its own precedents.

My analysis will also be targeted in another respect: it will revolve around precedents in constitutional cases. Disputes over the role of precedent have been particularly salient within the Supreme Court's constitutional docket. This focus owes in part to the magnitude of those disputes and in part to the Court's hesitancy to reconsider its statutory rulings.[13] Even so, the field of statutory law resembles the field of constitutional law in spawning debates about interpretive methodologies.[14] Common law adjudication can generate comparable debates about the nature and goals of judicial authority. Second-best analysis thus has resonance for statutory and common-law precedents as well as constitutional precedents.

I.
CONFRONTING PLURALISM

Modern American jurisprudence admits of no unified theory of stare decisis. By this I do not mean that judges always abide by a decision despite misgivings about its merits. To the contrary, I take judges at their word when they hold up stare decisis as a potentially constraining force,[15] and I am

13. The Supreme Court has described statutory precedents as (usually) entitled to a heightened degree of deference relative to constitutional decisions. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989).

14. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762–64 (2010) (discussing statutory textualism and statutory purposivism).

15. *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1150 (2008) (arguing that while "tacit norms of constitutional practice leave a large ambit for Supreme Court Justices to exercise ideologically

persuaded there is evidence of this constraint in landmark decisions as well as less prominent ones.[16] What I mean in saying there is no unified theory of stare decisis is that the existing doctrine is not an independent, predefined concept. Instead, stare decisis is interwoven with, and dependent upon, the broader interpretive philosophy that a particular judge embraces.

This Part begins by discussing the connection between interpretive philosophy and the strength of deference that a precedent receives. I then turn to the relationship between interpretive philosophy and a precedent's scope of applicability.

A. Interpretive Theory and Precedential Strength

In 1932, Justice Brandeis noted the tension between the law being "settled" and being "settled right."[17] Supreme Court Justices continue to echo Justice Brandeis's statement while adding that too little attention to continuity could "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."[18] This distinction between legal correctness and legal continuity guides the inquiry into precedential strength, which refers to the degree of deference that precedents receive.

There is no problem with Justice Brandeis's sentiment in the abstract. It is perfectly sensible that evaluating a precedent's durability should account for competing interests in accuracy and stability. Yet the value of interpreting the law correctly turns out to be deeply complex. The crux of the matter is that there is no established currency for determining how important it is to get the law right. Rather, the value of correct interpretation draws its content from the interpretive methodology a particular judge adopts.

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influenced judgment," it remains true that "precedent matters to their decisionmaking, binding them in some cases and empowering them in others to extend a precedent's reach").

16. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) ("For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* [*Cases*, 16 Wall. 36 (1873)] holding."); Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)]'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861 (1992) (describing the argument for retaining *Roe v. Wade*, 410 U.S. 113 (1973), on grounds of stare decisis as overcoming "whatever degree of personal reluctance any of us may have"); Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992) (retaining a precedent while noting that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today"); *cf.* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring in the judgment) (noting that he "will, on *stare decisis* grounds, enforce a self-executing 'negative' Commerce Clause" in certain situations).

17. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

18. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008); *see also* Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (describing the Court's duty to "balance the importance of having constitutional questions *decided* against the importance of having them *decided right*").

To illustrate, consider the position of an originalist judge who believes that the supremacy of the Constitution forbids deference to judicial precedents that deviate from the document's original meaning.[19] For such an originalist, the value of correct interpretation will be paramount in every constitutional case. No set of circumstances can justify consciously retaining an erroneous precedent, which would subvert the Constitution's rightful status as the supreme law of the land. Instead, every constitutional mistake requires correction.[20]

But the value of correct interpretation will look very different to those who reject originalism in favor of other methodologies. Common law constitutionalists may view certain types of interpretive mistakes as especially troubling based on moral judgments, notwithstanding their commitment to respect for precedent and their preference for measured change.[21] Constitutional pragmatists likewise may take moral considerations into account while emphasizing the primacy of a precedent's practical effects.[22] These examples are meant to introduce a simple but central point: the perceived importance of applying the law correctly depends on one's theory of constitutional interpretation. An originalist, a common law constitutionalist, and a pragmatist might all apply their theories of stare decisis in a principled manner, yet they might reach different results based on their respective views about which consequences are constitutionally salient.

Even fellow travelers within a given methodological school can adopt varying approaches to precedent based on their respective normative commitments. Consider a judge who prizes popular sovereignty, understood in basic terms as the authority of the people to govern themselves. One way to pursue that ideal is through an originalist methodology, on the rationale that fidelity to the Constitution's original meaning ensures that the mandate of the

19. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289, 291 (2005). Professors Lawson and Paulsen do not limit their arguments regarding the unconstitutionality of precedent to the context of originalism. Still, for present purposes, originalism provides a useful lens to begin the inquiry into the connection between precedent and interpretive methodology.

20. *See* Paulsen, *supra* note 19, at 291 (arguing that if one accepts the Constitution's supremacy, "courts must apply the correct interpretation of the Constitution, *never* a precedent inconsistent with the correct interpretation").

21. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 43 (2010) ("Reasoning from precedent, with occasional resort to basic notions of fairness and good policy, is what judges and lawyers do."); *id.* at 45 ("The common law approach explicitly envisions that judges will be influenced by their own views about fairness and social policy.").

22. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 150 (2010) (defending the Court's decision to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896), because, among other things, "it was clear . . . that *Plessy*'s rule had worked incalculable harm. . . . It was impossible to see how a racially segregated nation could become a nation that equally respected all its citizens"); *see also id.* at 149–50 (noting the relevance of whether the "passage of time" has shown "that the earlier case is harmful").

people constrains public officials.[23] Such a popular-sovereignty originalist might favor implementing the Constitution's original meaning while leaving open the possibility that certain precedents should be retained even if decided on nonoriginalist grounds—so long as those precedents do not severely impair the sovereignty of the people.[24] For example, a Supreme Court decision that fails to protect a constitutional right might legitimately be reaffirmed if the people retain the power to correct the Court's mistake through ordinary legislation.[25]

Other originalists take a different view of precedent's proper role. That category includes the theorists described above who view departures from original meaning as intolerable due to the Constitution's hierarchical superiority to case law.[26] It also includes consequentialists who ground their commitment to originalism in the benefits that they describe as flowing from the Constitution's supermajoritarian enactment process.[27] For consequentialists, it is not the case that every deviation from the Constitution's original meaning is so harmful as to warrant immediate rectification. Nor should the flagrancy of constitutional mistakes be defined by their impairment of popular sovereignty. Rather, consequentialists seek to "use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true."[28] They focus on welfare against a background assumption that faithfully applying the Constitution's original meaning tends to be desirable in light of the supermajority support required for ratification.[29]

In this way, each strand of originalism yields a particular view of stare decisis. The same goes for other interpretive methodologies. Some skeptics of originalism emphasize the power of precedent to limit judicial overreaching by

23. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999) (arguing that "originalism is the method most consistent with the judicial effort to interpret the written constitutional text and that an originalist jurisprudence facilitates the realization of a political system grounded on popular sovereignty").

24. *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1442 (2007) ("The cost of judicial error increases with the severity of the intrusion into the democratic process, and this accordingly increases the need for strong pragmatic justifications if precedent is to control.").

25. *See id.* at 1443 ("Cases where the Court erroneously fails to intervene generally allow the continued functioning of the political process and thus impose lower costs in terms of popular sovereignty.").

26. *See generally* Lawson, *supra* note 19; Paulsen, *supra* note 19.

27. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 19 (2013) (arguing that "passing a constitution through a strict supermajoritarian process provides the best method for discovering and enacting a good constitution").

28. *Id.* at 177.

29. *See id.* at 189 ("[T]he strong reasons for following the original meaning generally preclude a presumption in favor of precedent.").

entrenching a systemic preference for incremental change.[30] Others assert the need for judges to "distance themselves from the framework of prior judicial decisions" to "set[] out in a fresh jurisprudential direction."[31] The different emphases will lead to different conclusions about the salience and severity of erroneous decisions—and, ultimately, conflicting conclusions about whether certain precedents should be overruled.[32]

These debates are more than theoretical; they are relevant to the application of stare decisis in practice. If a Justice determines that the Supreme Court veered off course in withholding from corporations the right to endorse political candidates, how should she assess the harm that would result from leaving the offending precedent on the books?[33] Is it a matter of consequentialist analysis? Does it depend on the precedent's implications for popular sovereignty? Do moral judgments have some role to play? Questions like these are crucial to determining the implications of a constitutional mistake, yet they admit of no answer until connected with a deeper interpretive theory.[34]

If a judge's interpretive methodology gives primacy to factors such as freedom from governmental oppression, a case like *Plessy v. Ferguson* will be in urgent need of overruling.[35] But a case like *Miranda v. Arizona*, even if deemed incorrect, is much more difficult to view as oppressive to individuals.[36] Any argument for overruling would need to invoke other considerations. Alternatively, if a judge's interpretive methodology is grounded in promoting popular sovereignty, the denial of a constitutional right "to nondiscriminatory treatment by a private employer" might be tolerable; in theory, the political process can provide legislative protections against employment discrimination where the courts have improperly failed to act.[37] Yet the same denial could be problematic for theories that revolve around principles such as individual fairness or equal protection.

Similar questions attend the reconsideration of countless other precedents. For example:

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30. *See* David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300 (2005) ("[M]any constitutional principles that are morally appealing are simply off limits, because of precedent.").

31. *See* Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 351; *see also id.* at 349 (arguing that the type of common law constitutionalism urged by Professor Strauss "unduly diminishes living constitutionalism's greatest virtue: its capacity for judicial innovation").

32. *See* Kozel, *supra* note 5, at 1863–74.

33. *See* Citizens United v. FEC, 558 U.S. 310 (2010).

34. *See* Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2205 (2014) ("Given that different members of the Court embrace different normative theories of constitutional interpretation and judicial power, it is to be expected that different majorities would emphasize different costs and strike different balances.").

35. 163 U.S. 537 (1896).

36. 384 U.S. 436 (1966).

37. Lash, *supra* note 24, at 1459.

- If a Justice believes that the Supreme Court ruled incorrectly in withholding constitutional protection from intimate conduct between same-sex couples, what metric should she use to evaluate the harmfulness of leaving the erroneous precedent on the books?[38]
- If a Justice believes that states possess broad powers to impose tax-collection obligations on out-of-state retailers, how should she evaluate the harm caused by retaining a precedent that unduly limits those powers?[39]
- If a Justice believes that *Roe v. Wade* was mistaken in recognizing a constitutional right to abortion, how should she identify and assess the relevant implications of retaining *Roe*?[40]

It is impossible to answer these questions without consulting an organizing theory that determines which impacts of precedent are legally salient.

B. Interpretive Theory and Precedential Scope

The previous Section addressed the interplay between interpretive theory and the determination of precedential strength. Before a court considers a precedent's strength, it must decide whether the precedent even applies to the case at hand. That inquiry is one of precedential scope: defining the universe of propositions for which a precedent constitutes binding authority.[41]

Discussions about the scope of precedent are often couched in terms of "holdings" and "dicta," with the former treated as presumptively binding and the latter treated as dispensable. Separating the two categories is a famously vexing enterprise.[42] It is debatable whether a precedent's binding effect should extend to broad statements of rules and generalized doctrinal frameworks.[43] It is likewise debatable whether deference attaches to a court's explanation of its rationale or is limited to the opinion's application to concrete facts.[44] For its part, the Supreme Court has often adopted a capacious view of precedential scope as including doctrinal frameworks (think incorporation of the Bill of Rights via the Fourteenth Amendment)[45] and elaborate requirements that sweep far beyond the precedent case (think *Miranda* warnings).[46] The Court has even

38. *See* Lawrence v. Texas, 539 U.S. 558 (2003).
39. *See* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
40. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
41. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014).
42. *Cf.* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 68 (2008) ("The greater the effort devoted to distinguishing what is the *ratio* and what is *obiter*, . . . the more likely it will seem that no such meta-rules could ever exist.").
43. *See* Kozel, *supra* note 41.
44. *See id.*
45. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010).
46. Miranda v. Arizona, 384 U.S. 436 (1966).

indicated that some types of unmistakable dicta may be entitled to deference.[47] At other times, however, the Court has insisted on maintaining the holding/dicta divide.[48]

Lurking beneath these distinctions are methodological choices and value judgments that inform a precedent's scope of applicability. Certain interpretive methodologies suggest a particular conception of precedential scope. Consider the example of common law constitutionalism. Given its reliance on case law as a meaningful check on judicial innovation, common law constitutionalism is most compatible with the view that precedents should be construed broadly.[49] An approach that limited the binding effect of precedents to their narrow core—for instance, to the prior court's legal ruling as applied to concrete facts but not to its articulated rationale or doctrinal framework—would fall short of furnishing the requisite guidance and constraint. While common law constitutionalism permits deviations from precedent in light of considerations such as morality and sound policy, it suggests a broad rendering of precedents' threshold applicability to future cases.[50] By contrast, some versions of originalism are skeptical of invocations of precedent that displace the Constitution's original meaning. That skepticism implies a narrow view of precedential scope, which reduces the extent to which judicial pronouncements can draw the spotlight away from constitutional text and history.[51]

The scope of precedent may also depend on competing understandings of constitutional structure. A judge might construe Supreme Court precedents broadly based on his view of the Court's role as the judiciary's manager, or his commitment to national uniformity.[52] A different judge might construe precedents narrowly based on her understanding of Article III's conception of the "judicial Power" or her concerns about unanticipated results when courts paint with too broad a brush.[53] If approaches to precedential scope depend on underlying interpretive commitments and constitutional understandings, and if those commitments and understandings vary from judge to judge, it becomes difficult to settle upon a consistent approach to precedential scope.[54]

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47. *See* Kappos v. Hyatt, 132 S. Ct. 1690, 1698–99 (2012).

