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PRECEDENT AND RELIANCE

*Randy J. Kozel**

Among the most prevalent justifications for deference to judicial precedent is the protection of reliance interests. The theory is that when judicial pronouncements have engendered significant reliance, there should be a meaningful presumption against adjudicative change. Yet there remains a fundamental question as to why reliance on precedent warrants judicial protection in the first place. American courts have made clear that deference to precedent is a flexible policy rather than an absolute rule. The defeasibility of precedent raises the possibility that stakeholders who fail to mediate their reliance on precedent forfeit any claim to judicial protection through the doctrine of stare decisis.

This Article explores the dynamics and implications of precedential reliance. It contends that the case for protecting reliance on precedent is uncertain. There are several reasons why reliance might potentially be worth protecting, but all are subject to serious limitations or challenges. To bolster the doctrine of stare decisis while the status of precedential reliance continues to be worked out, the Article suggests a conceptual move away from backward-looking reliance and toward the forward-looking interest in managing the disruptive impacts of adjudicative change for society at large.

* Associate Professor of Law, Notre Dame Law School. For helpful comments and conversations, thanks to Amy Barrett, Joseph Bauer, Anthony Bellia, Barry Cushman, Daniel Farber, Richard Garnett, Bruce Huber, Daniel Kelly, Michael Stokes Paulsen, and Jeffrey Pojanowski. Arthur Gregg provided excellent research assistance.

INTRODUCTION

Precedent occupies an intriguing place in American legal discourse. The prospect of deference to past decisions, even decisions that are dubious or erroneous, has spawned its fair share of critics on both theoretical and practical grounds.¹ Nevertheless, the abstract virtues of following precedent continue to draw widespread support. Among those virtues is the protection of reliance expectations. The basic claim is that stakeholder reliance should occasionally persuade judges to accept interpretations of the law they would otherwise reject.²

If reliance expectations possess the power to forestall the evolution and refinement of the law, there ought to be a well-developed account of where that power comes from. The explanation cannot be that judicial overrulings are breaches of promise. Consider the experience of the U.S. Supreme Court. Time and again, the Court has cautioned that while deference to precedent is “the preferred course,”³ it is not “an inexorable command.”⁴ The Court can, does, and will continue to overrule its precedents when it sees fit. At the same time, the Court consistently invokes precedential reliance as a prime rationale for deferring to precedent. Justice Scalia has explained this solicitude by asserting that reliance on “unabandoned” precedent “is *always* justifiable reliance.”⁵

These two propositions—precedent is mutable; and reliance on the durability of precedent is both reasonable and entitled to judicial respect—stand in apparent tension. Indeed, the flexibility of *stare decisis* provides some basis for contending that it is actually *unreasonable* to rely on the durability of precedent. Given the unveiled reality that judicial decisions are subject to reconsideration, stakeholders might be expected to take their own measures to mitigate the costs of a potential overruling, just as actors must take precautions or purchase insurance in order to manage other types of risk. Moreover, by publicly announcing that precedents are subject to reconsideration, the Court

¹ See, e.g., Daniel A. Farber, Essay, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173 (2006) (“[S]tare decisis has . . . been portrayed as a betrayal of the judge’s duty to follow the law and thus of the rule of law itself.”); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 648 (1999) (collecting some of the more colorful “condemn[ations]” of stare decisis as applied by the Supreme Court).

² Cf. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2028 (1994) (“[R]eliance interests often tip the balance in favor of retaining a rule of law that might otherwise be overturned.”).

³ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

⁴ *Id.* at 828.

⁵ *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring in part and concurring in the judgment).

might be seen as avoiding any normative obligation to stakeholders who would be harmed by an overruling. Precedents are not promises,⁶ and when the Court chooses to overturn a prior decision, it does nothing more than exercise an option that it previously reserved. Why, then, should precedential reliance serve as an obstacle to adjudicative change?

The primary goal of this Article is to situate reliance interests within a universe of precedential uncertainty. The Article begins by drawing out some of the nuance that pervades the relationship between precedent and reliance. I hope to show that the arguments for treating precedential reliance as deserving of judicial protection are complex and warranting of greater scrutiny than they tend to receive in the caselaw.

The Article's second aim is to articulate a proposal for rationalizing the modern doctrine of *stare decisis* in its treatment of stakeholder expectations. I suggest that the doctrine might be put on firmer ground through a conceptual shift. The reason for being attentive to stakeholder expectations need not be *ex ante* effects on investment incentives or a moral obligation to protect those who relied on past judicial decisions. The significance of stakeholder expectations may stem from something simpler: a desire to control the disruptive impacts of adjudicative change for the benefit of society as a whole. From this perspective, the question is less about whether past reliance should be protected and more about how departures from precedent are likely to prove disruptive going forward. Deferring to a precedent whose overruling would have dramatic effects on settled expectations becomes a mechanism for controlling the degree of disruption that is injected into the legal system through the process of adjudicative change.

Reframing the debate in terms of disruption and transition costs would not obviate the need for continued analysis of reliance interests. It may be that the disruption-oriented approach is insufficiently protective of precedential reliance because it understates the fairness and rule-of-law implications of

⁶ *Cf.* *United States v. Carlton*, 512 U.S. 26, 33 (1994) (using similar language with respect to a retroactive change in the tax laws and stating that “a taxpayer has no vested right in the Internal Revenue Code”). The Supreme Court has referred to itself as giving a “promise of constancy” whose violation would represent a “breach of faith,” but its statement was related to those exceptional situations in which the Court “calls the contending sides of a national controversy to end their national division.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867–68 (1992). And even there, the Court qualified its “promise” by noting that it lasts only so long as “the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.” *Id.* at 868.

adjudicative change.⁷ I accept the possibility that such an argument may eventually emerge as persuasive. My claim is that shifting the conceptual focus to forward-looking disruption is a useful means of fortifying the modern doctrine of stare decisis so long as the case for protecting reliance qua reliance remains uncertain.

The focus on forward-looking disruption also has implications for the scope of impact that is relevant to the stare decisis enterprise. Overrulings can create destabilizing consequences for stakeholders beyond those who are directly affected by the applicable substantive rule. Employing the lens of forward-looking disruption underscores the utility of a *systemic* perspective that contemplates the numerous ways, both direct and indirect, that an overruling can affect individuals and institutions.⁸ The Supreme Court has hinted at this type of wide-ranging vision of systemic effects on a few occasions, but its treatments of the issue have been abbreviated.⁹ Connecting the systemic perspective with the disruption-based account provides a framework for fuller appreciation of the costs that can attend departures from settled law.

This Article begins in Part I by surveying the theoretical grounds on which stare decisis is commonly justified and explaining the value of a more foundational inquiry into the reliance interest. After a brief interlude in Part II to set the Article's methodological parameters, Part III addresses the leading arguments for deeming precedential reliance as worthy of judicial protection through the doctrine of stare decisis. Part IV suggests the desirability of recasting the jurisprudential concern with reliance in terms of the avoidance of future disruption costs. Part V then explains how the analytical move toward disruption emphasizes the need for a systemic view of the consequences of judicial overruling. Finally, Part VI offers some thoughts about the inquiry into systemic disruption within the context of litigating and resolving concrete disputes. My focus throughout will be the experience of the U.S. Supreme Court, though much of my analysis will be applicable to any court that treats its own precedents as worthy of presumptive deference on grounds including their tendency to generate reliance interests.

⁷ See *infra* Part III.B–C.

⁸ On the role of precedent in promoting the stability of the legal equilibrium, see, for example, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 111–13 (1997).

⁹ See *infra* Part IV.C.

I. JUSTIFYING STARE DECISIS

The classic explanation of why even dubious precedents may warrant respect is Justice Brandeis's declaration in 1932 that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."¹⁰ The Supreme Court has returned to this sentiment over the years,¹¹ though it should be remembered that Justice Brandeis also emphasized (in the very same opinion) the wisdom of overruling erroneous decisions of a particular sort: those that misinterpret the Constitution.¹² In constitutional cases, he contended, "[t]he Court bows to the lessons of experience and the force of better reasoning."¹³

The tension between the importance of settlement and the desire to reap the benefits of "experience" and "better reasoning" has continued to shape disputes over precedent into the twenty-first century. That tension transcends the distinction between constitutional and statutory cases. Though the Court portrays its statutory decisions as entitled to the strongest form of deference,¹⁴

¹⁰ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by* *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

¹¹ *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); *California v. FERC*, 495 U.S. 490, 500 (1990).

¹² *See Burnet*, 285 U.S. at 406–07 (Brandeis, J., dissenting) ("But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.").

¹³ *Id.* at 407–08; *see also* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 25 (2010) ("Particularly in constitutional cases, the Justices emphasize, undue insistence on the principle of stare decisis would tether the country to judicial interpretations of the Constitution absent the rare and difficult event of a constitutional amendment.").

¹⁴ Following the approach advocated by Justice Brandeis, the modern Court applies an especially strong form of stare decisis to most of its statutory decisions. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

This Article draws no distinction between statutory and constitutional precedents. Its focus is the treatment of stakeholder expectations, which arise in both contexts. To the extent one believes that statutory precedents deserve an additional degree of deference based on notions of implied congressional acquiescence or separation-of-powers norms, that deference could be integrated with the framework this Article develops for analyzing disruption costs. For explorations of the statutory–constitutional divide, *see, for example*, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–27 (2005), which discusses the conventional justifications for super-strong statutory stare decisis; and William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988), which refers to a "three-tiered hierarchy" in which common law precedents "enjoy a strong presumption of correctness," constitutional precedents create "a relaxed, or weaker, form of that presumption," and statutory precedents "often enjoy a super-strong presumption of correctness."

the presumption of adhering to precedent operates even in the constitutional context.¹⁵ Some extra justification is required before a prior decision of either sort may be repudiated.¹⁶

The Court's rationale for deferring to precedent draws on several animating principles. *Stare decisis* serves the "constitutional ideal" of the "rule of law"¹⁷ by ensuring—and demonstrating to the interested public—that "bedrock principles are founded in the law rather than in the proclivities of individuals."¹⁸ Given the presumptive resistance to overruling past decisions, change tends to be incremental rather than revolutionary, facilitating the gradual assimilation of new rules into the overarching legal framework.¹⁹ Institutionalizing a presumption of deference also reduces the incidence of

¹⁵ See, e.g., *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987) (plurality opinion) ("Although the doctrine is not rigidly observed in constitutional cases, '[w]e should not be . . . unmindful, even when constitutional questions are involved, of the principle of *stare decisis*, by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us.'" (alteration in original) (quoting *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting))); Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1195–96 (2008) (noting that the Supreme Court "continues to rely on precedent in interpreting the Constitution, and neither the President nor Congress has objected to this longstanding practice").

¹⁶ See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) ("[W]e have long recognized that departures from precedent are inappropriate in the absence of a 'special justification.'" (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (recognizing the principle that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided"); cf. *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("Who ignores [*stare decisis*] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)."); Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1462 (2010) ("Courts bound by *stare decisis* generally believe themselves obligated to provide a much stronger rationale for abandoning their prior decisions than they would feel obligated to provide if they are simply choosing to ignore persuasive precedent.").

¹⁷ *Citizens United*, 130 S. Ct. at 921 (Roberts, C.J., concurring); see also, e.g., *Casey*, 505 U.S. at 854 ("[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."); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983) ("[T]he doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."), *overruled in part by Casey*, 505 U.S. 833.

¹⁸ *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); see also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (noting that *stare decisis* is justified in part by "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments").

¹⁹ Cf. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 137 (2011) ("[A] strong doctrine of *stare decisis* is consistent with a judiciary characterized by steadiness and gradualism rather than erratic change."); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 946–47 (2008) (justifying deference to precedent based on factors including the "conviction that the judiciary plays a vital role in serving as a protector of continuity in the context of incremental change").

interpretive vacillation²⁰ and fosters a sense of stability and order, which (the argument goes) enhances public confidence and gives citizens a firmer basis for planning their affairs.²¹ The salience of these values is reinforced by the Justices' musings outside the work of the Court. The connection between stare decisis and the ideal of law as impersonal is evident in then-Judge Cardozo's famous statement that it would be "intolerable if the weekly changes in the composition of the court" were to beget corresponding fluctuations in the content of legal rules.²² Justice Powell advanced a comparable position in contending that it would "undermine the rule of law" if stare decisis were discarded in constitutional cases, for the Constitution would be reduced to "nothing more than what five Justices say it is."²³

A related fixture in the Court's discussions of stare decisis is the reliance interest of stakeholders whose lives and livelihoods are affected by judicial precedent.²⁴ The ultimate objective of stare decisis, Justice Scalia has explained, is to safeguard the "legitimate expectations of those who live under the law."²⁵ Similar sentiments are evident in *Planned Parenthood of*

²⁰ See *Vasquez*, 474 U.S. at 265 (describing stare decisis as "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion").

²¹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law."); *Casey*, 505 U.S. at 855 (including among the relevant questions whether an overruling could occur "without serious inequity to those who have relied upon [a precedent] or significant damage to the stability of the society governed by it").

²² BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150 (1921); see also LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 208 (2008) (defining stare decisis as the "principle that carefully considered constitutional interpretations issued by the organs of government should not be revisited absent circumstances more compelling than a mere change in the identity of the individuals who authored the interpretations in question"); Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 217 ("Decisions can hardly gain acceptance as based upon the enduring principles of the Constitution without the prospect that they will live an 'indefinite while,' at least beyond the life expectancy of the Justices deciding them.").

²³ Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990).

²⁴ See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 911–12 (2010); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009); *Arizona v. Gant*, 129 S. Ct. 1710, 1722–23 (2009); *Pearson v. Callahan*, 129 S. Ct. 808, 811 (2009); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (Breyer, J.); see also AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 239 (2012) ("[An] equitable principle, prominent in judicial decisions stretching back hundreds of years, directs judges to give due weight to the ways in which litigants who come before the Court may have reasonably relied upon prior case law.").

²⁵ *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment); *accord 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."), *overruled in part by Ring v. Arizona*, 536 U.S. 584 (2002); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 412 (2012) (noting that the "criteria for stare

Southeastern Pennsylvania v. Casey, where the Court noted that the “inquiry into reliance counts the cost of a rule’s repudiation as it would fall on those who have relied reasonably on the rule’s continued application.”²⁶ The protection of reliance interests is commonly intertwined with values of predictability, stability, and the rule of law.²⁷ So well established is the relevance of reliance that, even while departing from precedent, the Court has offered reassurance that “reliance on a judicial opinion [remains] a significant reason to adhere to it.”²⁸

Beyond the reflections of Supreme Court Justices, inquiry into the analytical underpinnings of *stare decisis* has generated a robust scholarly literature. The literature is vast, but certain strands can be singled out as particularly helpful in unpacking the doctrine’s conceptual foundations. For example, the frequent correlation of precedent with rule-of-law values is the subject of recent work by Jeremy Waldron. Professor Waldron contended that the rule of law requires a judge to “derive her particular decisions from an identified and articulated general norm.”²⁹ The converse situation, in which the judge “thinks of herself only as deciding [a] particular case” without any reference to general norms, exemplifies the “rule of men rather than the rule of law.”³⁰ Professor Waldron also defended a principle of institutional responsibility that requires subsequent judges to give precedents their proper effect,³¹ as well as a principle of constancy that militates against rapid change.³² For Professor Waldron, these elements converge to illustrate how the operation of precedent can facilitate the rule of law. His argument bears some similarities to that of Daniel Farber, who has characterized deference to precedent as promoting the type of judicial “neutrality” that comes from “articulating standards that one is willing to live with in the future.”³³

decisis” include consideration of “whether harm will be caused to those who justifiably relied on the decision”).

²⁶ *Casey*, 505 U.S. at 855.

²⁷ See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.”).

²⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007).

²⁹ Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 20 (2012).

³⁰ *Id.*

³¹ *Id.* at 22–26, 31.

³² See *id.* at 26–29; *id.* at 28 (noting that “refraining from overruling is not the same as the basic respect for the principle of a previous decision, which is the essence of following a precedent”).

³³ Farber, *supra* note 1, at 1179. Professor Farber also defended *stare decisis* as promoting clarity through the setting down of stable rules. See *id.* (“[O]nly by following the reasoning of previous decisions can the

Beyond the rule of law, scholars have scrutinized a host of other values that are sometimes associated with deference to precedent. In his study of models of precedential constraint, Larry Alexander emphasized the link between precedent and predictability.³⁴ Predictability likewise was prominent in the work of Frederick Schauer,³⁵ though Professor Schauer departed from Professor Alexander in also giving import to the role of precedent in promoting fairness through the consistent treatment of different parties across time.³⁶ By comparison, some commentators have devoted more of their attention to the role of stare decisis in advancing institutional and pragmatic goals. Among those taking such an approach are Thomas Merrill, who has depicted stare decisis as a source of judicial restraint,³⁷ and then-Judge Cardozo, who emphasized its implications for judicial efficiency.³⁸ There is also an informative literature in the law-and-economics spirit that considers the extent to which the doctrine of stare decisis might be employed to enhance social welfare by, among other things, performing “cost-saving functions.”³⁹

courts provide guidance for the future, rather than a series of unconnected outcomes in particular cases. . . . By articulating standards that are binding for the future, courts can offer some semblance of what has been called the ‘law of rules,’ which is one aspect of the rule of law.” (footnote omitted) (citing Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)).

³⁴ Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 17–18 (1989).

³⁵ See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) (“When a decisionmaker must decide this case in the same way as the last, parties will be better able to anticipate the future. The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.” (footnote omitted)).

³⁶ Compare *id.* at 596 (“We achieve fairness by decisionmaking rules designed to achieve consistency across a range of decisions. . . . Where the consistency among decisions takes place over time, we call our decisional rule ‘precedent.’”), with Alexander, *supra* note 34, at 10 (arguing that “there is no intertemporal equality value of sufficient weight to support precedential constraint; intertemporal equality cannot convert an otherwise morally erroneous decision into a correct one”). Other commentators have also addressed the legitimacy of substantive equality in relation to stare decisis. See Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2038 (1996) (contending that the “supposedly substantive principle of equality fails as a justification of stare decisis because, first, its purported effects can be explained as well by nonegalitarian justice, and, second, its application necessarily produces both internal inconsistency and injustice”).

³⁷ See Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274 (2005) (arguing that “someone who believes in judicial restraint should favor a strong theory of precedent . . . in constitutional law”); Powell, *supra* note 23, at 289–90 (“In the long run, restraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary’s role as a guardian of rights.”).

³⁸ See CARDOZO, *supra* note 22, at 149 (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”).

³⁹ 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, 648 (2000).

Most relevant to this Article, scholars have scrutinized the interplay between judicial precedent and reliance interests. Both Larry Alexander⁴⁰ and Michael Paulsen⁴¹ have raised (in very different ways) salient questions regarding the formation of reliance expectations notwithstanding the shadow of precedential uncertainty. Randy Barnett has discussed the role of reliance in carving out space for individual redress where “citizens have reasonably relied upon erroneous decisions of the past in a manner that should be protected.”⁴² More generally, in his economic analysis of legal transitions Louis Kaplow criticized the reliance interest as depending on the flawed premise that “it is reasonable to expect laws never to change.”⁴³ Professor Kaplow went on to recognize that “even if actors rationally expect that legal change of a given type is unlikely, there is still the question of whether they have a compelling normative claim to fulfillment of that expectation.”⁴⁴

The relationship between precedent and settled expectations is also central to the literature on “super precedents.” Commentators such as Michael Gerhardt have contended that there exists a class of judicial decisions that have generated so much reliance and become so well accepted as to be “practically immune to reconsideration and reversal.”⁴⁵ In somewhat similar terms, Daniel Farber has defended the retention of “bedrock precedents” as a means of preserving “a stable framework for government.”⁴⁶

Insights like these raise critical issues relating to the manner in which reliance expectations develop and the consequences of disrupting them. The project of this Article is to pull these issues together and move the discussion

⁴⁰ See Alexander, *supra* note 34, at 13–14.

⁴¹ See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1553–54 (2000).

⁴² See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 266 (2005); see also *id.* (“Even if we assume that . . . the Social Security Act is unconstitutional because it violates the original meaning of the Constitution, the government might still be obligated to make good on its promises to those who have relied to their detriment upon them. . . . [A] commitment to original meaning over precedent does not entail a commitment to rejecting properly tailored reliance claims by individual citizens.”).

⁴³ See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 522 (1986).

⁴⁴ *Id.* at 524.

⁴⁵ Michael J. Gerhardt, Essay, *Super Precedent*, 90 MINN. L. REV. 1204, 1206 (2006) [hereinafter Gerhardt, *Super Precedent*]; see also Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1293 (2008) (“Nothing becomes a superprecedent . . . unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.”).

⁴⁶ See Farber, *supra* note 1, at 1180. Still, Professor Farber left open the prospect of overruling bedrock precedents for “compelling reasons.” See *id.* at 1176.

forward by focusing on a fundamental question: Why should reliance on precedent warrant judicial protection in the first place?