48. *See, e.g.*, Kirtsaeng v. John Wiley & Sons, 133 S. Ct. 1351, 1368 (2013).

49. *See* Kozel, *supra* note 41, at 212–13.

50. *Cf.* STRAUSS, *supra* note 21, at 40 ("The working presumption in a common law system is that judges should follow precedent. But this is not an inflexible rule. . . . [T]here is no doubt that judgments about fairness and social policy enter into the picture, although again in a limited way.").

51. *See* Kozel, *supra* note 41, at 212–13.

52. *See, e.g.*, United States v. Bloom, 149 F.3d 649, 653 (7th Cir. 1998) ("The Supreme Court often articulates positions through language that an unsympathetic audience might dismiss as dictum . . . and it expects these formulations to be followed.").

53. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259 (2006) (arguing that "judicial lawmaking through dictum" is inconsistent with "the powers and duties of courts prescribed by the Constitution" and "common sense and sound judicial practice").

54. *See* Kozel, *supra* note 41, at 225–27.

C. The Prevalence of Pluralism

In a world of methodological and normative consensus, the relationship between precedent and interpretive theory would be relatively straightforward. Judges (and academic theorists) would use their agreed-upon interpretive methods and normative premises as the framework for considering the implications of precedent. That framework would provide an established definition of the scope of precedent, eliminating uncertainty about whether deference extends to reasons as well as results, and to dicta as well as holdings. It would also furnish a metric for assessing the importance of applying the law correctly. For instance, if pragmatic soundness were the key criterion in evaluating the severity of interpretive error, the durability of a case like *Miranda v. Arizona* (assuming that today's Supreme Court viewed the case as incorrect on the merits) would depend on its practical consequences. If, by comparison, popular sovereignty were the accepted currency for measuring the effects of error, the central question would be whether *Miranda* represents a serious impairment of the will of the people—perhaps because it constitutionalizes certain rights that the people cannot remove through the ordinary political process.[55] Whatever metric was established for assessing the costs of erroneous decisions, it would be stable and predetermined, thus facilitating coordinated discussion and deliberation.

In reality, there is nothing approaching consensus about the appropriate methodological and normative referents of legal interpretation, including constitutional interpretation.[56] The Supreme Court does not pledge its allegiance to any single theory of interpretation. Instead, it employs a variety of different approaches.[57] Some arguments are conceptual in their reasoning.[58] Others are steeped in tradition.[59] Still others draw heavily on original

55. *Cf.* Lash, *supra* note 24, at 1443 (arguing that "errors of intervention that involve issues of immunity (constitutional rights) generally remove the subject from majoritarian action" and "impose the highest costs in terms of popular sovereignty").

56. *See, e.g.*, Adrian Vermeule, *The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 556 (2005) ("The history of interpretive theory in American courts is, above all, a history of persistent and deep disagreements among judges and courts about the proper methods and sources of legal interpretation.").

57. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 14 (1996).

58. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to [campaign-related] speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair." (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam))).

59. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014) ("The Court's inquiry . . . must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.").

understandings.[60] When it comes to adjudication at the Supreme Court, pluralism is the order of the day.

It is important to be precise in defining this concept of interpretive pluralism. In particular, we should bear in mind that accepting the legitimacy of multiple sources of constitutional meaning does not, without more, amount to pluralism. To illustrate, imagine a Justice who adopts a theory of constitutional pragmatism characterized by an emphasis on "purposes and related consequences."[61] Notwithstanding her devotion to pragmatism as a unifying constitutional theory, our Justice may employ varying argument types. She may closely scrutinize the Constitution's text.[62] She may also devote considerable attention to issues of social policy.[63] But whichever argument type she employs in a particular instance, pragmatism serves as the Justice's touchstone. Her reasoning is guided by the overarching goal of achieving desirable results in pragmatic terms.

The example of pragmatism is only a starting point. Other interpretive philosophies also contemplate an array of argument types. Prominent examples include Jack Balkin's theory of "living originalism," which contends that fidelity to constitutional text can work hand-in-hand with judicial efforts to respect contemporary "political and cultural values."[64] David Strauss's theory of common law constitutionalism draws heavily on both precedent and moral intuitions, among other considerations.[65] Further, Richard Fallon describes the interaction of several decisional factors that inform and shape one another.[66] And Richard Primus contends that judges should employ multiple argument types while paying close attention to the underlying values being served.[67]

None of these approaches is pluralistic in the sense I am invoking. As I use the term here, pluralism refers to the embrace of different tools of interpretation without articulating or consulting an overarching theory that explains why a particular type of argument is appropriate for a given case.

Within the judiciary, one reason for pluralism's prevalence is the fact that the Supreme Court, like the federal appellate courts, consists of multiple members. And not just multiple members, but members of varying judicial philosophies and interpretive sympathies. Yet pluralism can also be

60. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 625–26 (2008) (adopting the "original understanding of the Second Amendment," though suggesting that such adoption might be complicated if there had been judicial precedents supporting a different result).

61. BREYER, *supra* note 22, at 81.

62. *See id.* at 80–81.

63. *See id.* at 81 ("The judges must seek an interpretation that helps the textual provision work well now to achieve its basic statutory or constitutional objectives.").

64. JACK M. BALKIN, LIVING ORIGINALISM 300 (2011).

65. *See* Strauss, *supra* note 30, at 44–45.

66. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987).

67. *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 186 (2008).

individualistic in its origins. A particular Justice may eschew constitutional theorizing in favor of proceeding pluralistically in her personal decisionmaking. For an illustration of this approach, we can look to the experience of Chief Justice Roberts, who noted during his Supreme Court confirmation hearing that "I have said I do not have an overarching judicial philosophy that I bring to every case, and I think that's true."[68] Justice Kagan expressed similar sentiments during her confirmation hearing in stating that "judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a case-by-case thing."[69]

The attractiveness of pluralism is easy to understand. It allows a judge to disavow precommitment to any interpretive theory, which is (one might contend) precisely the sort of open-mindedness and humility that is the judge's solemn duty to maintain.[70] Moreover, endorsing a pluralistic approach does not foreclose a judge from expressing respect for precedent, as both Chief Justice Roberts and Justice Kagan have explained.[71]

But regardless of whether an individual judge's dedication to interpretive pluralism is tenable as a general matter,[72] it is an uneasy fit with the existing doctrine of stare decisis. To promote judicial constraint, the doctrine implies the need for consistency in defining a precedent's scope of applicability. It also requires a stable metric for assessing the harm that would result from preserving an erroneous decision. Pluralism impedes both objectives.[73] Before

68. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) [hereinafter Roberts Confirmation Hearing]; *see also id.* at 182 ("So the approaches do vary, and I don't have an overarching view.").

69. *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 81 (2005) [hereinafter Kagan Confirmation Hearing].

70. *Cf.* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1013–14 (2009) ("[T]he justices might believe that although one or another constitutional theory comes closest to describing accurately the normative constraints to which they are subject, none does so perfectly, and that the tacit norms of constitutional adjudication thus actually constrain them from adopting any theory that might diverge from those tacit norms in possibly unforeseeable future cases.").

71. *See* Roberts Confirmation Hearing, *supra* note 68, at 142 ("[T]he Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, and the appearance of integrity in the judicial process."); *id.* at 144 ("It is not enough that you may think the prior decision was wrongly decided."); Kagan Confirmation Hearing, *supra* note 69, at 125 ("I will follow stare decisis with respect to *Heller* and *McDonald*, as I would with any case.").

72. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 136 (1990) ("[T]he facts of a case mean nothing until the judge supplies an organizing principle that leads him to a conclusion about their meaning."); *cf.* Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 575 (1999) ("A judge or Justice can proceed case by case. . . . Nonetheless, a judge's work cannot be innocent of constitutional theory, nor can a judge escape obligations of theoretical consistency.").

73. I take no position on the general desirability of pluralism in legal interpretation. Whether interpretive consensus would serve the ends of democracy is a complex question and one that need not detain us here. Irrespective of whether pluralism is desirable in the abstract, it creates serious challenges for the treatment of precedent.

there can be a well-functioning model of precedent, there must be an answer to the challenges of pluralism.

II.
RESPONDING TO PLURALISM

There are a variety of options for responding to interpretive pluralism. This Part examines three salient possibilities. The first entails redoubled efforts at achieving interpretive consensus. The second rejects any push toward consensus and encourages separate opinions that elucidate Supreme Court Justices' individual views. The third depicts different argument styles as interdependent rather than competing or mutually exclusive. While each of these approaches provides insights that can inform the consideration of precedent as deployed by multimember tribunals, I will suggest that none is suited to the distinctive problems posed by the modern doctrine of stare decisis. Later, I will propose an alternative approach: a theory of second-best stare decisis that is deliberately designed for operation in a world of interpretive disagreement.

A. Consensus

The problems described in Part I would dissipate if pluralism were replaced with an enduring interpretive consensus. If every Supreme Court appointee agreed to a uniform set of interpretive and normative commitments, the Justices eventually could converge upon a consistent definition of precedential scope. They could also establish criteria for evaluating the importance of rectifying interpretive errors. Of course, assessing the significance of a given interpretive mistake could still prove challenging. So too could the subsequent step of weighing the value of correcting the mistake against the countervailing benefits of legal continuity. But there would be harmony among the Justices as to the appropriate metric for evaluating constitutional mistakes.

To achieve such harmony, the consensus among the Justices would need to be foundational. Adopting an interpretive theory such as originalism or common law constitutionalism would be a necessary step, but not a sufficient one. Even if every Supreme Court Justice pledged to interpret the Constitution in light of its original meaning, avoiding the problems of pluralism would require further agreement as to what makes originalism the proper method of interpretation: its promotion of the rule of law, its protection of popular sovereignty, its propensity for yielding consequentialist benefits, or something else?[74] Specificity is crucial for determining which types of precedents may be retained notwithstanding their deviation from the Constitution's original meaning. Likewise, even if all the Justices were willing to abide by the

74. *See supra* Part I.A.

principles of common law constitutionalism, they would still need to agree on issues such as the principles of morality that separate the tolerable interpretive mistakes from the intolerable ones.[75]

It seems difficult to imagine the Justices reaching the depth of consensus needed to facilitate the consistent operation of stare decisis across cases. It is always possible that interpretive and normative consensus might emerge at the Supreme Court, at least among a majority of Justices. But from our present vantage point, that possibility seems remote. This is particularly true given the rejection by some recent appointees of the very idea of theory-based judging.[76] In the event that methodological consensus emerged at a particular moment, there is no guarantee that it would last. The consensus might revert to the type of pluralism that characterizes the present era. Alternatively, a different methodological consensus might arise based on premises that the Court previously dismissed. Either scenario would create questions about how a newly appointed Justice should treat precedents grounded in an interpretive theory that she rejects. In other words, even if consensus momentarily emerged, the possibility of intertemporal pluralism would persist.

B. Fragmentation

A second response to pluralism involves a deliberate choice to dispense with the need for consensus. Supreme Court Justices would willingly engage in methodological debates by publishing, as a matter of course, individual concurrences and dissents. In the most divisive cases, each Justice could write separately to explain how his or her interpretive theory affected the determinations of precedential scope and precedential strength. The Court's majority opinions would continue to indicate whether a precedent was controlling and whether it had been retained or overruled, but the Justices' deeper reasoning would emerge only through separate opinions.

The virtues and vices of separate opinions have garnered scholarly attention for decades, and thoughtful commentators have lined up on both sides of the issue.[77] For present purposes, there is no need to contemplate the merits of separate opinions as a categorical matter. It is enough to recognize that writing separately to explain one's personal methodological and normative commitments fits uneasily with the doctrine of stare decisis, at least if the doctrine's goals include promoting judicial unity and impersonality. When today's Justices defer to the decisions of their predecessors, they do not simply respect the past and promote continuity; they also reinforce the idea that even

75. *See supra* Part I.A.

76. *See supra* Part I.C.

77. *Compare* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 743 (1987) (suggesting that the "evils of [separate opinions] have been overstated"), *with* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 755 n.184 (1988) (criticizing the "tendency to submit individual views on the merits").

as Justices come and go, the Court continues forward as an institution.[78] As Archibald Cox observed, the rule of law might strain under a system of "[c]ontinuous fragmentation."[79] Excessive fragmentation challenges the notion that the Justices speak as a unit rather than an assemblage of "individual monads that collide only in the process of voting."[80]

The prospect of fragmentation becomes more palatable to the extent one is willing to sacrifice the role of stare decisis in promoting judicial impersonality. If stare decisis is concerned exclusively with legal stability, a fragmented approach can succeed so long as individual judges pay sufficient attention to preserving the status quo. But that diluted vision exacts a toll on the benefits that make stare decisis worth maintaining. At the very least, any decision to sacrifice the promotion of impersonality should be a last resort, becoming viable only after other responses to pluralism have proved inadequate.