II. METHODOLOGICAL PARAMETERS

Having provided a rough sketch of the conceptual landscape, I pause for a brief note on this Article's methodological approach. As noted, my objective is to take a step forward in theorizing the dynamics of precedential reliance. Four features of that project should be kept in mind. First, this Article assumes that deference to precedent is lawful, even when a precedent is dubious on the merits. This position has drawn some scholarly criticism with respect to constitutional cases,⁴⁷ but it remains consistent with the view of most commentators that deference to precedent (even constitutional precedent) is permissible under certain conditions.⁴⁸ It also coheres with the established practice of the Supreme Court in describing the doctrine of *stare decisis* as legitimate, though not absolute.⁴⁹

Second, though this Article uses the general term *precedent*, its topic is more precisely defined as horizontal precedent, meaning a court's adherence to its own past decisions. The concept of horizontal precedent is distinct from what is often called vertical or hierarchical precedent, which refers to the binding effect of a superior court's opinion on hierarchically inferior courts.⁵⁰ At the center of this Article is the question of what relevance the Supreme Court should ascribe to reliance interests in determining whether to follow its own precedents.

⁴⁷ See, e.g., Randy E. Barnett, Response, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 913 (2009); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

⁴⁸ See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3 n.12 (2007) (noting the continued prevalence of the view that deference to precedent can be lawful even in constitutional cases).

⁴⁹ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (indicating that the applicability of the Bill of Rights to the states is affected by “considerations of *stare decisis*”); *Citizens United v. FEC*, 130 S. Ct. 876, 911–12 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2812 (2008) (considering “whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment”).

⁵⁰ For an influential treatment of the bindingness of hierarchical precedent, see generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994). On the various roles of precedent in the realm of constitutional adjudication, see generally Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843 (2013).

Third, in exploring the operation of stare decisis at the Supreme Court, this Article accepts the Court's description of the doctrine as flexible rather than compulsory.⁵¹ In an alternate world in which deference to precedent was so powerful as to foreclose the reconsideration of past decisions,⁵² the dynamics and implications of precedential reliance might well be different. The Court, however, has not described itself as absolutely compelled to follow any precedent, even in statutory cases where the power of stare decisis is at its apex.⁵³

Finally, this Article deals with precedential *strength*, not precedential *scope*. The former term refers to the strength of presumptive deference that an applicable precedent will receive. The latter term deals with the issue of whether a given precedent really is on point, as opposed to being inapposite or plausibly distinguishable. By adopting a focus on precedential strength, the Article surely does not mean to imply that questions of scope are unimportant or peripheral. Indeed, one of the most significant and complex challenges presented by the doctrine of stare decisis is delineating the extent of a precedent's binding force. Alas, there is only so much one can do within the confines of a single article. Thus, I take as my paradigm those cases in which a precedent cannot plausibly be distinguished, leaving the reviewing court with the stark choice between reaffirming and overruling. In such situations, the scope question has already been answered. All that remains is the strength of deference—a consideration that is commonly described as bound up with the protection of reliance interests.⁵⁴

III. WHY PROTECT RELIANCE?

The previous two Parts were framed broadly. They surveyed common theoretical justifications for the doctrine of stare decisis and specified the methodological parameters for the balance of the Article. This Part narrows the focus to reliance interests themselves. It begins by presenting the argument that

⁵¹ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command . . .”).

⁵² The experience of the House of Lords prior to 1966 is often cited as an example of this approach. *But cf.* NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 127 (2008) (“Before 1966, the House of Lords had distinguished some of its own precedents to the point where they were effectively stripped of authority.”).

⁵³ See, e.g., Adrian Vermeule, Essay, *Veil of Ignorance Rules in Constitutional Law*, 111 *YALE L.J.* 399, 418 (2001) (“[U]nder current law, there is no absolute rule of stare decisis, even for cases of statutory interpretation.”).

⁵⁴ See *supra* Part I.

reliance on precedent ought *not* be protected. It then proceeds through a number of potential responses, drawing on considerations that range from fairness implications to investment incentives. I ultimately conclude that the case for protecting precedential reliance is too uncertain and underdeveloped to be entirely persuasive.

A. *The Prima Facie Case Against Reliance*

Legal changes create winners and losers.⁵⁵ Deviations from judicial precedent are a form of legal change. The question thus arises of how the plight of stakeholders whose fortunes would be impaired by an overruling should affect a court's choice between retaining and discarding a flawed precedent.

The Supreme Court's approach to *stare decisis* evinces a pronounced ambivalence. As explained above, respect for precedent—even dubious precedent—is commonly described as integral to the preservation of important values.⁵⁶ Yet the Court has made equally clear that, despite its benefits, the practice of deferring to precedent remains a defeasible principle characterized by flexibility; far from an “inexorable command,”⁵⁷ deference is a matter of judicial “policy”⁵⁸ and discretion.⁵⁹ The Court occasionally goes to great lengths to emphasize just how vulnerable its past decisions can be. Among the most vivid illustrations is *Payne v. Tennessee*, where the Court, en route to renouncing a decision issued only five years prior, explained that overrulings represent an ordinary part of doing business: “[T]he Court has during the past

⁵⁵ See, e.g., Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 161 (2003) (“Legal change, whether through legislation, regulation, or court decision, is a common phenomenon, and virtually all reform creates both gains and losses for those who under the prior regime took actions that would have lasting effects.”).

⁵⁶ See *supra* Part I; see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“[S]*tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’” (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888))), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

⁵⁷ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

⁵⁸ *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

⁵⁹ See, e.g., *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) (“The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.”); Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 94 (2003) (stating that “it is arguably a misnomer to describe *stare decisis* as a legal doctrine as well as perhaps misleading to describe precedents in terms of obligation”).

20 Terms overruled in whole or in part 33 of its previous constitutional decisions.”⁶⁰ Though the Court may believe strongly in the abstract appeal of reaffirming precedents irrespective of their merits, it has reserved the right to reconsider and overturn any given opinion.⁶¹

The Court’s avowed prerogative to overrule itself should affect the manner in which rational actors respond to its precedents.⁶² The point can be illustrated with a simple example. Imagine an interaction between two parties, *X* and *Y*. *X* currently intends to pursue a certain course of action at some future date. She informs *Y* of her intention. Nevertheless, she also cautions *Y* that she reserves the right to change her mind at any time; that is, she makes no promises.⁶³ In addition, *X* describes numerous previous instances in which she did, in fact, deviate from her initial intentions.

In deciding how to react, *Y* will refrain from behaving as though *X*’s course of conduct is guaranteed. Instead, *Y* will account for the possibility that *X* might change her mind yet again. Later, if *X* really does deviate from her initial intentions, *Y* will not have any compelling claim for redress. Assuming that *Y* took suitable precautions against *X*’s change of heart, additional compensation would be an unwarranted windfall. And if *Y* did not take precautions, any compensation would reward him for what was either carelessness or a calculated gamble.

The foregoing illustration bears structural similarities to the relationship between the Supreme Court and stakeholders who are affected by judicial

⁶⁰ 501 U.S. at 828; *see also Patterson*, 491 U.S. at 172 (“Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established.”); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting) (citing numerous examples of overrulings), *overruled by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

⁶¹ *See Citizens United v. FEC*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) (noting that if stare decisis were an absolute requirement, “segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants”); Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944) (“There is no infallibility about the makers of precedents. We cannot deny to the judicial process capacity for improvement, adaptation, and alteration unless we are prepared to leave all evolution and progress in the law to legislative processes.”).

⁶² *See* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 78 (1989) (“Expectations about legal obligations depend not only on the prevailing legal rule but also on the prevailing judicial practice. If the system does not adhere to stare decisis, no one will formulate expectations about her future legal obligations on that assumption.”).

⁶³ *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981) (“Words of promise which by their terms make performance entirely optional with the ‘promisor’ whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise.”).

precedent. Stakeholders are aware (at least constructively) that fidelity to precedent is the ordinary course, but that the Court reserves the right to overrule itself.⁶⁴ Likewise, stakeholders need not look far to find numerous examples of situations in which the Court has departed from its past decisions.⁶⁵ Given this backdrop, one might contend that when stakeholders are deciding how to organize their affairs, they should be expected to tailor their behaviors based on the possibility of adjudicative change.⁶⁶ Further, when the Court is contemplating a reversal of course, it should not be troubled by the notion that it is breaking its word. The Court has already announced that it occasionally will overrule its prior decisions. As a result, the argument goes, the exercise of that option cannot subvert anyone's reasonable expectations.⁶⁷

B. *Fairness*

One rejoinder to the foregoing claim is that respect for reliance on precedent is integral to treating stakeholders fairly.⁶⁸ But determining *why* disregarding reliance would be unfair—particularly given the Supreme Court's disclaimers that all precedents are subject to reconsideration—turns out to be complex. We might imagine five potential explanations.

⁶⁴ See, e.g., *Payne*, 501 U.S. at 827–28.

⁶⁵ See 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, 1179 (2008) (“Given that the courts have said, too many times to count, that the idea of stare decisis is not, and never has been, one of absolute adherence to a prior decision, and given the innumerable times that the Supreme Court has reconsidered and overruled its prior constitutional interpretations, there is not much more reason to expect that any given judicial interpretation will not change than there is to expect that a legislature will not enact a new statute.”).

⁶⁶ See Kaplow, *supra* note 43, at 525–26 (“Perceptive investors will typically act on probability estimates of possible changes in the legal regime, just as they will take into account the probabilities of changes in relevant market conditions”); Paulsen, *supra* note 41, at 1554 (“Rational actors should rely on a decision's remaining the rule *only to the extent that it can be predicted that the courts will adhere to the decision as correct*. To the extent that this is uncertain, prudent businesspersons should purchase insurance against (or learn to live with) the risk of changing judicial decisions”).

⁶⁷ Cf. Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 817 (1983) (“As long as the general rules of the game make clear in advance that the specific rules of the game are subject to change, the player cannot complain about per se unfairness merely because such a change is in fact effected.”).

⁶⁸ See Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69, 77 (2003) (noting the argument that “[i]ndividuals have a right to rely on the law as it is stated and should not be penalized after the fact for actions that were legal when made”); Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1730–31 (2007) (discussing the argument that “it is unfair to require actors who have invested in an upgrade before a new regulation takes effect to once again undertake costly compliance with a new standard”).

1. *Lack of Voluntary Choice*

The first explanation challenges the assumption that stakeholders have meaningful choices about how they react to judicial decisions. The argument unfolds as follows: even if we are willing to posit that stakeholders should be held responsible for the actions they voluntarily take in reliance on precedent, there are numerous situations in which adherence to precedent is effectively or practically unavoidable. Some precedents contain legal interpretations that are designed to restrict and shape particular behaviors, such as constitutional guidelines for lawful police searches.⁶⁹ Other precedents create regimes that could only be circumvented through heroic efforts. An individual citizen might well determine that there are doubts about the correctness of the *Legal Tender Cases*, which upheld the validity of paper money.⁷⁰ The citizen might also recognize that it is at least conceivable that the Supreme Court eventually will overrule the *Legal Tender Cases*. And still the citizen might be excused for continuing to rely on paper money as lawful, because the alternative is simply too burdensome to represent an appropriate obligation for a government to impose on the public. In such situations, the citizen's decision to rely on precedent may be seen as a *fait accompli* rather than the product of reasoned deliberation and discretion. Norms of fairness accordingly would require judicial respect for the citizen's reliance interests, lest she be punished for actions over which she had no real control.

This position has some force, but the scope of its impact is limited. The rationale only applies to judicial precedents whose implications are effectively or practically unavoidable. Thus, it does not justify protecting reliance in the many situations in which stakeholder reactions to precedent are truly discretionary. A corporation that arranges its operations so as to exploit a judicial interpretation of the tax laws takes an affirmative and calculated step in the interest of profit maximization.⁷¹ Likewise, a political organization that

⁶⁹ See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1728 (2009) (Alito, J., dissenting) (“Many searches—almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on [the precedent in question].”).

⁷⁰ See Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 122 n.15 (2006) (“The first of the *Legal Tender Cases*, *Hepburn v. Griswold*, 5 U.S. (8 Wall.) 603 (1870), was overruled the following year by *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871). The third and final case, *Juilliard v. Greenman*, 110 U.S. 421 (1884), was decided a decade later.”); *id.* at 123 (noting that in *Knox*, the Court “held that creating greenbacks was a valid use of implied authority as a wartime exigency,” and in *Juilliard*, the Court “upheld the use of paper money in peacetime”).

⁷¹ See *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992) (“[I]t is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in [*National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967)].”).

crafts a fundraising plan predicated upon its ability to accept donations from corporations and labor unions is reacting to existing precedent in a strategic fashion.⁷² Where a stakeholder's risk exposure arises primarily from his own voluntary speculation, the argument for viewing precedential reliance as inevitable ceases to apply. In those situations, forestalling adjudicative change to protect reliance interests would allow stakeholders to externalize the downside risk of their affirmative decisions. Society at large would be forced to subsidize the stakeholders by enduring the continued operation of an outdated or unsound interpretation of the law.⁷³

2. *Uncertainty*

Contending that stakeholders should discount their reliance based on the possibility of a future overruling assumes that they can, in fact, make meaningful predictions about the trajectory of judicial decisions. If that assumption is faulty, it might follow that stakeholders are incapable of managing the risk of judicial overrulings in a rational and effective manner. Disregard of their plight by the judiciary would become tantamount to subjecting them to unavoidable harms.

While it is foreseeable that the Supreme Court will occasionally depart from precedent, predicting which precedents will be overruled—and when those overrulings will occur—is much more difficult.⁷⁴ One accordingly might contend that, to borrow a distinction drawn by Larry Alexander, predictions about precedent are not just risky but fundamentally uncertain.⁷⁵ The difficulties are exacerbated by the role of the Court's changing composition in affecting the prospects of overruling.⁷⁶ Given the impediments to accurate

⁷² See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

⁷³ Cf. Larry Alexander, *Introduction to the Conference on Legal Transitions*, 13 J. CONTEMP. LEGAL ISSUES 1, 3 (2003) (“[T]he mere fact that someone chooses to occupy a house does not look like the kind of choice that should render the government’s decision to take that house in order to build a road a matter of ‘choice’ rather than a piece of brute bad luck. On the other hand, if someone could buy any of several houses, but purchases the one that he knows is at high risk of being taken by the government, the taking looks less like brute bad luck and more like an outcome for which the chooser should bear the cost.”).

⁷⁴ See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 79 (2008) (contending that “the actual process of deciding cases has enough play in the joints to make it difficult, if not impossible, to predict which particular precedents the justices will agree to weaken, if not overrule”).

⁷⁵ See Alexander, *supra* note 73, at 2 (“Risk represents known probabilities of outcomes and can be rationally weighed in prudential or moral decisionmaking Uncertainty, on the other hand, represents ignorance of the distribution and incidence of various outcomes and confounds prudential and moral decisionmaking.”).

⁷⁶ See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 94 (1991) (“Because there is no way to predict who future Justices will be or how

prediction, we might conclude that stakeholders lack any effective means to protect themselves against precedential swings. The result would be to bolster the argument that principles of fairness require some degree of judicial solicitude for reliance interests.

Anticipating the path of judicial precedent can undoubtedly be challenging. Even seasoned students of the Court can have difficulty making accurate forecasts, especially in the mid- to long-term. Nevertheless, the implications of that difficulty should not be overstated. Not every precedent is situated identically in terms of its probable durability. Certain precedents are plainly more likely than others to be reconsidered and overruled.⁷⁷ Relying on a precedent like *Marbury v. Madison*⁷⁸ that consistently draws the Court's esteem as a pillar of our constitutional order is a far safer bet than relying on a recent, controversial decision that multiple sitting Justices have vowed to dismantle.⁷⁹

Further, though predicting the trajectory of precedent may be difficult, the same is true of many other risks that confront us on a daily basis. A homeowner faces risks from catastrophic weather events; she responds by buying insurance. An investor faces risks from the instability of global currency markets; she responds by buying derivatives. A global corporation faces risks from civic instability in an emerging market; it responds with a panoply of measures to hedge its economic exposure. None of these risks is easy to gauge. Still, it would seem strange to contend that our homeowner, investor, and corporation would have behaved in a reasonable and justifiable fashion by throwing up their hands and refraining from taking any precautions against uncertain events. For similar reasons, the fact that predicting judicial overrulings is difficult falls short of furnishing a convincing justification for protecting stakeholder reliance through the doctrine of stare decisis.⁸⁰

they may interpret the ambiguities or develop the ideas in precedents, there is inevitably substantial uncertainty over the direction of constitutional law.”).

⁷⁷ Cf. Kaplow, *supra* note 43, at 525 (“The issue of whether a specific change can be anticipated is a matter of degree.”).

⁷⁸ 5 U.S. (1 Cranch) 137 (1803); *see also* Gerhardt, *Super Precedent*, *supra* note 45, at 1208 (“Societal acquiescence in *Marbury*, as a defense and authority for the exercise of judicial review of federal authorities, is deeply engrained in the public consciousness and the fabric of American law.”).

⁷⁹ *See, e.g.*, *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2492 (2012) (Breyer, J., dissenting) (“Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case.”).

⁸⁰ Cf. Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 66 (1977) (“[E]fficiency may demand that persons expect changes in the law. In the market context, only behavior that takes into account probabilities of change is treated as reasonable.”).

3. *Absence of Private Insurance Markets*

Analogizing judicial overrulings to events such as natural disasters or currency fluctuations elides a potentially important difference pertaining to the availability of private insurance. As Jonathan Masur and Jonathan Nash recently explained, “There exists no meaningful market for regulatory insurance in the United States.”⁸¹ Whatever the explanations for that gap,⁸² the fact remains that a stakeholder seeking to hedge against the risk of legal change will generally need to look beyond established insurance markets. One might conclude that the absence of such markets makes it unfair to penalize stakeholders for failing to hedge against the prospect of adjudicative change. Instead, in light of the unavailability of private insurance, precedential reliance should be treated as de facto justifiable and worthy of protection.

The trouble with this argument is that, notwithstanding the lack of a private insurance market, stakeholders may avail themselves of other measures to mitigate their risk in the event of an overruling. Most obviously, they can restrict the extent to which they make affirmative and calculated choices to exploit favorable judicial decisions as a means of achieving objectives such as profit maximization. Whether or not that restraint would lead to a suboptimal level of investment in the aggregate—an issue that is taken up below⁸³—it dilutes the fairness justification for protecting reliance in situations where stakeholders exercise discretion in determining how to respond to precedent.

4. *Bounded Rationality*

A different perspective on the fairness rationale emerges from the teachings of behavioralist economics. Drawing on the insights of behavioralism, one might contend that, even if the path of precedent is predictable in theory, many individuals will misestimate the risk of detrimental legal change.⁸⁴ Given the deficiencies and biases that influence individuals’ processing of information about the future, it is arguably misguided for the legal system to assume that stakeholders will make rational and sensible predictions about the likelihood

⁸¹ Jonathan S. Masur & Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 N.Y.U. L. REV. 391, 408 (2010); *see also id.* (noting that there is “not even a market for insurance against government takings (which would appear to be a much simpler endeavor)”).

⁸² Professors Masur and Nash argued that the most significant cause of the gap is the difficulty of pricing insurance against regulatory change. *See id.* at 421–26.

⁸³ *See infra* Part III.E.

⁸⁴ *See* Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 221–25 (2003).

and consequences of adjudicative change.⁸⁵ And in light of these biases, it may be unfair for courts to disregard precedential reliance based on the premise that individuals can properly discount their reliance according to the probability that judicial decisions will be overruled.

Again, however, the reach of this argument is limited. Even if bounded rationality and limited cognitive capacity impede stakeholders from precisely forecasting the risk and consequences of overrulings, stakeholders remain capable of recognizing that certain precedents—such as those that recently issued from a closely divided Court—are more likely candidates for reconsideration. Treating all precedential reliance as reasonable ventures beyond the justifications provided by behavioralism. In addition, as Kyle Logue has explained, there is a plausible argument that certain stakeholders (such as business corporations and sophisticated individuals) will tend to make decisions that approach the rational-actor ideal.⁸⁶ That prospect chips away further at the behavioralist justification for protecting reliance on precedent. These limitations suggest the more general point that, while the lessons of behavioralism might support targeted decisions to protect some types of reliance on grounds of fairness, they cannot justify the across-the-board protection of reliance reflected in contemporary *stare decisis* jurisprudence.

5. *Immutable Obligations of Government*

That leaves what is perhaps the most intuitive argument for the protection of precedential reliance on fairness grounds: when stakeholders take actions in compliance with existing law as declared by the Supreme Court, the Court is obliged to protect that reliance in order to avoid “inequity.”⁸⁷ This obligation cannot be disclaimed through a general warning that all precedents are subject to reconsideration. Treating citizens fairly requires giving effect to their compliance efforts notwithstanding the well-known reality that judicial interpretations can change.

Whether or not this argument is sound as a general matter, it is ill suited to the context of *stare decisis*. If one believes that citizens have an absolute right

⁸⁵ See *id.* at 224 (“Arguments that seek to justify one transition over another on the basis of the relative *ex ante* incentive effects are significantly limited by the behavioralists’ findings.”).