C. Constructivist Coherence

I noted above that recognizing the validity of multiple sources of legal meaning, from text to purposes to practical consequences, does not amount to interpretive pluralism. As I use the term, pluralism is defined by the absence of an overarching theory that links together different styles of reasoning from case to case—an absence that impedes consistency in defining the salient effects of flawed precedents. Yet as I have noted, it is possible to encompass a variety of argument styles within a single, coherent philosophy.

Instructive in this regard is the work of Richard Fallon. Professor Fallon rejects the notion that various styles of constitutional argument are constantly competing for theoretical primacy.[81] On his account, considerations such as constitutional text and theory are relevant, but so are judicial precedents and value arguments.[82] What is more, these considerations often reinforce each other. For example, value arguments can affect conclusions about the meaning of constitutional text and the best reading of the relevant precedents.[83] Mindful of this interdependence, Professor Fallon describes an approach of "constructivist coherence" that incorporates and validates multiple argument styles.[84]

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78. *Cf.* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 25 (2012) (arguing that a present-day judge "must think of himself as acting in the name of the selfsame entity that decided the case that came before" previous judges).

79. Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72 (1980).

80. Monaghan, *supra* note 77, at 755 n.184.

81. *See generally* Fallon, *supra* note 70.

82. *See id.* at 1238.

83. *Id.*

84. *See id.* at 1250 ("By accommodating the claims to interpretive authority of five factors of normative relevance, constructivist coherence theory respects the values underlying all of them.").

Given its focus on accommodating various types of legal argumentation, constructivist coherence warrants consideration as a potential response to interpretive pluralism. The theory possesses significant descriptive force; as Professor Fallon notes, it is commonplace for judges and lawyers to describe different factors and approaches as pointing toward the same outcome.[85] Yet despite its insights, I would submit that constructivist coherence is not suited to the problem of pluralism as it arises in the specific context of stare decisis. The reason is that constructivist coherence accepts the relevance of value judgments that differ from judge to judge. To use Professor Fallon's example, the theory has no objection to a Justice Brennan and a Justice Rehnquist invoking different "moral and political values" that "influence [their respective] perception of arguments," including arguments about the role of precedent.[86] As I have explained, pluralism confounds a system of stare decisis in which a precedent's durability depends on the substantive harms it creates. If different judges devote themselves to different core values, they will lack a uniform basis for reconsidering the vitality of precedent. For the doctrine of stare decisis to transcend disagreements about which normative values are relevant to the enterprise of constitutional interpretation, the doctrine must proceed along a different path.

III.
SECOND-BEST STARE DECISIS

The previous Part discussed three options for addressing the dissonance between interpretive pluralism and stare decisis. I now turn to developing an alternative proposal: *second-best stare decisis*. Second-best stare decisis accepts interpretive pluralism as an enduring feature of the American constitutional landscape. At the same time, it concludes that the Supreme Court's current approach to precedent is only practicable in a world of interpretive and normative consensus.

Second-best stare decisis responds by seeking to mitigate the effects of methodological disagreement. Theoretically, the doctrine of stare decisis could encompass every issue that is potentially relevant to determining a precedent's scope and strength. In reality, some of those considerations do not cohere with interpretive pluralism.[87] That is where second-best stare decisis comes in. It seeks an approach to precedent that can work in a world of interpretive pluralism.[88]

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85. *See id.* at 1193.

86. *Id.* at 1246–47.

87. *Cf.* Fallon, *supra* note 10, at 126 ("[A]n ideal of what would be first-best should not obscure the practical need for approaches that are second-best; second-best approaches are sometimes necessary, in practice, for the Constitution to be implemented reasonably successfully.").

88. *See* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 312 (2008) (describing "the idea of a constitutional second best" as recognizing that "certain choices or options are outside the set of choices that are feasible or possible"); *cf.* Cass R. Sunstein & Adrian Vermeule,

Second-best stare decisis is methodologically neutral. It endorses an approach to precedent that does not depend on the validity of any particular interpretive theory. That feature makes it amenable to application by judges with differing methodological commitments. Yet second-best stare decisis also reflects value judgments of its own. The theory is founded on the principle that deference to precedent can generate significant benefits in terms of stability, continuity, and judicial impersonality. This principle finds support in the Supreme Court's explanations of the role of stare decisis. The Court has described deference to precedent as a mechanism for "maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[89] It has depicted stare decisis as integral to "the very concept of the rule of law underlying our own Constitution," which "requires such continuity over time that a respect for precedent is, by definition, indispensable."[90] And it has recognized stare decisis as promoting "the evenhanded, predictable, and consistent development of legal principles," while at the same time "foster[ing] reliance on judicial decisions" and "contribut[ing] to the actual and perceived integrity of the judicial process."[91] Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[92] In short, "[f]idelity to precedent" is "vital to the proper exercise of the judicial function."[93] It is nothing less than a "foundation stone of the rule of law."[94]

Parlance should match practice. Second-best stare decisis reflects the Court's descriptions of the virtues of continuity—and the costs of vacillation—by recognizing a presumption of fidelity to precedent and by separating the treatment of precedent disagreements over interpretive philosophy.

Fidelity to precedent also has considerable normative appeal in its own right, quite apart from the Supreme Court's endorsements. Stare decisis gives the law a more stable core, reducing the contingency of its content. Legal rules come to enjoy some conceptual distance from the shifting winds of judicial appointments.[95] When a judge defers to her predecessors despite reservations about the merits of their decisions, she reinforces the generality of law. Deference, particularly deference following changes in judicial personnel, sharpens the distinction between courts as institutions and courts as

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Interpretation and Institutions, 101 MICH. L. REV 885, 914 (2003) (arguing that "if an imperfect judge knows he will fall short of the standard of perfection defined by the reigning first-best account of interpretation, it is by no means clear that he should attempt to approximate or approach that standard as closely as possible").

89. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).
90. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).
91. Payne v. Tennessee, 501 U.S. 808, 827 (1991).
92. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).
93. Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring).
94. Michigan v. Bay Mills Indian Cnty., 134 S. Ct. 2024, 2036 (2014).
95. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921).

assemblages of individuals.[96] Fidelity to precedent helps to "transform[] the Court from an ever-changing collection of individual judges to an institution capable of building a continuing body of law rather than merely a succession of one-time rulings."[97] It also underscores the distinction between the judiciary and the political branches, promoting a vision in which changing the law and changing the judge are very different things.[98]

These are the objectives to which second-best stare decisis aspires. Disagreements over the role and content of interpretive theory are here to stay. But the doctrine of stare decisis need not be undermined by this fact. Untangled from debates over interpretive theory, second-best stare decisis can embody an overarching commitment to continuity and impersonality—a commitment to the rule of law rather than the rule of men and women.[99]

IV.
SECOND-BEST STARE DECISIS AND PRECEDENTIAL STRENGTH

I begin with the discussion of precedential strength, which contemplates a pair of second-best approaches: one dealing with the content of stare decisis *doctrine* and one directed at the *structure* of judicial voting procedures.

A. Doctrinal Solution

In its first formulation, second-best stare decisis engages with the doctrine of precedent by seeking ways to separate a flawed decision's durability from debates over interpretive methodology. The objective is to imbue the law with a sense of continuity, stability, and impersonality even as judges come and go and interpretive philosophies ebb and flow.

Stare decisis recognizes that today's judges do not write on a clean slate. Respect for the past should also affect how we approach the doctrine of stare decisis itself. Stare decisis is an established component of American legal

96. *See id.*

97. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1183 (2006).

98. *Cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.").

99. In shifting the doctrinal focus away from optimal, theory-rich solutions, second-best stare decisis bears structural parallels to Professor Schauer's defense of the use of plain meaning to interpret statutes. *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 ("The reliance on plain meaning, . . . as one form of a solution to a coordination problem, substitutes a second-best coordinating solution for a theoretically optimizing but likely self-defeating search for first-best solutions by multiple decisionmakers with different goals and different perspectives.").

practice.[100] Time and again, the Supreme Court has emphasized the foundational importance of precedent.[101] When a new Justice takes her place on the bench, she is greeted by a preexisting doctrine of stare decisis, just as she encounters preexisting doctrines in scores of other fields. This is an important point, because a doctrine whose touchstone is respect for the past should be mindful of its own lineage.

There are numerous doctrinal factors that the Court has, from time to time, described as relevant to the stare decisis analysis.[102] The most prominent account comes from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[103] in which the Court revisited its decision in *Roe v. Wade*[104] regarding the constitutional status of abortion rights. In surveying the components of stare decisis doctrine, the *Casey* majority articulated the following factors:

> So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.[105]

100. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000) (noting the requirement of a "special justification" for departing from precedent even in constitutional cases).

101. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) (describing stare decisis as a "foundation stone of the rule of law"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[T]he 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.").

102. *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416–49 (2010) (discussing the conventional stare decisis considerations).

103. 505 U.S. 833.

104. 410 U.S. 113 (1973).

105. *Casey*, 505 U.S. at 855; *see also, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009) ("Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 923–29 (2007) (Breyer, J., dissenting) (describing the stare decisis inquiry as including considerations such as workability, legal settlement, and reliance expectations); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 26 (2010) ("The Court asks whether a rule has proven unworkable, whether subsequent legal developments have made the rule idiosyncratic and contrary to the texture of the law, whether subsequent factual developments have rendered it perverse, and whether reliance interests justify adherence nonetheless."); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1173–98 (2008) (describing the existing doctrine as including considerations of workability, reliance, whether a decision is a remnant of abandoned doctrine, factual changes, and judicial integrity).

In constructing the second-best doctrine of stare decisis, it will be useful to begin from *Casey*'s account.[106] In the Sections below, I have (for expositional clarity) reordered the relevant considerations and labeled them as *unworkability*, *factual inaccuracy*, *reliance and disruption*, and *jurisprudential coherence*. After discussing each factor against a backdrop of interpretive pluralism, I incorporate two additional concepts that often play a role, either explicitly or implicitly, in the stare decisis calculus: the *flagrancy* of a precedent's interpretive error, and the precedent's *substantive effects*.

1. Unworkability

Unworkability refers to the "mischievous consequences to litigants and courts alike" that can result from a vague or byzantine judicial rule.[107] The rationale for paying attention to workability is intuitive: precedents that have proved cumbersome and unpredictable warrant reconsideration.[108] Such precedents create byproducts of uncertainty, cost, and opacity that all judges can recognize as undesirable.

In practice, the characterization of a decision as workable or unworkable can sometimes track judges' views about the precedent on the merits.[109] That correlation might suggest that the diagnosis of unworkability cannot be extricated from interpretive and normative preferences, rendering considerations of workability unsuitable for the second-best world. There is little doubt that, when the judicial conception of workability is broad and vaguely delimited, methodological and normative commitments may creep into the analysis. At base, however, the concepts of workability and interpretive philosophy are severable and distinct. Some workability concerns are independent of interpretive theory and susceptible to principled application regardless of methodological predilections.

The crucial step is rejecting the argument that a precedent becomes unworkable simply because a judge does not like the substance of its results. Saying that a precedent has wrought moral or practical harms is not an argument from unworkability. It is an argument about the precedent's substantive effects. The proper reasons for paying attention to a decision's

106. The *Casey* majority also discussed the national controversy surrounding *Roe* as a reason to reaffirm it. *See* 505 U.S. at 866–67. But the Court described that consideration as outside the realm of conventional stare decisis analysis and suitable only for highly exceptional cases. *See id.* at 861.

107. Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); *see also* Paulsen, *supra* note 105, at 1173 ("[A] precedent or line of precedents . . . tends to be thought 'unworkable' where there exist no readily discoverable, judicially manageable standards to guide judicial discretion or where the purported 'rule' supplied by precedent seems to require judicial policy determinations of a kind not appropriate for courts to be making.").

108. *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 670 (2000).

109. *Compare* Dickerson v. United States, 530 U.S. 428, 444 (2000) (defending the relative workability of the *Miranda* rule), *with id.* at 463 (Scalia, J., dissenting) (disputing *Miranda*'s "supposed workability").

workability are procedural in nature.[110] They deal with whether courts, litigants, and other stakeholders have been able to understand and apply the rule without undue difficulty. A rule of decision that is hopelessly convoluted or exceedingly vague renders a precedent unworkable regardless of its substantive effects. Likewise, a rule of decision that is unmistakably clear must be acknowledged as workable even if its substantive effects have been disastrous. It is one thing to criticize, for example, a line of Supreme Court cases for unduly constraining federal power. It is quite another to conclude that, whatever their substantive result, the cases failed to articulate "consistent" and "well defined" legal standards for determining the extent of congressional authority.[111]

I will discuss the treatment of substantive effects in greater depth below.[112] The important takeaway for present purposes is that such effects are distinct from considerations of procedural workability, which have independent force regardless of a judge's preferred interpretive methodology. Either a precedent has been clear enough for courts and other stakeholders to understand and apply, or it has not. The answer does not change depending on whether one is an originalist, a pragmatist, or a common law constitutionalist. This is not to say that judges will always agree about a precedent's workability. Disputes will continue to arise. But second-best stare decisis is compatible with that reality. The second-best approach is not quixotic. It does not seek to eliminate disagreements in judgment. The goal, rather, is to facilitate reasoned deliberation in a common grammar that overcomes competing interpretive commitments. Second-best stare decisis can tolerate disagreement or misdiagnosis in the context of an individual case. What it rejects are criteria that have no content until they are situated within a particular methodological framework. Because the creation of workable decisions—and the revision or eradication of unworkable ones—has independent value across a range of methodological perspectives, unworkability emerges as a legitimate component of second-best stare decisis.