⁸⁶ See *id.* at 228 (“There are reasons to believe that over the long run the decisions of corporate managers and of business decision-makers generally tend to be rational in the traditional sense; that is, they tend not to be subject to the same biases that plague individuals acting in their capacities as consumers, at least not to the same degree.”).

⁸⁷ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

to rely on existing law—a right that the government, including the courts, cannot prevent from arising through an ex ante disclaimer of fidelity to the past—the protection of precedential reliance via the doctrine of stare decisis seems like a curious remedy. Reliance by stakeholders does not guarantee that a flawed precedent will be retained.⁸⁸ Under existing law, reliance interests can be overcome by the countervailing benefits of interpreting the law correctly. There is thus no inalienable right to rely on precedent. To the contrary, the protection of reliance is contingent; it can always be subordinated to other values. That leads to a doctrinal middle ground in which fairness justifications require reliance on precedent to receive *some* judicial respect even though stakeholders have been warned that precedent can change, but nevertheless allow stakeholder reliance to be trumped by countervailing considerations. Perhaps a convincing explanation for this approach is possible. But if it is, the Court has not yet articulated it.

The conceptual terrain would be different if judicial decisions were viewed as creating vested rights in stakeholders that could not be undermined without the payment of compensation. That prospect is particularly intriguing in light of the Supreme Court's recent decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.⁸⁹ In *Stop the Beach Renourishment*, a four-Justice plurality indicated that a judicial ruling could violate the Takings Clause of the Fifth Amendment if it amounts to “elimination of established private property rights.”⁹⁰ The full sweep of the plurality's reasoning is not yet clear.⁹¹ For present purposes, the key takeaway is that where a party does, in fact, have an “established private property right[]”⁹² that would be eliminated by an overruling but compensated as a taking, the discussion of protecting reliance interests through the doctrine of stare decisis is less salient: even if an overruling occurs, the parties who are affected most directly will receive payment for their losses.⁹³ The difficult

⁸⁸ Cf. *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring in part and concurring in the judgment) (noting that “reliance alone may not always carry the day”).

⁸⁹ 130 S. Ct. 2592 (2010).

⁹⁰ *Id.* at 2606 (plurality opinion).

⁹¹ For an interesting and provocative effort at extending the *Stop the Beach Renourishment* rationale, see Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 556 (2012), which argued that “anyone affected by particular kinds of adverse legal rulings, whether a party to the primary litigation or not, should be able to sue courts for the effects of the decision, with compensation to be provided by the state.”

⁹² *Stop the Beach Renourishment*, 130 S. Ct. at 2606 (plurality opinion).

⁹³ This is one of the concerns raised by Justice Kennedy's concurrence, in which he suggested that the knowledge that aggrieved parties would be made whole might lead courts to be aggressive in changing the law. *See id.* at 2616 (Kennedy, J., concurring in part and concurring in the judgment) (“The idea . . . that a

question for the doctrine of stare decisis is how to conceptualize stakeholder interests whose diminution would *not* require compensation following a judicial overruling.⁹⁴ Why do those interests warrant judicial protection, and at what point should they yield to countervailing concerns?

C. Rule of Law

Another potential basis for protecting precedential reliance is grounded directly in the rule of law. By giving regard to citizens' attempts to comply with the legal boundaries and mandates in force at any particular time, the judiciary can help to infuse the law with "qualit[ies] of clarity, certainty, predictability, [and] trustworthiness."⁹⁵ Those qualities, in turn, serve the rule-of-law ideal.⁹⁶ They are thus worthy of protection "not only [due to] the desirability of minimizing tangible forms of harm and economic loss," but also for their "own sake."⁹⁷

The implicit claim is that a certain amount of continuity is necessary in order for a legal system to embody the rule of law.⁹⁸ The converse situation, in which dramatic vacillation is the ordinary course, lacks the requisite stability of a sound legal system.⁹⁹ Nor can the problem be rectified through public notice that all laws are subject to change.¹⁰⁰ Even if the legal system's architects—including its judges—disclaim any fidelity to the past, ceaseless and pervasive overhaul of the legal order cannot be squared with the stable

judicial takings doctrine would constrain judges might just well have the opposite effect. It would give judges new power and new assurance that changes in property rights that are beneficial, or thought to be so, are fair and proper because just compensation will be paid.”).

⁹⁴ *Cf. id.* at 2615 (juxtaposing governmental takings against “the type of incremental modification under state common law that does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law”).

⁹⁵ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 272 (2d ed. 2011).

⁹⁶ *See supra* Part I.

⁹⁷ FINNIS, *supra* note 95, at 272.

⁹⁸ *See id.* at 270 (arguing that “[a] legal system exemplifies the Rule of Law to the extent” that, among other things, “its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules”); LON L. FULLER, *THE MORALITY OF LAW* 79 (Yale Univ. rev. ed. 1969) (arguing that the “internal morality of the law . . . demands that laws should not be changed too frequently”).

⁹⁹ *See FULLER, supra* note 98, at 39 (describing as a “route[] to disaster” the maintenance of a system that “introduc[es] such frequent changes in the rules that the subject cannot orient his action by them”).

¹⁰⁰ *Cf. Carmell v. Texas*, 529 U.S. 513, 533 (2000) (“There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.”).

core that the rule of law requires.¹⁰¹ The objective is as much to constrain governmental action as it is to protect individual actors.

While the rule-of-law argument for protecting reliance is powerful in theory, it loses much of its resonance in its practical application to modern American law. The dynamics of legal change at institutions like the U.S. Supreme Court bear little resemblance to a state of perpetual overhaul.¹⁰² The Court continually underscores the respect that is due to past decisions. Even when it opts to overrule a prior case, the Court commonly describes itself as committed to incrementalism by narrowing the scope of its reversal of course.¹⁰³ Provided that the modern practice continues, and that adjudicative change does not become so frequent and dramatic as to threaten the legal system's core stability, the Court's failure to protect the interests of stakeholders who relied on a given precedent would not seem to present a serious challenge to the rule of law. Though a tendency toward constant vacillation and revolutionary change might create serious rule-of-law concerns, occasional overrulings can be compatible with a system dedicated to the rule of law even if they work to the detriment of particular stakeholders.¹⁰⁴

D. *Judicial Identity*

A rational actor who is serious about forecasting legal developments must take into account a variety of considerations, not the least of which are changes

¹⁰¹ Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (“There is . . . a point beyond which frequent overruling would overtax the country’s belief in the Court’s good faith.”). The *Casey* Court was attempting to make a point about the Court’s perceived legitimacy, though it seems to me that the impact of frequent overruling on the rule of law is the more relevant concern.

¹⁰² Cf. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1156 (2008) (“[T]he Justices feel constrained from overturning too many past decisions—however loose the notion of ‘too many’ might be—by an apprehension that the public would find too much instability in constitutional law to be unacceptable.”).

¹⁰³ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (altering the rationale for resolving Confrontation Clause disputes but noting that “the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”). Of course, the articulated limitations can sometimes be exceeded fairly quickly. Compare *Blakely v. Washington*, 542 U.S. 296, 305 n.9 (2004) (“The Federal Guidelines are not before us, and we express no opinion on them.”), with *United States v. Booker*, 543 U.S. 220, 226–27 (2005) (“We hold that . . . the Sixth Amendment as construed in *Blakely* does apply to the [Federal] Sentencing Guidelines.”).

¹⁰⁴ See Waldron, *supra* note 29, at 26 (“[I]n no context does the rule of law dictate immutability. But the rule of law does counsel against too-frequent changes in the law, and this applies as much to precedent as to other sources of law.”).

in judicial personnel. The likelihood that the Supreme Court will overrule a given precedent fluctuates as Justices of different backgrounds, ideologies, and predispositions come and go.¹⁰⁵ It would be foolhardy for a stakeholder to ignore the Court's composition in attempting to predict the path of judicial decisions. The corollary is that if the Court were to treat precedential reliance as worthy of protection only where it was the product of reasonable judgments, the need presumably would arise for evaluating whether stakeholders properly adjusted their views of certain precedents upon the arrival of new Justices to the bench. It is easy to see why the Court might find this prospect—that is, the need to declare that Justice *B*'s confirmation should have been understood as the death knell for certain decisions joined by Justice *A*, whom Justice *B* replaced—to be uncomfortable.¹⁰⁶

By treating all precedential reliance as justifiable and worthy of protection, the Court avoids the need for parsing the impact of judicial identity. All stakeholders are deemed to have behaved reasonably by acting as though existing law would remain valid in perpetuity. When stakeholders are released from the obligation to consider the effects of individual Justices' departures and arrivals, the Court is too. The treatment of reliance as *de facto* reasonable might likewise be viewed as reinforcing the principle that ours is a society ruled by laws rather than the particular women and men who don judicial robes, connecting the subjugation of judicial identity with the rule-of-law considerations discussed above.¹⁰⁷

But doctrinal disregard for judicial identity cannot render that factor irrelevant in practice. So long as the Justices are empowered to deviate from precedent when they perceive a compelling reason for doing so, judicial identity will remain a driver of adjudicative change.¹⁰⁸ Rational stakeholders

¹⁰⁵ See GERHARDT, *supra* note 74, at 11 (discussing the correlation between personnel changes and overrulings).

¹⁰⁶ Cf. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 66 (1994) (“The perception that judicial decisions are grounded in principle and not politics may be undermined if [inferior] courts . . . routinely based their predictions on hunches concerning how particular Justices would decide a legal issue given their basic political ideologies and perceived agenda.”).

¹⁰⁷ See, e.g., *In re Concerned Corporators of the Portsmouth Sav. Bank*, 525 A.2d 671, 701 (N.H. 1987) (Souter, J., dissenting) (“[W]hen governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.”).

¹⁰⁸ See GERHARDT, *supra* note 74, at 11 (noting the “rarity of the Court’s overturning a precedent without a change in membership”); cf. Barry Cushman, *The Securities Laws and the Mechanics of Legal Change*, 95 VA. L. REV. 927, 928 (2009) (discussing the “strand of positive constitutional theory that contends that judicial appointments are the means by which constitutional revolutions . . . have been achieved”).

will be cognizant of this fact, and they will continue to view the path of precedent as bound up with judicial identity. That creates something of a dilemma for the Court as an institution. On one hand, reducing the durability of precedent to “a prediction of how the particular individuals sitting on the . . . court would resolve the issue presented” puts pressure on the vision of the law as transcending the proclivities of individual jurists.¹⁰⁹ On the other hand, it is beyond question that the probability that a given precedent will be overruled depends in part on judicial personnel. However understandable the impulse, the desire to downplay judicial identity is a dubious justification for treating all precedential reliance as worthy of judicial protection.