2. Factual Inaccuracy

Judicial decisions contain factual premises, and those premises can be wrong. The error may have occurred at the outset, as when the Supreme Court repeats a mistaken statement by a litigant regarding federal immigration policy.[113] Or a premise may have disintegrated over time, as when

110. *See, e.g.*, BREYER, supra note 22, at 152 (noting that a decision "that has created a set of unworkable legal rules" is problematic because it "may have proved confusing or created legal conflict or otherwise caused serious harm").

111. The example is drawn from BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 217 (1998).

112. *See infra* Part IV.A.6.

113. *See* Nken v. Holder, 556 U.S. 418, 435 (2009) ("Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation

technological developments undermine the Court's prior characterization of certain forms of media.[114] In either situation, factual accuracy is compromised.

As with their treatment of workability, courts occasionally conflate diagnoses of factual error with assessments of a precedent's persuasiveness or impact. Consider the Supreme Court's discussion of factual mistakes in *Casey*. The Court concluded that there had been no factual developments that undermined the "central holding" of *Roe v. Wade* regarding viability as the critical point for determining the government's power to prohibit nontherapeutic abortions.[115] In explaining its conclusion, the Court discussed two precedents that it characterized as resting on factual mistakes. The first case was *Lochner v. New York*,[116] which *Casey* described as reflecting inaccurate assumptions about "the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[117] The second case was *Plessy v. Ferguson*,[118] which *Casey* described as overlooking the pernicious stigmatization that results from racial segregation.[119]

One can accept that both *Lochner* and *Plessy* deserved to be overruled, while recognizing that calling their respective errors the products of fact rather than opinion erodes the line between a decision's factual foundations and its substantive effects. The dispositive change from *Plessy* to *Brown v. Board of Education*,[120] and from *Lochner* to *West Coast Hotel Co. v. Parrish*,[121] was not empirical reality. It was the opinions and values through which reality is perceived and understood. Opinions and values are important, but they do not possess the objectivity of facts.

The *Casey* approach is not the only way to identify which of a judicial decision's components are factual. Factual content can be understood more narrowly as driven by objective and empirical observations that do not depend on one's assessment of a precedent on the merits. A useful example comes from the field of broadcast regulation. In the 1978 case of *FCC v. Pacifica Foundation*, the Supreme Court explained that broadcasters do not enjoy the

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of their return, along with restoration of the immigration status they had upon removal. *See* Brief for Respondent 44."). *But see* Letter from Michael R. Dreeben, Deputy Solicitor General, to William K. Suter, Clerk, the Supreme Court of the United States, at 4 (Apr, 24, 2012) ("[T]he government is not confident that the process for returning removed aliens . . . was as consistently effective as the statement in its brief in *Nken* implied."). The example is discussed in Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 63–64 (2013).

114. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 533 (2009) (Thomas, J., concurring) (arguing that "even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time [the Court issued the two relevant precedents], dramatic technological advances have eviscerated the factual assumptions underlying those decisions").

115. *See Casey*, 505 U.S. at 860.

116. 198 U.S. 45 (1905).

117. *Casey*, 505 U.S. at 862–63.

118. 163 U.S. 537 (1896).

119. *See Casey*, 505 U.S. at 863.

120. 347 U.S. 483 (1954).

121. 300 U.S. 379 (1937).

same degree of First Amendment protection as do other speakers.[122] Among the reasons for the distinction was that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[123] In the years since *Pacifica*'s issuance, the emergence of competing media sources, including cable television, satellite television, and the Internet, has undercut that "unique" status.[124] In other words, technological changes have eroded a factual predicate of the Court's prior approach.[125] *Pacifica* accordingly should be understood as subject to reconsideration based on factual developments—though whether the case ultimately deserves to be overruled depends on other factors as well, among them the matters of reliance and disruption discussed below.

Contrasting *Pacifica* with cases like *Lochner* and *Plessy* illustrates how the concept of factual inaccuracy can be pared down to its central, objective core. This streamlined conception of a judicial decision's factual propositions allows deliberation across methodological lines. One need not belong to any particular interpretive school to conclude that broadcasting is no longer uniquely pervasive among media technologies. An incorrect statement of fact is an incorrect statement of fact, regardless of a judge's interpretive philosophy. Given its severability from claims about interpretive theory, an opinion's factual accuracy is an appropriate consideration for second-best stare decisis.

3. Reliance and Disruption

Procedural unworkability and factual inaccuracy are potential reasons for rejecting a flawed precedent. Cutting against those considerations is the impact of an overruling on reliance expectations.[126] The Supreme Court has expressed reluctance about overruling precedents that command significant reliance.[127]

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122. 438 U.S. 726 (1978).

123. *Id.* at 748.

124. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 533 (2009) (Thomas, J., concurring) ("[T]raditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were.").

125. The pervasiveness of broadcast media was not the only reason the Court offered to justify its approach. *See Pacifica*, 438 U.S. at 749 ("[B]roadcasting is uniquely accessible to children, even those too young to read."). But the alternative rationale based on accessibility to children has also become tenuous in light of technological developments. *See Fox Television Stations*, 556 U.S. at 533–34, 545 n.* (Thomas, J., concurring) (noting the proliferation of cable, satellite, and Internet media, as well as the emergence of "innovative solutions to assist adults in screening their children from unsuitable programming—even when that programming appears on broadcast channels").

126. *See* Barrett, *supra* note 12, at 1730 ("[W]hile the doctrine [of stare decisis] serves many goals, the protection of reliance interests is paramount."); *cf.* Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) ("The doctrine [of stare decisis] exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules.").

127. For recent expressions of this point, see Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) (observing that "tribes across the country, as well as entities and individuals doing business with them, have for many years relied on [the relevant precedent] (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal

As Henry Monaghan has put it, "History has its claims, at least where settled expectations of the body politic have clustered around constitutional doctrine."[128]

While disputes over the degree of reliance on a precedent are important and unavoidable, they need not collapse into debates about interpretive philosophy. The assessment of reliance is fundamentally an empirical undertaking, albeit one in which the data will never be comprehensive. There is no reason why a judge's calculation of the reliance that a precedent has engendered should vary depending on whether the judge is, for example, an originalist or a living constitutionalist. Despite its complexity, the reliance analysis can be an objective inquiry in which a judge's interpretive predilections do not dictate her conclusions about the degree of disruption that an overruling is likely to cause.

The conceptual difficulty comes from trying to define which types of reliance are relevant to the stare decisis inquiry. Once again, my starting point is existing practice, which emphasizes direct reliance by implicated stakeholders as the core area of interest. Supreme Court case law thus suggests that disruption is most problematic in cases involving investment-backed expectations and rights in property and contract. [129] Nevertheless, the basic rationale for protecting reliance can apply to noneconomic liberties. Whatever the nature of the underlying right, when stakeholders have taken tangible steps or made concrete plans in reliance on the stability of Supreme Court pronouncements, the disappointment of their expectations is a relevant consideration in the decision whether to overrule.

Reliance by governmental officials such as legislators presents a more complex case. Supreme Court decisions suggest that reliance by government actors, such as through the enactment of statutes, can be a legitimate part of the stare decisis calculus.[130] A potential counterpoint is *Citizens United*, which

immunity"); Harris v. Quinn, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) ("[The relevant precedent] has created enormous reliance interests. More than 20 States have enacted statutes authorizing fair-share provisions, and on that basis public entities of all stripes have entered into multi-year contracts with unions containing such clauses.").

128. Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 7 (1979).

129. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992) ("[T]he classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, [] where advance planning of great precision is most obviously a necessity." (citation omitted)); Quill Corp. v. North Dakota, 504 U.S. 298, 317 (1992) (treating as relevant the fact that a precedent "has engendered substantial reliance and has become part of the basic framework of a sizable industry").

130. *See* Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) (noting the reliance on a precedent by "Congress and state legislatures"); Harris v. United States, 536 U.S. 545, 567–68 (2002) (plurality opinion) (noting the relevance of legislative reliance); cf. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in

overruled a precedent that had commanded considerable legislative reliance. But the *Citizens United* majority did not state that legislative reliance is inapposite; rather, it described that factor as "not . . . compelling."[131] In light of the Court's other opinions giving regard to legislative reliance, it would be curious if the *Citizens United* majority meant to sweep away its past practice without acknowledging what it was doing. Viewed against a backdrop in which Supreme Court opinions have treated legislative reliance as a legitimate consideration, the "not . . . compelling" language from *Citizens United* is best understood to mean that, within the context of corporate electioneering, such reliance was not sufficiently weighty to save a flawed precedent.

Governmental reliance does not implicate the issues of individual expectation that form the core case in which disruption is a relevant consideration. Still, the upsetting of legislative expectations can be a direct, tangible, foreseeable effect of overruling precedent. There is also something to the claim that the judiciary ought to be cognizant of the costs its vacillations can impose on the political arms of government. Recognizing governmental reliance expresses respect for coordinate branches and acknowledges the reality that it is private citizens who ultimately bear the costs of sending politicians back to the drawing board to understand new and different judicial pronouncements. Taken in combination, these features and implications of legislative reliance suggest its suitability for consideration even under second-best conditions.

The same cannot be said for reliance by society at large. Broad notions of societal reliance on precedent have played a role in major constitutional cases. In *Casey*, the Court described disruption in broad terms as encompassing the interests of "people who have ordered their thinking and living around" the continued validity of *Roe*.[132] Similarly, when it reaffirmed *Miranda v. Arizona*, the Court cited the status of the *Miranda* warnings as "part of our national culture."[133] Of course, *Roe* and *Miranda* are exceptional cases in terms of their notoriety, creating questions about whether the Court's invocation of societal reliance in the course of reaffirming them can be extended to other areas of constitutional law. And unlike the private and legislative reliance discussed above, appeals to societal reliance do not depend on tangible behaviors and concrete expectations of stakeholders who stand to be affected most proximately by a precedent's overruling.

Moreover, the objectives served by protecting societal reliance are promoted to a considerable extent by the very existence of a meaningful doctrine of stare decisis—even one that does not expressly account for

this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.").

131. Citizens United v. FEC, 558 U.S. 310, 365 (2010).

132. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

133. Dickerson v. United States, 530 U.S. 428, 443 (2000).

society's reliance on a given precedent. Societal reliance is distinct from private and legislative reliance because it captures the myriad effects that overruling a well-known precedent can have on various communities, including those who have not taken tangible action based on the precedent. To illustrate, return to the example of *Miranda*. The overruling of *Miranda*—and the corresponding rewrite of the rules of engagement for apprehending criminal suspects—could matter immensely to the perceived stability of the law and weaken perceptions of the law's continuity and impersonality, even for those who will never be put in the position of hearing the *Miranda* rights read to them. This does not mean *Miranda* is impervious to reconsideration, but it does mean that an overruling would affect more than the people most directly affected by the case's rule of decision. The potential costs of societal reliance should encourage recognition that stability and impersonality are important as a general matter. One way to promote those values is by demanding a significant justification above and beyond flawed reasoning before a precedent will be overruled. Deferring generally to all precedents is a way of respecting societal reliance on the body of extant judicial pronouncements.

Societal reliance might well be a sensible consideration within a doctrine of stare decisis fashioned under first-best conditions of interpretive consensus. But in our second-best world, compromises are necessary to appeal to a wide cross-section of judges. Societal reliance does not possess the same grounding in existing case law as does reliance by directly impacted stakeholders. Further, its relevance rests on conceptual underpinnings different from the direct actions and expectations covered by the inquiries into private and legislative reliance. Finally, societal reliance can receive indirect protection from a doctrine of stare decisis that demands a significant justification for the overruling of any precedent. On balance, these arguments lead me to conclude that societal reliance—even if relevant in an ideal world—should be excluded from second-best stare decisis.

4. Jurisprudential Coherence

Precedents receive diminished protection if they have become "mere survivor[s] of obsolete constitutional thinking."[134] Take *Lawrence v. Texas*,[135] in which the Supreme Court described its decision in *Bowers v. Hardwick*[136] as inconsistent with more recent statements regarding equal protection and due process.[137] Similarly, the plurality in *Mitchell v. Helms* discarded certain

134. *Casey*, 505 U.S. at 857; *see also* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 31 (2008) (noting the significance of a precedent's "irreconcilability with subsequent case law" in the Court's analysis of whether to overrule).

135. 539 U.S. 558 (2003).

136. 478 U.S. 186 (1986).

137. *See Lawrence*, 539 U.S. at 576.

precedents in part because they were in tension with subsequent case law.[138] The operative question, to recall the language of *Casey*, is "whether the law's growth in the intervening years" has left a precedent as "a doctrinal anachronism discounted by society."[139]

In theory, jurisprudential coherence is another consideration that can be isolated from methodological disagreements. The consistency of one precedent with another does not depend on any particular interpretive philosophy. It reflects the idea that sound judging aspires to consistent decisions—a commitment shared by judges across the methodological spectrum. But while decisions will sometimes be glaringly incompatible, in other cases the inquiry into jurisprudential coherence will repackage debates over a precedent's soundness and animating principles.[140] Was the Supreme Court's pre-*Citizens United* case law inconsistent in failing to protect corporate electioneering on behalf of political candidates, or did the case law properly recognize the unique dynamics of corporate advocacy in elections?[141] Is the Court's brightline rule regarding the tax liability of out-of-state retailers an anachronistic holdover from an absolutist era of jurisprudence or a specialized application that makes sense within the broader doctrinal scheme?[142] How should the Court's subsequent cases involving abortion rights and equal protection have affected the vitality of its decision in *Bowers* to uphold a criminal prohibition against same-sex intimate conduct?[143]

Without an objective baseline, there is too great a risk that the question of jurisprudential coherence will be answered by reference to interpretive commitments that vary from judge to judge and court to court, robbing stare decisis of its ability to serve as a bridge between methodologies. Standardizing the definition of precedential scope cannot solve the problem. I will argue below that a uniform approach to scope is crucial for infusing stare decisis with the ability to promote continuity, impersonality, and stability. But even a uniform definition of scope will leave uncertainty around the assessment of jurisprudential coherence. When the Court was deliberating about *Citizens United*, there was no doubt that its precedents permitted restrictions on corporate electioneering. The question was whether other cases, though not

138. 530 U.S. 793, 835–36 (2000) (plurality opinion).

139. *Casey*, 505 U.S. at 855.

140. *See supra* Part I.A.

141. *See* Citizens United v. FEC, 558 U.S. 310, 348 (2010) ("The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on a speaker's corporate identity and a post-*Austin* line that permits them.").

142. *Compare* Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992) (arguing that the precedent in question could be squared with subsequent cases despite superficial tension), *with id.* at 323 (White, J., concurring in part and dissenting in part) (arguing that the majority's assertion of coherence "will be news to commentators, who have rightly criticized" the relevant precedent).

143. *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003) ("The foundations of *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] have sustained serious erosion from our recent decisions in *Casey* and *Romer* [*v. Evans*, 517 U.S. 620 (1996)].").

directly applicable, reflected an incompatible constitutional theory or adjudicative approach. Likewise, when the Court heard arguments in *Lawrence v. Texas*, there was no doubt that *Bowers v. Hardwick* was, formally speaking, the governing law. But that did not resolve the issue of jurisprudential coherence. The Court evaluated the impact of other decisions that, while not directly "on point," illuminated broader themes in its case law.

If definitions of precedential scope do not resolve debates over jurisprudential coherence, other considerations must be doing the work. It is possible to conceptualize the diagnosis of coherence as objective and uniform in the first instance. A judge could look over a body of jurisprudence, extract its general themes, and ask whether a given precedent respects or deviates from them. But the ultimate question will always be whether thematic outliers are justified on their own terms. There may be good reasons for treating corporate electioneering differently from electioneering by individuals, or for recognizing special rules for the tax treatment of out-of-state retailers. Or there may not. Either way, making that determination is too complicated and controversial to furnish a component of stare decisis doctrine in a world of interpretive pluralism.

The best explanation for why *Citizens United* treated the Court's precedents on corporate electioneering as anomalous (and wrong) rather than context-sensitive (and correct) is the majority's conclusion that the prior decisions were antithetical to core First Amendment values. The same is true of *Lawrence*. The majority's characterization of *Bowers v. Hardwick* as a doctrinal anachronism was connected to the conclusion that *Bowers* permitted states to "demean" the "existence" of consenting adults and to "control their destiny by making their private sexual conduct a crime"—a point the *Lawrence* majority underscored by stating that *Bowers* "was not correct when it was decided."[144] As I have explained, factors such as procedural workability and factual accuracy may also intermingle with interpretive philosophy. But those factors are more susceptible to a paring down that separates them from methodological commitments. The inquiry into jurisprudential coherence admits of no such narrowing, at least in practical terms. Its complex and wide-ranging nature prevents its decoupling from interpretive and normative debates. Notwithstanding its potential relevance in a world of interpretive consensus, the inquiry into jurisprudential coherence must be excluded from second-best stare decisis.

5. Flagrancy of Error

Beyond the factors discussed above, there is a related consideration that frequently finds its way into discussions of stare decisis: the reasoning of the precedent under review. The Supreme Court has stated that the presence of

144. *Id.* at 578.

error is not a sufficient ground for overruling a precedent. As the Court wrote in *Casey*, "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[145] Nevertheless, the Justices have sometimes included the soundness of a precedent's reasoning among the relevant considerations in deciding whether to preserve it.[146] One way to justify this practice is to draw distinctions among erroneous precedents based on the flagrancy of their error: when a precedent is not simply mistaken but clearly or manifestly so, the extent of error becomes a reason to overrule. Caleb Nelson has provided a powerful account of this position, grounding it in theory and historical practice.[147] He suggests that withholding deference from manifestly erroneous precedents may be a desirable alternative to embracing a "*general* presumption against overruling past decisions."[148]

Within the contours of a single interpretive school, classifying dubious precedents based on the flagrancy of their error is surely plausible. If, for example, a judge believes that constitutional rules should be assessed pragmatically based on their costs and benefits, it is natural that the judge will distinguish between precedents whose costs slightly outweigh their benefits and precedents whose costs greatly outweigh their benefits. In this example, the latter category includes cases of manifest error—sufficient to jeopardize a precedent's continued vitality—whereas the former category includes cases of ordinary error that do not themselves constitute sufficient justification for overruling. A similar analysis applies to other interpretive methodologies. If one accepts the validity of originalism, it is sensible to distinguish between precedents that reflect *probable* misreadings of the constitutional text and those that reflect *blatant* misreadings.[149] Again, such a distinction facilitates the sorting of precedents into the categories of manifest error and ordinary error.[150] That categorization, in turn, can determine which mistakes justify an overruling and which mistakes judges should live with (absent other reasons to overrule).

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145. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992); *see also, e.g.*, Harris v. Quinn, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) ("The special justifications needed to reverse an opinion must go beyond demonstrations (much less assertions) that it was wrong; that is the very point of *stare decisis*."); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) ("The doctrine of *stare decisis* would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter.")

146. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 362–63 (2010) (including among the relevant factors whether a precedent was well reasoned); Montejo v. Louisiana, 556 U.S. 778, 793 (2009) (same); Payne v. Tennessee, 501 U.S. 808, 827 (1991) (noting that precedents may be overruled if they are "unworkable or are badly reasoned").

147. *See* Nelson, *supra* note 145, at 3–5.

148. *Id.* at 4.

149. For elaboration of this point, see Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 121–22 (2015).

150. *See* Nelson, *supra* note 145, at 7 ("If the prior court went outside the range of indeterminacy, it did not simply exercise its discretion; it made a demonstrably erroneous decision.").

Yet in our pluralistic world, the prospect of distinguishing precedents based on their degree of error becomes problematic—a point that Professor Nelson notes.[151] To illustrate, simply combine the examples discussed in the previous paragraph. If Judge *A* believes that pragmatism is the proper method of interpreting the Constitution, how is she to determine whether a precedent that is reasoned on originalist grounds reflects an ordinary error or a manifest error? And if Judge *B* adheres to originalism, how is she to distinguish between ordinary error and manifest error in precedents explained in pragmatic terms?[152]

A potential solution, which is based on *interpretive fidelity* to one's preferred philosophy, is to treat as manifestly erroneous all precedents that reflect a methodology different from one's own.[153] An originalist judge would characterize all nonoriginalist interpretations as manifestly erroneous and, thus, subject to overruling. A nonoriginalist judge would take the same view of precedents decided on originalist grounds. And so the divide between ordinary error and manifest error would collapse into disagreements over interpretive philosophy. The problem with this approach is that it sacrifices the ability of stare decisis to unite judicial actors across time. Interpretive methodology determines flagrancy of error, and flagrancy of error determines susceptibility to overruling. But if precedents are only as strong as the interpretive commitments of five Supreme Court Justices, the continuity and impersonality of law is dramatically impaired.

Rather than treating all precedents that arise from rival interpretive schools as egregiously wrong, judges might attempt to practice *interpretive empathy* by placing themselves within the decisional mindset that a prior decision reflects. An originalist judge would not treat flawed decisions as manifestly erroneous simply because they were reasoned on pragmatic grounds. Instead, she would evaluate those decisions against a backdrop assumption of pragmatism's validity. Nor would a pragmatic judge treat all originalist precedents as manifestly erroneous. She would assess the flagrancy of error from the standpoint of an originalist. This practice would maintain a

151. *See id.* at 67 (discussing the risk that "current judges may be committed to an entirely different interpretive method than their predecessors, and they may be too quick to decide that their predecessors' method was illegitimate").

152. *Cf.* Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 100 (2003) ("A subsequent court's disagreement with a prior precedent is more likely to reflect a disagreement about the prior court's selection of decisional principles than the application of those principles."); *id.* at 101 (arguing that the outcome of a Supreme Court case "may reflect a variety of policy, methodological and political choices, but is unlikely to demonstrate that the minority view is objectively without merit").

153. *See* BREYER, *supra* note 22, at 154 ("[D]ifferent judges will have different philosophical approaches about how best to apply highly general constitutional terms. . . . And judges on one Court may have different basic views on such subjects from their predecessors. It is consequently not surprising if a later Court considering an earlier case believes that the earlier Court decision was absolutely wrong.").

distinction between the adoption of a given interpretive philosophy and the declaration of manifest error.

But interpretive empathy presents serious difficulties of its own. Even assuming that judges have the time and capacity to deploy divergent methodologies from case to case, interpretive empathy forces them to apply, at least hypothetically, an interpretive methodology that they may view as imprudent or even illegitimate. An originalist Justice is required to adopt a competing methodology that may be incompatible with the tenets of originalism. The same is true of the pragmatist or common law constitutionalist who must imagine himself as a momentary originalist, regardless of any doubts he may have about the originalist enterprise.

Further problems arise with respect to precedents that do not fit neatly into one interpretive box. As Professor Fallon has explained, Supreme Court decisions often describe different types of arguments as pointing toward the same result.[154] That practice can render it impracticable for a later Justice to put herself in the methodological mindset of the Court that decided the precedent case. There may be no way to determine what, exactly, that mindset was.

In light of the difficulties associated with interpretive fidelity and interpretive empathy, the flagrancy of a precedent's error fits uneasily with the doctrine of stare decisis in a pluralistic legal culture. Despite its role in some of the Supreme Court's discussions of stare decisis, and notwithstanding powerful scholarly treatments such as the one provided by Professor Nelson, I am inclined to believe that the degree of a precedent's error coheres with the doctrine of stare decisis only in a world of interpretive consensus.

The diagnosis of error obviously requires the integration of interpretive philosophy. After all, one must choose a metric by which to determine whether judicial decisions are right or wrong. And it is possible, if unlikely, that a Supreme Court decision may be not simply wrong but illegitimate and unlawful, for instance because it was rendered by a Justice who expressly ignored the relevant enactments and ruled instead based on personal regard, a flip of the coin, or the like. Such decisions, of course, would be entitled to no deference whatsoever. But beyond that category of cases, second-best stare decisis should focus on factors apart from theory-dependent reactions to a decision's reasoning.

6. Substantive Effects

There is considerable force to the argument that a precedent that has led to problematic outcomes should have a limited shelf life. The importance of deciding a case *correctly* must be informed by the effects of deciding it *incorrectly*. But we have seen that the assessment of a precedent's harmfulness depends on conclusions about constitutional relevance, which in turn depend

154. Fallon, *supra* note 15, at 1192–93.

on theories of constitutional interpretation.[155] Substantive assessments—and the methodological choices they reflect—are unsuitable for a world of interpretive disagreement. Second-best stare decisis responds by excluding substantive effects from the overruling calculus in the ordinary course.

This argument does not imply that substantive effects must be irrelevant to determining whether a precedent is wrong. The essence of interpretive pluralism is the pervasiveness of competing beliefs regarding the appropriate ends of legal interpretation. By excising substantive effects from the analysis of whether a flawed precedent should be overruled, second-best stare decisis accepts the prevalence of pluralism. In selecting the best interpretation of a disputed constitutional provision, judges will continue to disagree about the types of benefits and harms that are legally relevant. Second-best stare decisis simply prevents those disagreements from reemerging when considering whether a flawed precedent should be retained or jettisoned.

Treating substantive effects as inapposite reflects a compromise that cuts across methodological and ideological lines. Judges who would otherwise be inclined to view a precedent's injustice or inefficacy as a reason for overruling will need to set those factors aside in recognizing the challenges posed by pluralism. Similarly, judges who emphasize factors such as popular sovereignty will need to relinquish the idea that precedents are in greater need of overruling when they impede democratic self-government; the primacy of popular sovereignty is not a norm that applies across interpretive methodologies.[156] The same is true for those who would determine a precedent's durability by referring to principles of consequentialist analysis.[157] Conclusions about the salient effects of flawed decisions can serve as the basis for declaring a precedent to be erroneous (or for resolving a case of first impression), but they are generally barred from the inquiry into a precedent's durability. Rather than drawing on the substantive value of interpreting the Constitution correctly, second-best stare decisis revolves around factors whose application can be cordoned off from disputes over interpretive theory.

Disregard of substantive effects thus characterizes the ordinary course of second-best stare decisis. But the ordinary course is not the only course. I am inclined to believe that there is a category of exceptional situations in which a precedent's substantive effects may play a role in the second-best analysis. Cases may occasionally arise in which a judge perceives an overwhelming justification for renouncing a precedent due to its substantive effects. The common law constitutionalist might view a precedent as deeply immoral. The pragmatist might view a precedent as creating disastrous results in terms of its practical effects. The popular sovereignty originalist might view a precedent as

155. *See supra* Part I.A.
156. *Cf.* Lash, *supra* note 24, at 1456–57.
157. *Cf.* MCGINNIS & RAPPAPORT, *supra* note 27, at 175.

severely impairing the authority of the people. The rule of law originalist might view a precedent as a stunning affront to judicial constraint.