E. Optimal Investment

Viewed from the *ex ante* perspective, the protection of precedential reliance might be defended as a mechanism for promoting social welfare by encouraging an efficient level of investment. The argument has two premises. First, the threat of adjudicative change is problematic because it inhibits investments that may be impaired by a shift in the legal backdrop. Second, those inhibitions can be mitigated through the doctrine of *stare decisis*. By resisting the overruling of precedents that have engendered substantial expenditures in reliance, the Supreme Court can provide comfort to prospective investors notwithstanding the looming possibility of judicial reconsideration.¹¹⁰

Neither premise is beyond dispute. At the outset, it is unclear that disregarding reliance expectations would lead to a suboptimal level of investment. In a world where precedential reliance received no regard from the courts, stakeholders would not be completely paralyzed by the threat of overruling. Rather, they would attempt to discount their reliance based on the perceived risk that today’s precedent might subsequently be overturned. Perhaps stakeholders would tend to discount too heavily, or perhaps they would tend to discount too lightly.¹¹¹ In either event, a more developed theory

¹⁰⁹ Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 685 (1995) (also noting that “[t]his conception is inconsistent with central specific practices of American law—including the norm of the impartial adjudicator”).

¹¹⁰ See, e.g., STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 152 (2010) (“Individuals and firms may have invested time, effort, and money based on [a judicial] decision. The more the Court undermines this kind of reliance, the riskier investment becomes. The more the Court engages in a practice that appears to ignore that reliance, the more the practice threatens economic prosperity.”).

¹¹¹ See *supra* Part III.B.4.

would be required to prove that the possibility of adjudicative change creates a genuine problem for investment levels.

Indeed, it might be the case that under certain conditions, society is best served by reducing parties' incentives to invest in ways that are consistent with existing precedent. As suggested by the work of commentators including Louis Kaplow, it may sometimes be in society's best interest for parties to reduce their reliance on a legal requirement or standard of liability even before its revision, so that the benefits associated with the new law (or new interpretation of existing law) are brought about more quickly.¹¹² Protecting precedential reliance in those cases may prove counterproductive by diminishing private incentives to avoid relying on troublesome precedents. And the insights of behavioralism add another layer of complexity to the investment-incentives story.¹¹³ If cognitive biases affect many stakeholders' perceptions about the risk of adjudicative change, the relationship between ex post treatment of reliance interests and ex ante investment behaviors becomes still more complicated and difficult to predict.¹¹⁴

Even if failing to protect reliance would lead to suboptimal levels of investment, it is unclear whether judicial solicitude for reliance interests represents an effective solution. The fact that a precedent has commanded reliance does not insulate it from reconsideration or overruling. Reliance implications remain subject to override in light of the countervailing benefits associated with legal accuracy and evolution. Thus, a stakeholder who is deciding how to invest in light of existing caselaw cannot assume that every precedent that has generated reliance will be reaffirmed indefinitely. In a few cases, the magnitude of reliance might give potential investors an unshakeable

¹¹² See Kaplow, *supra* note 43, at 529–30; see also *id.* at 551 (“A policy of no mitigation does not . . . go far enough in addressing the incentive problem in all cases. Sometimes new legal rules should be made fully retroactive: they should be applied to time periods before the enactment date, even as to investments no longer in existence.”). The link between ex ante incentives and assumptions about legal progress is critical to the analysis of legal transitions. See Kaplow, *supra* note 55, at 191 (“[F]ailure to provide relief to manufacturers when their product is banned will discourage production of the product ex ante. This effect is desirable if the product is banned when in fact it is found to be dangerous. But if it is a beneficial product that will be banned, the reduction in ex ante production is counterproductive.”); Logue, *supra* note 84, at 235 (“The economic approach . . . is an anticipation-based argument; it depends specifically on the claim that, if private parties expect law change to be applied retroactively, they will have an ex ante incentive to make investments in anticipation of this change. For a large class of legal changes . . . such anticipatory moves on the part of private actors will be desirable *if and only if* the law change in question is itself expected to be desirable . . .”).

¹¹³ See *supra* Part III.B.4.

¹¹⁴ Cf. Logue, *supra* note 84, at 225 (“It seems likely that the same cognitive quirks that affect consumers' assessments of product risks, and of risks more generally, will affect individuals' guesses about the likelihood of legal change, the nature of the change, and the way in which transition costs and benefits will be handled.”).

feeling of comfort. To return to the *Legal Tender Cases*,¹¹⁵ stakeholders might reasonably conclude that because the extent of reliance on paper money is so great, it is highly unlikely that the Supreme Court will find countervailing considerations sufficient to justify an overruling. But in most cases precedential reliance will be far more limited, leaving adjudicative change as a realistic possibility. The marginal increase in investor confidence resulting from the treatment of stakeholder expectations as worthy of presumptive, though defeasible, respect is a thin reed on which to support the protection of reliance interests.

F. Tradition

A final potential reason for affording protection to precedential reliance is based on tradition and past practice: The Supreme Court has previously treated reliance on precedent as a relevant factor in its stare decisis jurisprudence, so it should continue to do so going forward.¹¹⁶ This argument need not go so far as to consider whether the doctrine of stare decisis is itself entitled to formal stare decisis effect.¹¹⁷ The point could simply be that the Court generally ought not deviate from its past practices.

Even if one is inclined to accept the relevance of precedential reliance based on past judicial practice, as an analytical matter it is still worth asking what justifies the practice in the first place. Determining the import of reliance interests in any given case requires the exercise of judgment and the weighing of competing considerations. Those tasks will be affected by the underlying rationale on which the protection of reliance is based. A deeper inquiry into the justification for protecting reliance thus remains crucial.

IV. FROM RELIANCE TO DISRUPTION

The previous Part sought to demonstrate that the arguments for protecting precedential reliance are susceptible to serious challenges. The foregoing analysis does not prove, or attempt to prove, that the various rationales for protecting reliance are beyond salvage. Instead, it suggests that important ambiguities and uncertainties need to be addressed before the protection of reliance can be persuasively justified on any of the asserted grounds.

¹¹⁵ See *supra* Part III.B.1.

¹¹⁶ See *supra* Part I (discussing the Court's treatment of reliance interests).

¹¹⁷ On that question, see generally Paulsen, *supra* note 41.

There is, however, an analytical reframing that provides a firmer basis for protecting stakeholder expectations. That reframing, which is the topic of this Part, shifts the doctrinal focus from backward-looking reliance to forward-looking disruption.¹¹⁸

A. *The Basics*

Instead of being defended as a tool for promoting fairness, justice, or optimal levels of investment, judicial attention to settled expectations can be recast as a mechanism for controlling the disruptive costs of adjudicative change going forward. The point is not to protect past reliance qua reliance—a proposition that is controversial for the reasons I have discussed¹¹⁹—but rather to manage the disruptive impacts of breaking from precedent and requiring stakeholders to make corresponding adjustments.

Recasting the inquiry in terms of forward-looking disruption allows the doctrine of stare decisis to move beyond the question of whether stakeholders should have taken better precautions against the prospect of adjudicative change.¹²⁰ There is no longer any need to assess the reasonableness of stakeholders' conduct in determining whether norms of fairness require that their expectations be protected. Viewed through the lens of disruption, past expectations are protected only insofar as their undermining would impose adjustment costs going forward.¹²¹ Past reliance becomes a presumptive proxy for forward-looking disruption.¹²² This retheorization is informed by the reality that change is inherently costly.¹²³ Even beneficial changes require the expenditure of resources—economic and otherwise—in order for stakeholders to understand and comply with the new regime. Whether or not individual stakeholders behaved reasonably in calibrating their past reliance, the

¹¹⁸ See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 63 (2001) (“When a court overrules a particular precedent, it frequently generates some transition costs; among other things, public and private actors must make investments to understand and conform to the new rule, and money may have to be spent on litigation to refine and clarify it.”).

¹¹⁹ See *supra* Part III.

¹²⁰ For a comparable focus on the forward-looking “adjustment costs” of deviating from precedent, see Lee, *supra* note 39, at 663–64.

¹²¹ Cf. Epstein, *supra* note 68, at 72 (“It is not that individuals and firms are incapable of making adjustments to changes in their legal environment. Rather, it is that they are required to incur the costs of so doing.”).

¹²² Cf. Lee, *supra* note 39, at 664 (“If no decisions are made in reliance on a rule, then there are no adjustment costs that flow from its replacement.”).

¹²³ See Epstein, *supra* note 68, at 72 (“The time, expense, and uncertainty created by the development and implementation of new legal rules should always tilt the scale in favor of the status quo.”).

disruptiveness of change affects the net social gains from overruling a flawed precedent.

The Supreme Court has immense power to initiate legal change, but limited tools to manage it. The Court cannot supplement its decision to overrule a precedent with an order that those who are helped by the decision must share their windfall with those who are harmed.¹²⁴ Nor can it depend on those who benefit from legal changes to make voluntary payments to the losers in order to dull the sting. Prospective overruling remains available for situations in which the Court wishes to spare those who relied on past interpretations from the full brunt of adjudicative change. But the Court has expressed disfavor toward that approach.¹²⁵ Moreover, prospective overruling is an incomplete solution, for it provides no relief to those who made forward-looking investments on the assumption that a certain legal rule would remain binding into the future.¹²⁶

Notwithstanding these limitations, what the Court *can* do is infuse its jurisprudence with a general preference for the status quo in order to reduce the incidence of dramatic change and the corresponding occurrence of disruptive impacts.¹²⁷ Viewing the durability of precedent in these terms circumvents difficult questions about whether stakeholders should have taken better precautions to mitigate their losses in the event of a judicial overruling. The focal point becomes the social costs of adjudicative change going forward.

In discussing the retroactive application of tax laws, the Supreme Court has described the tax system as “a way of apportioning the cost of government

¹²⁴ *Cf. id.* at 73 (suggesting that an ideal system of legal transitions might provide “side payments to compensate the losers from the legal changes in question” to help ensure that “all legal changes were Pareto efficient to the extent that government could make them so”).

¹²⁵ *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”).

¹²⁶ *See United States v. Carlton*, 512 U.S. 26, 33–34 (1994) (“An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.”); *Graetz*, *supra* note 80, at 77 (“[W]hile it has been argued that persons who purchase tax-exempt bonds should be entitled to tax-free interest for the life of the bond, it has not been suggested that issuers of tax-exempt bonds, who may well have structured their financing plans on the expectation that the exempt status would continue into the future, are entitled to continuation of the tax exemption because of their ‘reliance’ interest.”).