Despite its general exclusion of substantive effects, second-best stare decisis can accept the legitimacy of substantive considerations in these exceptional cases. Fidelity to precedent is not an absolute. It is a presumption, one subject to override when certain criteria are met. In most cases, those criteria should exclude a precedent's substantive effects to prevent stare decisis from collapsing into debates over interpretive philosophy. At the same time, by ensuring that most disputes over precedent will be resolved without reference to substantive effects, second-best stare decisis can permit exceptional cases in which substantive effects are relevant without jeopardizing the larger project of accommodating the treatment of precedent to a pluralistic world.

The key is ensuring that attention to substantive effects remains the exception rather than the norm. Invoking substantive considerations to justify an overruling triggers a corresponding obligation to imagine what the consequences would be if one's judicial colleagues were to behave in the same way with respect to precedents that they view as severely problematic.[158] This type of aggregated analysis should sharply limit the category of cases in which substantive considerations are relevant. The citation of substantive effects must be extraordinary rather than commonplace.[159]

For example, even under the second-best approach, a Supreme Court Justice could leave open the possibility that considerations of morality can be relevant to the durability of precedent. But she would reserve those considerations for extreme cases rather than allowing them to affect the treatment of precedent in every constitutional dispute.[160] A different Justice might determine that precedents posing a substantial threat to popular sovereignty—for example, by inhibiting the free elections necessary for meaningful self-government—should be overturned based on their substantive effects.[161] Yet second-best stare decisis forecloses the broader conclusion that *all* precedents that impair popular sovereignty should be subject to reconsideration. While such an approach may be legitimate in a world of interpretive consensus, it fails under conditions of interpretive pluralism.

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158. *Cf.* BREYER, *supra* note 22, at 155 (discussing the importance of recognizing the "psychological factors" that make it "difficult to remain faithful to a decision with which" one disagrees).

159. Note that legitimizing substantive considerations in exceptional cases is not the same as allowing the overruling of precedents that are "manifestly" or "clearly" erroneous. Even a precedent that is not manifestly or clearly wrong may have substantive ramifications that are extraordinarily bad.

160. *Cf.* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 895 (1996) (defending departures from traditionally accepted practices in light of reasons including a belief that a practice "is terribly wrong").

161. *Cf.* Lash, *supra* note 34, at 2217 ("An erroneous failure of the Court to intervene in order to protect the democratic process falls outside the category of precedents that can benefit from the application of stare decisis.").

The exception for substantive effects makes second-best stare decisis more plausible in practical terms. Some (or all) Supreme Court Justices might well balk at promising to uphold even the worst of the worst precedents unless they can find a factual mistake or workability problem. The substantive-effects exception gives those Justices a safety valve for handling the most troubling cases, removing a serious obstacle to the adoption of second-best stare decisis. The exception also provides space for correcting the judiciary's most harmful (however that concept is defined) mistakes without creating pressure to distort the ordinary tools of stare decisis analysis. So long as substance-based overrulings are limited to rare and exceptional situations, they do not threaten the enterprise of second-best stare decisis. Stare decisis operates as it should: as a strong presumption that yields when the countervailing considerations are truly compelling.

7. Constructing the Second-Best Doctrine

The previous Subsections provide a framework for putting second-best stare decisis into practice. On one hand, there is inquiry into a precedent's procedural workability and the accuracy of its factual claims. Those factors can justify overruling a flawed precedent. They define, in other words, the importance of getting the law *right* within the context of second-best stare decisis. On the other hand is the disruption of reliance expectations that an overruling is likely to cause. The prospect of disruption informs the value of allowing the law to remain *settled*. Finally, in exceptional cases an overruling may be justified by a precedent's disastrous effects as viewed through a particular methodological lens.

The second-best approach builds on the factors that have formed the core of stare decisis as set forth in *Casey*, the Supreme Court's most prominent exposition of the doctrine. The pivotal difference between the existing account of stare decisis and the second-best approach is the latter's introduction of doctrinal revisions designed to alleviate the problems posed by interpretive disagreement. Under second-best stare decisis, a decision that is unworkable or that rests on a factual inaccuracy loses its presumptive claim to deference. In the vernacular of the Supreme Court, these conditions are "special justifications" that warrant overruling the precedent.[162] The inquiry then turns to whether, notwithstanding the presence of a sufficient justification for overruling, the precedent should be retained for the sake of protecting reliance expectations.

162. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) ("[T]his Court has always held that 'any departure' from the doctrine [of stare decisis] 'demands special justification.'" (citation omitted)).

Like the Supreme Court's existing doctrine, second-best stare decisis requires comparing incommensurable values.[163] As Caleb Nelson notes, asking judges to "compare the harms of instability" to "the harms of inaccuracy" calls to mind Justice Scalia's reference to asking "'whether a particular line is longer than a particular rock is heavy.'"[164] Still, comparing incommensurables is a familiar feature of legal practice, bearing on questions like how the freedom of speech interacts with safety and security[165] and how equal protection interacts with educational diversity.[166] To be effective, second-best stare decisis need not avoid such comparisons altogether.[167] It need only keep them distinct from disputes over interpretive methodology. Different judges will sometimes reach different conclusions about whether a precedent is, for instance, so unworkable as to justify its overruling, notwithstanding the disruption that is likely to ensue. But under the second-best approach, the terms of the debate are uniform, and they transcend methodological disputes.

I have also suggested the compatibility of second-best stare decisis with a narrow exception that allows the overruling of cases whose substantive effects are—from the standpoint of an individual judge applying her own interpretive methodology—too detrimental to tolerate. This exception permits the consideration of a precedent's substantive effects in extraordinary cases. At the same time, it underscores that substantive effects are irrelevant to stare decises in the ordinary course.

Finally, I note that the Supreme Court occasionally populates the doctrine of stare decisis with considerations other than the ones I have addressed. They include a precedent's age, the voting margin by which it was decided, and beyond.[168] This Article has begun the inquiry into second-best stare decisis by focusing on workability, factual accuracy, reliance, and jurisprudential

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163. *See* Fallon, *supra* note 70, at 1239 ("Incommensurability obtains when there are competing conceptions of what the arguments within a particular category properly refer to."); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) ("Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized." (emphasis omitted)).

164. Nelson, *supra* note 145, at 63 (quoting *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring)).

165. *See, e.g.*, Wood v. Moss, 134 S. Ct. 2056, 2061 (2014) ("The First Amendment . . . disfavors viewpoint-based discrimination. . . . But safeguarding the President is also of overwhelming importance in our constitutional system.").

166. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (noting that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests"); *cf.* Fallon, *supra* note 70, at 1239 n.226 ("Even though the claims about the original understanding may be incommensurable with claims about current meaning, the two conceptions can be usefully and rationally compared and a judgment made to prefer one or the other.").

167. *Cf.* Sunstein, *supra* note 163, at 798 ("Incommensurability need not entail incomparability.").

168. *See* Kozel, *supra* note 102, at 416–49 (discussing the various factors); Montejo v. Louisiana, 556 U.S. 778, 793 (2009) (considering a precedent's antiquity); Payne v. Tennessee, 501 U.S. 808, 828–29 (1991) (discussing voting margins and the presence of "spirited dissents").

coherence in light of the centrality of those factors to *Casey*, which continues to represent the Court's most significant overview of the doctrine. I have also described the role of a precedent's degree of wrongness and substantive effects, on the rationale that those factors tend to crop up—sometimes implicitly—in cases involving the durability of precedent. Notwithstanding these focal points, I do not mean to suggest that no other factors bearing on the durability of precedent are suitable for second-best stare decisis. I leave open the possibility that some such factors may exist, so long as they derive their content from sources other than interpretive methodology.

B. Structural Solution

The previous Section explained how the inquiry into precedential strength can be tailored for the second-best world through a series of revisions to the content of stare decisis *doctrine*. This Section offers an alternative approach focused on the *structure* of judicial decision making: a supermajority voting requirement for the overruling of precedent.[169]

1. Supermajority Stare Decisis

Requiring a supermajority vote to overrule precedent is a simple mechanism for responding to the problems of interpretive pluralism. Rather than revising the doctrine of stare decisis to make it suitable for the second-best world, the supermajority approach permits the consideration of any factor—from workability to factual integrity to all manner of substantive effects—that a Supreme Court Justice deems relevant to a precedent's durability. But by increasing the number of Justices whose votes are needed to overrule a precedent, the supermajority requirement raises the probability that the Court's collective decision to overrule will bridge methodological divides. In a world of pluralism, it will often be difficult to cobble together a supermajority to overrule a precedent unless the precedent is unacceptable from multiple methodological perspectives. Depending on the composition of the Supreme Court, building even a five-Justice majority may require considerable compromise. As the requisite number of votes rises to six or seven, it becomes decreasingly likely that a majority coalition could overrule a precedent without drawing together adherents of competing methodological schools. By preserving precedents absent supermajoritarian disapproval, second-best stare decisis reduces the impact of interpretive vacillation. A supermajority requirement would foreclose five-to-four overrulings of the sort that occurred

169. *Cf.* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 682 (2007) (imagining a rule whereby a "precedent decision must be followed unless overruled by a supermajority vote or even a unanimous vote of the later court").

in recent cases like *Citizens United v. FEC* (corporate electioneering)[170] and *Alleyne v. United States* (mandatory minimum sentences).[171]

Supermajority stare decisis resembles the approach laid out by Jacob Gersen and Adrian Vermeule in their examination of the *Chevron* rule.[172] They emphasize the conceptual problems that arise when "individual decision-makers are charged with internalizing a legal norm of deference that is conceptually ill defined and that cuts against both their individual judgments of what is best and their biases and prejudices."[173] Instead of asking individual judges to defer to administrative agencies, Professors Gersen and Vermeule would have courts uphold agency decisions absent a supermajoritarian judicial override. Through the use of supermajority rules, deference becomes "an emergent property of the aggregate vote, rather than of individual decisions."[174] While their focus is administrative law, Professors Gersen and Vermeule briefly extend their claims to the operation of stare decisis, where a supermajority requirement could "avoid[] the inevitable uncertainty involved in lumpy linguistic formulations like 'strong' and 'super-strong' deference accorded to prior judicial decisions."[175]

The structural version of second-best stare decisis embraces a similar rule while emphasizing a different rationale: the need for circumventing methodological pluralism. Under the supermajority approach to stare decisis, each Justice makes her own decision about the durability of precedent. The Justices' votes are aggregated, but their analyses remain personal and distinctive. As with the doctrinal version of second-best stare decisis, a likely effect of adopting a supermajority-voting rule is a reduction in the number of overrulings. Yet that result—while consistent with the Justices' description of stare decisis as the rule rather than the exception[176]—is less important than the creation of a structural framework that increases the conceptual distance between the durability of precedents and the cycling of prevailing interpretive methodologies.

2. Implementation

There are two ways that a tribunal such as the U.S. Supreme Court might implement supermajority stare decisis. First, the Court could adopt the requirement through its case law and internal practices. Second, the Court could formally amend its operating rules.[177] Templates exist for both

170. 558 U.S. 310 (2010).
171. 133 S. Ct. 2151 (2013).
172. *See* Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
173. Gersen & Vermeule, *supra* note 161, at 685.
174. *Id.*
175. *Id.* at 706 n.60.
176. *See supra* Part III.
177. On the Supreme Court's rulemaking authority, see 28 U.S.C. § 2071(a) (2012) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for

approaches. The "Rule of Four" regarding the votes necessary for certiorari does not appear in the Court's formal rules.[178] Similarly, the *Marks* principle, which governs the binding effect of fractured Supreme Court decisions, developed out of the Court's case law.[179] By contrast, the factors that are relevant to granting certiorari are spelled out in the Court's official rules.[180] And the Court's quorum requirements are included in its rules (and set by statute).[181]

Though both options are defensible, the safer course for implementing the supermajority-voting requirement is a formal revision to the Court's rules. After the rules were updated, the requirements for overruling would be unmistakably clear to future Justices and other stakeholders—not unlike the U.K. House of Lords' decision in 1966 to alter its treatment of precedent through the issuance of a Practice Statement.[182] Following a rule change, there would be little chance that a five-Justice majority might depart from the supermajority requirement within the confines of a significant or controversial case. Cases would come and go, but the supermajority requirement would remain in place unless and until the Supreme Court formally removed it.[183]

3. The Move Toward Minimalism

In evaluating supermajority stare decisis, it is important to consider its potential effects on the composition of judicial opinions. If there were a supermajority of Supreme Court Justices belonging to a single methodological school, the Court could explain its justifications for overruling in considerable depth notwithstanding the requirement of supermajority approval. In periods of pluralism, however, there may be no unified theory that encompasses the

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the conduct of their business."); *cf.* Jed Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 951–53 (2003) (discussing the potential options for requiring a supermajority vote in order to invalidate legislative action). I am putting aside the possibility that Congress might wish to impose its own precedent rules on the Court. For discussions of congressional control over the doctrine of stare decisis, compare Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000), with Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

178. On the Rule of Four generally, see, for example, Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–73 (1988).

179. Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

180. *See* SUP. CT. R. 10.

181. *See* SUP. CT. R. 4.

182. *See* DUXBURY, *supra* note 42, at 129 ("[B]y issuing something akin to a legal press release, the House drew far more attention to its action than would likely have been the case if it had departed from [its prior approach to precedent] in the course of a judgment . . . ." (internal footnote omitted)).

183. This discussion assumes arguendo that the Constitution does not limit the Supreme Court's ability to determine its internal voting procedures.

various reasons why different Justices opted to overrule a precedent. Instead, we would expect the Court's majority opinions to exhibit a minimalist approach to stare decisis.[184]

So long as there is agreement regarding the result, minimalist courts can dispense with theoretical wrangling in the interest of reaching resolution.[185] As applied to second-best stare decisis, a minimalist approach would lead to joint decisions regarding the durability of precedent without the need for deeply theorized discussions about what makes a precedent vulnerable to overruling. The collective problems posed by interpretive pluralism would not stand in the way of collective pronouncements regarding the fate of precedent. Indeed, Cass Sunstein, who is one of minimalism's leading expositors, describes minimalism as a response to (among other things) pluralism.[186]

Minimalists tend to avoid "abstract theories."[187] They focus on "concrete outcomes" that are acceptable to judges of varying interpretive stripes.[188] Minimalism's endgame is the construction of "[i]ncompletely theorized agreements."[189] Judges may not agree "all the way down,"[190] but they can act collectively based on the beliefs they *do* share. Through the fashioning of incompletely theorized agreements, judges evince a healthy "reluctance to challenge the basic commitments of one's fellow citizens when it is not necessary to do so."[191]

The introduction of a supermajority requirement for overruling could amplify the role of incompletely theorized agreements in constitutional adjudication. Increasing the number of Justices whose votes are required to overrule a precedent leads to a corresponding increase in the chances that some Justices whose votes are necessary for overruling will disagree with each other on matters of interpretive methodology. Justices from different methodological schools could agree that a precedent should be overruled, but each Justice might have a distinctive view of the underlying theory that justifies the overruling. Rather than declaring an impasse, the Justices would take a minimalist approach by joining together to support a collective opinion that renounces the applicable precedent without seeking to furnish a comprehensive or highly detailed rationale.

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184. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1999) (defining minimalism as "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided").

185. *See id.* at 57 ("As a practical matter, minimalism may be the only possible route for a multimember tribunal, which may be incapable of bridging its many disagreements, and which may be able to converge only on a minimal ruling.").

186. *See id.*

187. *Id.* at 13.

188. *Id.*

189. *Id.* at 13–14.

190. *Cf.* STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 1 (1988).

191. SUNSTEIN, *supra* note 184, at 50–51.

C. Comparing the Doctrinal and Structural Approaches

Notwithstanding their shared attention to the challenges posed by interpretive pluralism, the doctrinal and structural versions of second-best stare decisis differ dramatically. The doctrinal approach draws on the distinction between considerations that can operate independently of interpretive methodology and considerations that cannot. As applied to the Supreme Court, the structural approach avoids the need for making any such distinction by increasing the number of Justices whose votes are required to overrule a precedent.

The supermajority requirement implies that the overruling of precedent is essentially a matter of judicial will—of "having the votes." Each Justice is at liberty to take into account whatever considerations she wishes and to defer to her successors as much or as little as she likes. Deference to the past occurs through the aggregation of multiple Justices' behaviors. The doctrinal approach operates differently. It asks the individual Justice to subordinate her views in order to keep faith with the Court's institutional history.

While the structural approach has the advantage of simplicity, I view the doctrinal approach as superior due to its promotion of judicial impersonality.[192] Even against the backdrop of a supermajority voting requirement, if Justices invoke stare decisis to defend precedents they like but withhold deference from precedents they disapprove, stare decisis loses its claim to emphasizing the Court's nature as a unified whole rather than an accumulation of individuals. Nevertheless, for those who are inclined to challenge this sentiment—perhaps because they are willing to trade some impersonality for an added degree of simplicity, or because they doubt the ability of any doctrine to operate independently of interpretive philosophy—the structural approach deserves consideration as an alternative response to pluralism.[193]

V.
SECOND-BEST STARE DECISIS AND PRECEDENTIAL SCOPE

Thinking about the strength of precedent in isolation is incomplete. Even the most powerful precedents become nonconstraining if future judges can easily distinguish them. A system of stare decisis is only as reliable as its concept of precedential scope. There must be preexisting rules for determining when precedents apply and when they do not. Without such rules, precedents

192. On other potential arguments against adopting a supermajority requirement for the overruling of precedent, see GERHARDT, *supra* note 134, at 105–06.

193. It is also possible to combine the doctrinal and structural approaches by requiring a supermajority vote while excluding certain issues from the stare decisis calculus. Such an approach would sacrifice the simplicity of the pure structural approach. Still, it could be attractive if one were to conclude that, even after the doctrinal revisions to stare decisis that I have set forth, the incidence of overruling remained too frequent. Under that scenario, integration of the supermajority requirement would preserve the doctrinal revisions of second-best stare decisis while reducing the likelihood that any particular precedent would be overruled.

lose much of their constraining force regardless of how resistant they are to express overruling.

The Supreme Court often characterizes precedents' binding effect as arising not only from their results, but also from their articulated rules and supporting reasons.[194] At the same time, the Court has remained attentive to the distinction between holdings and dicta.[195] The picture that emerges is, roughly, one in which broad statements of rules, reasons, and doctrinal frameworks often receive deference while judicial asides and counterfactuals usually do not.[196] Yet as explained above,[197] the Court's practice has been uneven. Despite its tendency to accord deference to rules and reasons in addition to results, the Court occasionally treats supporting rationales as dispensable.[198] It has also suggested that certain types of dicta can, through factors such as their indicia of deliberation, establish some warrant of deference.[199]

The initial step in revising the treatment of precedential scope is smoothing out these inconsistencies. But there must also be a deeper layer to the analysis. The implications of precedential scope are bound up with theoretical commitments and constitutional understandings. When there are nine different Justices applying (potentially) nine different interpretive theories, the likelihood of achieving consensus regarding the definition of precedent is low. The prospect is all the worse when the Court is viewed as an institution continuing over time, such that even the momentary emergence of consensus might give way to a different perspective at some later date.

This Part proposes a second-best approach to precedential scope designed to enhance consistency and coherence notwithstanding the reality of interpretive pluralism. Drawing on the Supreme Court's existing jurisprudence, I suggest three principles for defining a precedent's scope of applicability. The goals are to facilitate adjudication pursuant to general rules and promote respect for the Court's status as an enduring institution, while at the same time rejecting the notion that every utterance contained within a judicial opinion warrants deference going forward.

A. Rules

The first question is whether a judicial opinion sets a precedent for a rule of decision as opposed to the specific application of law to concrete facts. There appears to be agreement among Supreme Court Justices about the Court's ability to articulate rules infused with binding force. The Justices commonly formulate rules that seem designed to guide future adjudication in

194. *See* Kozel, *supra* note 41, at 194–97.
195. *See id.* at 187–88.
196. *See id.* at 190–97.
197. *See supra* Part I.B.
198. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 471 (2010).
199. *See* Kappos v. Hyatt, 132 S. Ct. 1690, 1699 (2012).

the lower courts and the Supreme Court itself, and those rules receive deference in due course. Sometimes the rules are relatively targeted, such as a mandate to apply strict scrutiny to content-based restrictions on speech. Other times the rules take the shape of broader doctrinal frameworks, such as the protocol for determining whether an aspect of the Bill of Rights is incorporated against the states.[200] Either way, deference is often treated as attaching to the Court's broad rules of decision. The rationale behind this practice seems clear enough. Withholding deference from judicial rules risks impeding the development of a systematic, continuous framework of law.[201]

In building from the existing law of precedent, second-best stare decisis starts from the proposition that a decision's scope of impact includes its legal rule as well as its fact-specific result.

B. Rationales

The implications of second-best stare decisis are more complicated with respect to judicial rationales, meaning the reasons offered in support of a decision.[202] The Supreme Court has explained that a "well-established rationale upon which the Court based the results of its earlier decisions" generally receives deference in future cases.[203] But at other times, the Court distinguishes between a precedent's rule and its "descriptive" components.[204] A consistent doctrine requires choosing between these two approaches lest variation in the definition of precedent be allowed to dilute the constraining force of stare decisis.

Treating supporting reasons as authoritative promotes impersonality by respecting the statements of prior judges. It also makes judicial case law a source of thicker norms for guiding litigants, courts, and other stakeholders.[205] But construing decisions broadly also gives greater power to judges who are establishing precedents in the first instance. That effect may be disconcerting if one interprets Article III as placing strict limits on the ability of judges to establish binding precedents, or if one believes that decisions are more likely to

200. *See* Kozel, *supra* note 41, at 193–96; *cf.* County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

201. *Cf.* Waldron, *supra* note 78, at 20 (describing the connection between the rule of law and the adjudication of cases through generally applicable norms).

202. In discussing the binding effect of judicial rationales, I am intentionally steering clear of any discussion of an opinion's *ratio decidendi*—a concept that I view as sound in theory but fraught in practice. *Cf.* DUXBURY, *supra* note 42, at 68–69 (discussing the distinction between a case's *ratio* and its other elements).

203. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66–67 (1996).

204. United States v. Stevens, 559 U.S. 460, 471 (2010).

205. *See* Kozel, *supra* note 41.

be sound in their logic and accurate in their inferences when they hew closely to the facts at hand.[206]

Second-best stare decisis need not make an election between these competing arguments. It suggests an accommodation that seeks buy-in from judges of different methodological predilections. As it relates to the precedential status of decisional rationales, the second-best approach is one of compromise and shared sacrifice. Rationales need not receive deference irrespective of how widely they range, but neither must they be treated as utterly dispensable. Instead, supporting rationales should receive deference to the extent that they illuminate the content of the applicable legal rule. On this account, the justification for paying attention to supporting rationales is not their intrinsic worth. It is their clarification of the articulated rule—a rule that, in light of modern Supreme Court practice, has a strong claim to respect.[207] A decision's rationale becomes a tool for understanding the general rule that the decision endorsed and applied.

To illustrate, consider the First Amendment implications of "true threats," which the Supreme Court addressed in *Virginia v. Black*.[208] The Court ruled in *Black* that the burning of a cross is not necessarily beyond the First Amendment's protection.[209] Along the way, the Court explained that unprotected threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[210] As lower courts attempted to apply *Black*, one area of uncertainty was whether a threat requires that the speaker *intend* to threaten the victim, or whether it is enough that "a reasonable speaker would foresee the statement would be interpreted as a threat."[211]

To resolve this uncertainty under the second-best approach, a court would look to *Black*'s supporting rationale in attempting to shed light on its rule of decision. For example, *Black* included the statement that a prohibition against threats "protect[s] individuals from the fear of violence and 'from the disruption that fear engenders."[212] That statement is an expression of the Court's reasoning, not part of its rule of decision. Even so, the second-best approach allows consultation of the statement to help identify the applicable rule. The quoted language from *Black* may be understood as providing some (though certainly not dispositive) support for the argument that, for First

206. *See supra* Part I.B.
207. *See supra* Part V.A.
208. 538 U.S. 343 (2003).
209. *See id.* at 347–48.
210. *See id.* at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).
211. United States v. Elonis, 730 F.3d 321, 323 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015).
212. *Black*, 538 U.S. at 360 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

Amendment purposes, threats need not be made with a subjective intent to threaten so long as they are foreseen as instilling fear.[213]

As a counterexample, the Court's approach in *United States v. Stevens* is problematic from the standpoint of second-best stare decisis.[214] In *Stevens*, the Court invalidated a federal statute dealing with depictions of animal cruelty.[215] The Court withheld deference from its prior assertions that speech is unprotected for First Amendment purposes if it falls into a category of expression whose costs far exceed its benefits—a category that, according to the government, included the speech prohibited by the statute at issue.[216] By treating as dispensable the Court's prior teaching that a category of speech's meager benefits and serious detriments could lead to its exclusion from protection, *Stevens* gave insufficient attention to the argument that the constitutional rule reflected by its precedents was one grounded in cost-benefit analysis.[217] This does not necessarily mean *Stevens* was incorrect on its own terms; it might be that *Stevens* is right from the perspective of one who has interpretive, normative, or structural concerns about infusing decisional rationales with binding force.[218] But from the second-best perspective, the Court's prior endorsements of cost-benefit analysis warranted presumptive respect. Those endorsements helped to explain the Court's rule of decision in its prior cases, and they accordingly were entitled to deference.

C. Asides and Hypotheticals

We come finally to judicial observations that do "not explain why the court's judgment goes in favor of the winner."[219] While there are some notable exceptions, the Supreme Court's tendency is to treat such statements as dispensable dicta.[220]

As with the treatment of decisional rules, the Court's general approach to judicial asides provides a baseline for second-best stare decisis. Some interpretive theories treat unnecessary asides as overstepping judicial authority or creating a heightened risk of erroneous pronouncements. But other theories might accept that judicial asides can sometimes exert binding force so long as they are clear, well considered, and thoroughly explained. The rationale would

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213. *See Elonis*, 730 F.3d at 330 ("Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from 'the fear of violence' and the 'disruption that fear engenders,' because it would protect speech that a reasonable speaker would understand to be threatening."). The Supreme Court decided its most recent threats case on statutory grounds without addressing the First Amendment's requirements. *See Elonis*, 135 S. Ct. at 2012.