¹²⁷ On the subordination of individual interests, consider the Court’s statement in *Casey* that “[h]owever upsetting it may be to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992).

among” the citizenry.¹²⁸ A comparable perspective applies to the operation of stare decisis when the touchstone becomes forward-looking disruption instead of backward-looking reliance. The doctrine of stare decisis is reframed as a means of apportioning the costs of legal progress among the citizenry at large, as opposed to a tool for promoting individualistic goals such as fair treatment of particular actors. Sometimes the burdened parties are those who must endure the continued operation of a suboptimal legal rule for the sake of continuity. At other times, it is those who hoped for a precedent’s continued vitality who must suffer the pains of an overruling. The shift toward disruption emphasizes this vision of stare decisis as a public-minded instrument for achieving wide-ranging social objectives.

B. *Rethinking Specific Reliance*

Twenty-one years ago the Supreme Court decided the case of *Quill Corp. v. North Dakota*, dealing with the extent of state power to impose tax-collection obligations on mail-order sellers.¹²⁹ Viewed through the lens of precedent, the proper outcome seemed clear. The Court’s prior opinion in *National Bellas Hess, Inc. v. Department of Revenue* had sided with sellers in comparable circumstances.¹³⁰ In the years since the decision in *Bellas Hess* was issued, however, developments in related areas of constitutional law had arguably rendered that case a doctrinal outlier.¹³¹ The question in *Quill* was whether the Court would reaffirm *Bellas Hess* notwithstanding doubts about its soundness by contemporary standards¹³² or overrule the case and enhance the internal consistency of the Court’s jurisprudence.

¹²⁸ *Welch v. Henry*, 305 U.S. 134, 146–47 (1938).

¹²⁹ 504 U.S. 298 (1992).

¹³⁰ 386 U.S. 753 (1967); *see also Quill*, 504 U.S. at 301 (“This case, like [*Bellas Hess*], involves a State’s attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State. In *Bellas Hess* we held that a similar Illinois statute violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce.”).

¹³¹ *See Quill*, 504 U.S. at 307 (“Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess* . . .”); *id.* at 310 (“*Bellas Hess* was decided in 1967, in the middle of this latest rally between formalism and pragmatism [in the interpretation of the Commerce Clause].”).

¹³² *Id.* at 317; *see also id.* at 308 (“[T]o the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.”); *id.* at 311 (conceding that “contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today”).

The Court chose the former course, opting for “adherence to settled precedent” to an extent sufficient to preserve the *Bellas Hess* result.¹³³ Along with defending *Bellas Hess*’s application of the Commerce Clause as adequately suited to its particular context, the Court noted the importance of reliance expectations. It explained that mail-order sellers had expended significant resources based on the Court’s previous articulation of the legal landscape and that altering the rules could have threatened “the basic framework of a sizable industry.”¹³⁴ It also recognized that, because “[m]any States have enacted use taxes,” a decision to abandon “*Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail-order houses.”¹³⁵

Quill provides a useful illustration of the concept of *specific* reliance on precedent, meaning reliance in the form of direct action, such as spending money and structuring business operations.¹³⁶ The focus on tangible and immediate harms constitutes the dominant paradigm of precedential reliance in modern Supreme Court parlance. The Court asks whether stakeholders have taken identifiable steps in reaction to the issuance of a precedent, and it considers the reliance interests in deciding whether the precedent should be retained.¹³⁷ The goal is to protect the welfare of those who invested resources based on the evident belief that a given precedent would remain binding into the future.

The relevance of tangible, economic effects also finds expression in the Court’s practice of according heightened deference to precedents that involve property and contract rights.¹³⁸ The received wisdom is that in those contexts, “[c]onsiderations in favor of *stare decisis* are at their acme”¹³⁹ because “parties

¹³³ *Id.* at 317.

¹³⁴ *Id.*

¹³⁵ *Id.* at 318 n.10 (citation omitted).

¹³⁶ I discuss the distinction between specific and broader based reliance in Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 453–64 (2010).

¹³⁷ See *Quill*, 504 U.S. at 317.

¹³⁸ See Lee, *supra* note 1, at 688–703 (surveying the historical support for this practice); *id.* at 699 (“By the founding era, English courts and American commentators had embraced the notion of an enhanced rule of *stare decisis* in cases involving rules of property. That principle also dominated the Court’s treatment of precedent during the Taney era.”); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 844 (2009) (“Traditionally, precedent rules were significantly influenced by reliance interests. In particular, stronger precedent rules were applied to property—and, sometimes, commercial interests—based on the view that reliance in this area was greater.”).

¹³⁹ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); see also Lee, *supra* note 39, at 662 (“Enhanced deference to rules of property may be understood to hinge on the prediction that the adjustment costs associated with overturning precedents establishing such rules will be high.”); Paulsen, *supra* note 41, at 1553

may have acted in conformance with existing legal rules in order to conduct transactions.”¹⁴⁰ By contrast, where a precedent involves “procedural and evidentiary rules,” reliance expectations have less resonance,¹⁴¹ for such rules do “not alter primary conduct.”¹⁴²

I have argued that it is not entirely clear why specific reliance should be worthy of judicial solicitude. Neither the moral, pragmatic, nor economic basis for protection is self-evident.¹⁴³ But notwithstanding that uncertainty, specific reliance can remain relevant as a potential indicator of forward-looking disruption. The disruption-based account recognizes the forward-looking costs that arise when stakeholders must modify their behaviors to accommodate a changed legal order. Past instances of specific reliance are relevant to the extent they increase the likelihood of forward-looking adjustments following a judicial overruling. The driving concern is not with protecting individual stakeholders in light of their previous expectations. The point, rather, is to protect society at large from the aggregate costs of disruption.

(“Traditionally, [the reliance] factor is thought most apposite in the commercial context, where resources have been committed and investments have been made in reliance on a legal rule or set of rules reflected in judicial decisions.”).

¹⁴⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010); *see also* *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)); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (“The [precedent was issued] twenty-three years ago and affected many tracts of land In the meantime there has been . . . continuous growth and development [and] . . . reliance on the decision. . . . It has become a rule of property, and to disturb it now would be fraught with many injurious results.”); *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 458 (1851) (“The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it . . . [f]or every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed.”).

This special concern with stability in matters of property, contracting, and commercial transactions is not unique to the United States. *See* Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234 (Eng.) (noting “the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law”).

¹⁴¹ *Payne*, 501 U.S. at 828.

¹⁴² *Hohn v. United States*, 524 U.S. 236, 252 (1998); *see also* *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (“Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent’s shortcomings.”). *But see Hohn*, 524 U.S. at 259 (Scalia, J., dissenting) (arguing that although “procedural rules do not ordinarily engender detrimental reliance,” in the present case “detrimental reliance by the Congress of the United States is self-evident”).

¹⁴³ *See supra* Part III.

C. *The Systemic Turn*

Tangible responses to precedent by directly impacted stakeholders are only one aspect of the consequences of overruling. Reframing the inquiry in terms of societal disruption highlights the need for a *systemic* perspective that captures the ramifications of legal change for parties and institutions beyond those who are immediately affected by a judicial reversal. The systemic perspective could be applied even to backward-looking reliance by enlarging the universe of expectations that are deemed relevant to the *stare decisis* inquiry. But it gains additional resonance and clarity in the context of forward-looking disruption.

On the disruption-based account, a central feature of adjudicative change is the transition cost it is likely to impose going forward. That cost is not limited to acts of specific reliance by individual stakeholders. Legal disturbances are felt more broadly than that. They extend to other actors who operate at an additional degree of remove from a particular precedent but whose actions and understandings have nevertheless been influenced by the precedent in indirect ways. As then-Judge John Roberts put it during his Supreme Court confirmation hearing, overruling a precedent can cause “a jolt to the legal system.”¹⁴⁴ Intuitions like this inform the systemic perspective, which recognizes that departures from precedent can create significant disruption even when the specific, transactional effects are narrow in scope.¹⁴⁵

Among the pertinent considerations from the systemic point of view are the effects of adjudicative change for governmental actors, such as legislators and

¹⁴⁴ *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. 144 (2005) (statement of John Roberts, J.); see also DUXBURY, *supra* note 52, at 123 (“The costs generated by the overruling of a precedent . . . might be significant: public bodies and private citizens might have to invest heavily to understand and conform to the new ruling, and may even have to litigate in order to force the courts to make the ruling clearer or more refined.”); Lee, *supra* note 39, at 652 (“When the Court adopts a newly restrictive conception of governmental power or a newly expansive conception of individual rights, it may threaten institutions that are built around the presumed validity of the current precedential regime.”).

¹⁴⁵ See, e.g., McGinnis & Rappaport, *supra* note 138, at 838 (arguing that to overrule “entrenched” constitutional precedents could “harm people’s attachment to their understanding of the Constitution—an attachment which helps unify the nation”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988) (“Stability and continuity of political institutions (and of shared values) are important goals of the process of constitutional adjudication, particularly ‘in a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.’” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819))).

executive officials.¹⁴⁶ Those actors necessarily operate against the backdrop of judicial precedent.¹⁴⁷ Overrulings require government officials to spend their—that is, our—time and resources formulating new approaches.¹⁴⁸ Transition costs arise regardless of whether judicial overrulings are understood as ever-present possibilities. Even legislators who foresaw the possibility of a statute’s undermining via a revision to the web of relevant judicial precedents may need to invest additional resources to craft a subsequent statute that satisfies the newly announced doctrinal requirements.¹⁴⁹

The systemic costs of disruption can also accrue to society in a more elliptical fashion. Onlookers who are not directly affected by a substantive rule nevertheless may need to alter their understandings of the legal regime’s content and operation.¹⁵⁰ As Michael Dorf has noted, cases like *New York Times Co. v. Sullivan*¹⁵¹ and *Brown v. Board of Education*¹⁵² “have come to

¹⁴⁶ Cf. Lee, *supra* note 39, at 701 (“[W]hen constitutional decisions establish the framework for other laws and governmental institutions, reversal of such decisions would give rise to substantial adjustment costs as public and private actors are forced to restructure the laws and institutions that are built around the abandoned regime.”).

¹⁴⁷ The Supreme Court occasionally discusses legislative reliance in applying its doctrine of stare decisis. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (Breyer, J.) (“*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws.”); *Harris v. United States*, 536 U.S. 545, 567–68 (2002) (plurality opinion) (“Legislatures and their constituents have relied upon [the precedent under discussion] to exercise control over sentencing through dozens of statutes like the one the Court approved in that case. . . . We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them.” (citations omitted)); *Bush v. Vera*, 517 U.S. 952, 985 (1996) (plurality opinion) (“Legislators and district courts nationwide have modified their practices—or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census—in response to [the precedent under discussion].”); *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 this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.”); cf. *Hohn*, 524 U.S. at 261 (Scalia, J., dissenting) (asserting that adherence to precedent was justified in part by “the reliance of Congress upon an unrepudiated decision central to the procedural scheme it was creating”).