214. 559 U.S. 460 (2010).

215. *See id.* at 482.

216. *See id.* at 470.

217. *See id.* at 471.

218. *See supra* Part I.

219. Leval, *supra* note 53, at 1256.

220. *See supra* Part I.B.

be that even asides can furnish guidance, promote uniformity, encourage reliance, and constrain future judges. Irrespective of which approach is better, the need for consistency in the definition of precedential scope forecloses the argument that both approaches should operate simultaneously. Tethering a precedent's scope of impact—in other words, what the precedent *means*—to competing philosophical predilections runs counter to the aspirations of impersonality and continuity that animate second-best stare decisis.

Without a consistent definition of scope, a precedent's meaning is unknowable until the precedent is situated within a particular interpretive methodology. Just as second-best stare decisis resists interpretive vacillation as a driver of overrulings, it resists interpretive vacillation as the determinant of what a given case stands for. The second-best approach pursues a uniform, consistent definition of scope that accords with a vision of the law as stable, ascertainable, and existing apart from the methodological commitments of individual judges.

In pursuing a consistent definition of precedential scope, the question is whether to treat asides and hypotheticals as entitled to some degree of formal deference. Again, the better course is to validate the approach more in line with the Supreme Court's prevailing practice. Asides and hypotheticals never warrant formal deference beyond their persuasive appeal. When this treatment of asides and hypotheticals combines with full deference to decisional rules and qualified deference to statements of rationale, the vision of precedential scope that emerges is an intermediate one, representing a compromise between those who would define precedents narrowly and those who would define them broadly. The resulting framework may not be ideal from the standpoint of any interpretive theory. But it is a workable solution that allows for consistent treatment of precedent across cases while respecting existing practices and emphasizing areas of common ground. That spirit of continuity, common ground, and compromise is what transforms a group of individual judges into a unified institution that maintains its character and identity over generations.

D. Revisiting the Structural Solution

In examining second-best approaches to precedential strength, I began with a doctrinal proposal before considering a structural one. The structural proposal provides that no precedent may be jettisoned unless a supermajority of judges on a given court votes to overrule it.[221] Given that I have now sketched a doctrinal approach to precedential scope, it is worth asking whether, as with the concept of precedential strength, there ought to be a structural proposal as well. The idea would be to leverage supermajority-voting requirements to insulate determinations of precedential scope from methodological shifts and cycles.

221. *See supra* Part IV.B.

With respect to precedential strength, I argued that the structural proposal is inferior to the doctrinal proposal for reasons involving the value of impersonality.[222] Similar reasons explain the superiority of a doctrinal approach to precedential scope over a structural version grounded in supermajority voting requirements. Indeed, I think a structural approach to scope would be deeply problematic. The first question would be where to put the presumption. Should precedents be construed narrowly absent a supermajority vote to the contrary, or should they be construed broadly unless a supermajority says otherwise? There is no comparable problem in the context of precedential strength, because the Supreme Court's case law makes clear that the presumption must be in favor of fidelity to precedent.

Beyond that uncertainty, a supermajority approach to scope would imply that a precedent's meaning is a contingent fact. In difficult cases, the question of what a precedent stands for could not be confidently answered until a supermajority had spoken. This conception of precedent stands in considerable tension with the Supreme Court's description of precedent as enhancing the stability and perceived legitimacy of law.[223] Declaring that a precedent may be overruled in light of countervailing considerations exacts some toll on the nature of constitutional law as a stable and impersonal force. But the toll is far greater when the contingency goes to the very heart of what a precedent means. Notwithstanding its attributes in the context of precedential strength, the supermajority approach is ill suited in both practical and theoretical terms for the determination of precedential scope.

VI.
THEORIES OF PRECEDENT AND THE INDIVIDUAL JUDGE

Parts III, IV, and V described second-best stare decisis as an alternative to the Supreme Court's existing approach to precedent. This Part turns to the mechanics by which second-best stare decisis can be implemented by individual judges and Justices.

A. Judging Precedential Strength

The dynamics of multimember tribunals are complex and interdependent. The "best approach for any given judge" must take into account what other judges are doing.[224] This point is relevant to second-best stare decisis—and, in particular, to what I have described as the doctrinal approach to precedential strength—because it raises the question of why any judge or Justice would compromise her vision of sound legal interpretation absent a guarantee that her colleagues and successors will follow her lead.

222. *See supra* Part IV.C.
223. *See supra* Part III.
224. Vermeule, *supra* note 56, at 552.

As a starting point, Supreme Court Justices already describe the doctrine of stare decisis as warranting application even when it conflicts with their individual assessments of legal accuracy.[225] Further, it is not the case that each Justice characterizes her vision of stare decisis as endogenous to her broader interpretive theory. Rather, Justices commonly invoke a doctrine of stare decisis that resembles the multifactor doctrines that govern numerous areas of substantive law, even if there is some variability within the descriptions of the relevant factors.[226] The explanation for this practice may be the Justices' beliefs in the systemic virtues of continuity, or it may be a more self-interested recognition that "[j]udges who submit to a system of precedent-following are more likely to be judges with power and influence . . . ."[227] Whatever the explanation, the Justices often approach the doctrine of stare decisis like any other doctrine: as something that exists outside of them and that is their duty to consult.[228]

The status quo, then, is not a world in which each Justice fends for herself. It is a world in which the Justices employ an established doctrine of stare decisis, albeit one that stands in tension with interpretive pluralism. Framed this way, the immediate project of second-best analysis is not to defend the relevance of precedent, but to revise the current version of stare decisis in light of the challenges posed by pluralism.

Nor are there any serious transitional obstacles to implementing the second-best approach. In particular, there is no danger that applying second-best stare decisis would put one Justice at a disadvantage relative to her peers who continue to apply the existing doctrine. There is no "first mover" in the announcement of Supreme Court decisions. All of the Justices' votes, positions, and arguments have been thoroughly discussed by the time an opinion is released to the public. A Justice faces little risk in proposing second-best stare decisis to her colleagues as grounds for deciding a pending case. If enough of the other Justices agree, second-best stare decisis can achieve validation by the Court as an institution. If not, the first Justice retains the option of concurring or dissenting as she sees fit. In either case, invoking the second-best approach is a low-risk strategy.

But a Supreme Court Justice does not deal solely with her contemporaries. She is also linked with the Justices who preceded her, as well as those who will

225. *See supra* Part III.

226. *See supra* Part IV.A.

227. DUXBURY, *supra* note 42, at 166; *see also id.* ("When precedents do not constrain, . . . one's own precedents do not constrain: all judges would be free to ignore the decisions of others, and so there would be no reason to expect any decision to have authority beyond the immediate case.").

228. Even Justice Thomas, who is commonly cited as the sitting Justice who is least enamored with stare decisis, has "acknowledg[ed] the importance of *stare decisis* to the stability of our Nation's legal system." McDonald v. City of Chicago, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in the judgment).

follow her. If today's Justice adopts the second-best approach to stare decisis, who is to say that future Justices will follow suit?[229]

There is, of course, no guarantee that one Justice's application of second-best stare decisis will convince future Justices to take the same path. Nor is there any guarantee that the adoption of second-best stare decisis in a majority opinion will entrench that approach in perpetuity. Nevertheless, Justices who apply second-best stare decisis can help to establish its presence going forward. Moreover, for a Justice who hopes that her contributions will remain relevant to future generations, showing fidelity to the Court's precedents might well be the wiser course. In the course of overruling a decision, the Court sometimes cites the decision's deviation from the cases that came before it.[230]

Even if a Justice finds herself paying greater attention to precedent than her colleagues do, she can still make a valuable contribution through her individual choice to apply second-best stare decisis.[231] Adopting the second-best approach is about mediating one's interpretive philosophy for the sake of behaving like a member of an impersonal and enduring institution. Obviously, the benefits of stare decisis are enhanced when a majority of Justices endorse it. But a single Justice who casts her lot with deference to precedent can promote the ideals of continuity and impersonality. The act of compromising one's interpretive predilections underscores the separation between the judge and the law, as well as the ideal of legal rules as general norms to which courts commit themselves across the span of time.[232]

It is possible to imagine a Supreme Court Justice who simply cannot countenance the second-best doctrine of stare decisis. For example, a few commentators have taken the position that it is illegitimate for the Court to uphold precedents that conflict with the Constitution's original meaning.[233] For those commentators, it may be the case that adherence to the second-best approach—like the acceptance of stare decisis more generally—is not an option. But for the Justices who treat stare decisis as a legitimate part of constitutional adjudication, there is good reason to consider the second-best

229. *Cf.* Vermeule, *supra* note 56, at 578 ("Theories of precedent typically recommend that any particular judge adopt the theorist's approach because that approach would be best if adopted by all judges. But many other judges will adopt different approaches; when they do, accounts of precedential decisionmaking that implicitly require or assume generalization will go badly awry.").

230. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 363 (2010); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996); GERHARDT, *supra* note 134, at 79 ("Justices . . . generally know from experience, training, and temperament they cannot be too disdainful of precedents or else they risk having other justices show the same, or even more, disdain for their preferred precedents.").

231. *Cf.* Vermeule, *supra* note 56, at 580 (noting that "[s]o long as the relevant theory does not require or assume a critical mass or threshold of judicial coordination—so long as individual judges may make a strictly divisible or marginal contribution to the aims specified by the theory—then the infeasibility of sustained judicial coordination poses no problem").

232. *See* Waldron, *supra* note 78, at 20.

233. *See, e.g.*, Lawson, *supra* note 19; Paulsen, *supra* note 19.

approach.[234] Second-best stare decisis leaves judges and Justices at liberty to apply their preferred methods of interpretation in cases of first impression and in diagnosing whether a precedent was erroneous. But within the specific domain of determining whether to overrule a flawed precedent, the second-best approach constricts the universe of relevant considerations in pursuing a doctrine of stare decisis that retains its efficacy across methodological lines.

Second-best stare decisis also stands on a different footing from interpretive methodologies such as originalism and living constitutionalism. I have argued that pursuing consensus around such methodologies is likely to be unavailing in our pluralistic era. Yet to ask an originalist or living constitutionalist to recognize a meaningful role for precedent is not to ask her to abandon her interpretive philosophy in the name of interpretive unanimity. I have already hinted at the reasons supporting this distinction. First, looking to precedent as a unifying and stabilizing force coheres with repeated statements by Supreme Court Justices across the methodological spectrum about the role and benefits of stare decisis. Precedent already possesses the status of common ground helping to draw together judges of varying methodological predilections. Second, deference to precedent reflects a shared sacrifice, because it calls upon every Justice to give presumptive respect to some decisions—and, by implication, the methodologies that yielded them—that she views as suboptimal.

It is also worth reiterating that in its pursuit of continuity and judicial impersonality, second-best stare decisis promotes values that have been endorsed by the Supreme Court and that are normatively desirable in their own right. As a result, the case for second-best stare decisis is not an argument that the Supreme Court should go back to the drawing board in thinking about the normative dimensions of constitutional adjudication. The second-best approach rests on the more modest claim that there is a disconnect between the values the Court has properly emphasized in its discussions of precedent and the operation of stare decisis doctrine as presently constructed. If we take as given the legitimacy of stare decisis in general—which Supreme Court Justices consistently have done—the move to second-best stare decisis is much less jarring and dramatic than the wholesale replacement of one interpretive philosophy with another.

B. Judging Precedential Scope

An analogous question is why an individual judge or Justice, possessing her own interpretive theory (or exercising her prerogative to renounce all theories in favor of a case-by-case approach), should accept a second-best

234. *Cf.* Fallon, *supra* note 70, at 1261 ("Though precedents can be rejected based on arguments from text and the framers' intent, this seldom happens. The cases take on a significance of their own.").

version of precedential scope rather than construing precedents in light of her methodological, constitutional, and normative commitments.

For those who would otherwise be inclined to interpret precedents broadly, the second-best approach to scope imposes relatively little cost. A judge or Justice can always choose to follow dicta that she finds persuasive. The implications of second-best stare decisis are more complicated for those who are inclined to defer only to a precedent's narrow core. Such a jurist would need to give presumptive deference to aspects of opinions, including doctrinal frameworks and broad statements of rationale, that she might otherwise treat as dispensable.[235] This is indeed a sacrifice, whether our jurist's preferred approach to scope is grounded in pragmatic concerns about judicial error, her understanding of the judicial power as set forth in Article III, or some other source.[236]

Yet the sacrifice is warranted by the benefits of formulating a definition of precedential scope that applies across cases. Committing oneself to second-best stare decisis confirms that the meaning of a precedent is not simply in the eye of the beholder. Even if it comes at some cost to pursuit of individual judicial philosophies, that is a valuable principle for a legal system to embody.

CONCLUSION

This Article has developed a second-best approach to precedent for a world of methodological disagreement. The central idea has been to revisit the conventional elements of stare decisis doctrine with a view toward isolating the factors that can operate in isolation from interpretive disputes. As a corollary, considerations that are deeply intertwined with underlying interpretive commitments are minimized. This form of analysis applies to the strength of deference as well as the scope of propositions for which a precedent is presumptively binding.

The overarching objective of second-best stare decisis, which I hope to have furthered to at least some degree, is to produce a doctrine of precedent suitable for judges of varying methodological predilections. If the promise of precedent is constancy and impersonality, the doctrine of precedent must transcend methodological debates.

235. *See supra* Part V.
236. *See* Kozel, *supra* note 41.