¹⁴⁸ Cf. *Arizona v. Gant*, 129 S. Ct. 1710, 1728 (2009) (Alito, J., dissenting) (“While reliance is most important in ‘cases involving property and contract rights,’ the Court has recognized that reliance by law enforcement officers is also entitled to weight.” (citation omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991))); *id.* (“The *Belton* rule has been taught to police officers for more than a quarter century.”).

¹⁴⁹ See Gerhardt, *supra* note 76, at 86–87 (addressing how “the Court’s decisions can shape the elected branches’ agendas”).

¹⁵⁰ See Monaghan, *supra* note 145, at 750 (noting that the expectations created by precedent can be “symbolic” as well as “tangible”); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69 (1996) (“Official pronouncements about law—from the national legislature and the Supreme Court—have an expressive function. They communicate social commitments and may well have major social effects just by virtue of their status as communication.” (footnote omitted)).

¹⁵¹ 376 U.S. 254 (1964).

¹⁵² 347 U.S. 483 (1954).

stand for more than the legal doctrines they announced . . . [by] symboliz[ing] the association in the public imagination of the Constitution with core ideals of liberty and equality.”¹⁵³ Overruling such cases would carry intellectual and psychological consequences as well as tangible ones, creating the need for forward-looking adjustments to behaviors and mentalities.

The Supreme Court occasionally directs its gaze toward these broader implications of change. Consider *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁵⁴ where the Court reaffirmed the “central holding” of *Roe v. Wade*¹⁵⁵ that only at the point of fetal viability does the “State’s interest in fetal life” permit the prohibition of nontherapeutic abortions.¹⁵⁶ The Court based its decision in part on reliance interests: “[P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”¹⁵⁷ This attention to self-definition and shared understandings about the meaning of the constitutional order suggests an underlying concern with systemic impacts.¹⁵⁸ But despite the sweep of its depiction of reliance and its departure from the classic focus on tangible activities and investment-backed expectations, the *Casey* Court stopped short of fully elucidating the contours of systemic disruption.¹⁵⁹

A comparable approach was on display in *Dickerson v. United States*.¹⁶⁰ In declining to repudiate *Miranda v. Arizona*¹⁶¹ and its requirement of pre-interrogation warnings for criminal suspects, the *Dickerson* Court noted that

¹⁵³ Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2030 (2012) (book review).

¹⁵⁴ 505 U.S. 833 (1992).

¹⁵⁵ 410 U.S. 113 (1973).

¹⁵⁶ *Casey*, 505 U.S. at 860.

¹⁵⁷ *Id.* at 856; *see also id.* (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. . . . [W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”).

¹⁵⁸ *See id.* at 855 (describing as relevant the question whether *Roe*’s “limitation on state power could be removed without . . . significant damage to the stability of the society governed by it”); *id.* at 860 (“An entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . .”).

¹⁵⁹ The Court’s failure to elaborate prompted Chief Justice Rehnquist to criticize its theory of reliance as “undeveloped and totally conclusory.” *Id.* at 956 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice also argued that “[i]n the end, having failed to put forth any evidence to prove any true reliance, the joint opinion’s argument is based solely on generalized assertions about the national psyche.” *Id.* at 957.

¹⁶⁰ 530 U.S. 428 (2000).

¹⁶¹ 384 U.S. 436 (1966).

Miranda is such a staple of “routine police practice” that its “warnings have become part of our national culture.”¹⁶² The Court’s focus seemed to be on what Michael Gerhardt has called *Miranda*’s “network effects” within the law enforcement community, the political sector, and the public at large.¹⁶³ As in *Casey*, however, the apparent invocation of these systemic effects was left without much elaboration.

The same type of abbreviated discussion occurred in *Lawrence v. Texas*, which rejected *Bowers v. Hardwick*¹⁶⁴ and invalidated a criminal prohibition against sexual relations between members of the same gender.¹⁶⁵ The *Lawrence* Court reasoned that “there has been no individual or societal reliance on *Bowers*” sufficient to warrant preserving it.¹⁶⁶ Justice Scalia responded in dissent by articulating a capacious—and quintessentially systemic—view of the implicated reliance interests: “Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”¹⁶⁷ *Lawrence* thus serves as another illustration of issues of systemic reliance bubbling to the surface of Supreme Court discourse, though neither Justice Scalia nor the *Lawrence* majority devoted significant attention to the status and implications of systemic effects.

For a final example of precedential reliance being defined broadly to encompass systemic concerns, consider a recent opinion by Justice Breyer. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court overruled a longstanding precedent in the field of antitrust law that had categorically prohibited resale price maintenance agreements between manufacturers and distributors.¹⁶⁸ Justice Breyer dissented, advocating the retention of the previous rule.¹⁶⁹ He described the operation of resale price agreements as a complex issue whose impact was too uncertain to justify a break from longstanding precedent.¹⁷⁰

¹⁶² *Dickerson*, 530 U.S. at 443.

¹⁶³ GERHARDT, *supra* note 74, at 185.

¹⁶⁴ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶⁵ 539 U.S. at 578.

¹⁶⁶ *Id.* at 577.

¹⁶⁷ *Id.* at 589 (Scalia, J., dissenting).

¹⁶⁸ 551 U.S. 877, 881, 907 (2007).

¹⁶⁹ *See id.* at 908–09 (Breyer, J., dissenting).

¹⁷⁰ *See id.* at 920 (concluding that economic “studies at most may offer some mild support for the majority’s position. . . . [but] cannot constitute a major change in circumstances”).

Justice Breyer evaluated a panoply of factors that have appeared in the Supreme Court's discussions of *stare decisis*.¹⁷¹ Included among those factors were reliance considerations. He identified instances of specific reliance on the previous resale price maintenance rule, such as strategic decisions by certain types of businesses.¹⁷² He also looked beyond those businesses to reliance by a host of other stakeholders: courts that had resolved disputes under the previous rule; lawyers who advised clients about the rule's application; shopping malls that were built in light of assumptions about the economic prospects of discount distributors; and even homeowners who had "taken a home's distance from . . . a mall into account."¹⁷³ Justice Breyer also recounted legislative efforts, which he described in terms of "public reliance," that were "premised upon" the previous rule's continued existence.¹⁷⁴ Perhaps most interestingly, he ventured into the realm of psychological expectations and understandings by citing the effects on producers, distributors, and consumers who had come to view the bar on resale price maintenance as a "legally guaranteed way of life."¹⁷⁵

The conception of reliance evident in Justice Breyer's dissent faces a serious analytical challenge. Why, one might ask, shouldn't the affected individuals and institutions have taken suitable precautions in light of the possibility that the Supreme Court might someday change its mind?¹⁷⁶ Upon recasting the driving rationale in terms of forward-looking disruption, this challenge becomes more manageable. Even if the prospect of change is foreseeable, its occurrence can be disruptive. Legislators are not spared the additional effort of crafting a new regulatory regime simply because they always recognized that the Court might alter the legal backdrop. Nor are manufacturers and retailers spared the need to consider reorganizing their operations. Formulating a thoughtful contingency plan will make it easier for an individual or organization to cope with legal change, but it will not eliminate all the transition costs of conforming to a new judicial mandate once it is issued.

¹⁷¹ See *id.* at 923–29.

¹⁷² See *id.* at 925 (“[W]hole sectors of the economy have come to rely upon the *per se* rule. . . . The Consumer Federation of America tells us that large low-price retailers would not exist without [the precedent that was overruled] New distributors, including internet distributors, have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans.”).

¹⁷³ *Id.* at 918, 925–26.

¹⁷⁴ *Id.* at 919–20.

¹⁷⁵ *Id.* at 926.

¹⁷⁶ See *supra* Part III.

The relationship between precedent and societal understandings likewise could profit from being recast in terms of disruption. Return to the example of *Roe v. Wade*. Despite the collective understanding that *Roe* might someday be overturned, its actual overruling undoubtedly would prove disruptive. Apart from the obvious effects on individual behaviors and the likelihood of extensive administrative and legislative responses, widespread understandings about the content of the legal backdrop would need to adapt.

The same type of analysis applies to the overruling of *Miranda*. Even for those who will never be detained as criminal suspects, the repudiation of the familiar litany of warnings would require an updated understanding about a core feature of criminal procedure. The overturning of a well-established precedent like *Miranda* might also fuel more generalized doubts about the stability and constancy of the legal order.¹⁷⁷ That, too, is a disruptive consequence of change. Of course, many onlookers would nevertheless welcome the overruling of *Miranda* and applaud the Court's willingness to rectify a perceived constitutional mistake. But regardless of whether the net effects of an overruling are deemed to be beneficial, adjudicative change remains a potentially disruptive force. The threshold step is ensuring that the disruptive impacts of an overruling are properly identified and understood.

V. ADJUDICATING DISRUPTIVE EFFECTS

Parts III and IV contended that judicial concern with stakeholder expectations can profitably be reframed in terms of forward-looking disruption, and that the move toward disruption emphasizes the importance of adopting a systemic view of adjudicative change. The remaining question is how to integrate those principles into a workable doctrine of stare decisis. This Part sketches the outline of an answer. It begins by resisting the argument that assessing disruption is beyond the competence of the courts. It then offers a brief case study based on the Supreme Court's debate over precedent in *Citizens United v. FEC*.¹⁷⁸ The Part concludes with a few words about the disruptiveness of legal changes that are initiated outside the judiciary, as well as the place of the disruption inquiry within the broader doctrine of stare decisis.

¹⁷⁷ Cf. Peters, *supra* note 36, at 2114 (“In areas of the law with high visibility—free speech, equal protection, and abortion cases come to mind—slapdash application of supposedly immutable constitutional provisions would undermine public confidence in the courts.”).

¹⁷⁸ 130 S. Ct. 876 (2010).

A. *The Objection from Institutional Competence*

At the outset, we must consider whether assessing the disruptive impacts of adjudicative change is even within the competence of the courts. A negative answer would be reason enough to exclude those impacts from the doctrine of *stare decisis*.

The institutional competence concern is especially resonant for the systemic view of disruption. It is initially daunting to contemplate the aggregate disruption that overruling a precedent might generate. Yet it is worth probing deeper, for the fact that systemic effects are “inchoate”¹⁷⁹ does not make them any “less real.”¹⁸⁰ Systemic considerations might be evaluated through means short of quantifying them with mathematical precision. Indeed, if algorithmic expression were the standard, even the classic case of specific reliance in the form of economic investments would often pose insurmountable obstacles to judicial assessment.¹⁸¹

Despite the impossibility of exactitude, both the specific and systemic dimensions of adjudicative change are amenable to judicial analysis.¹⁸² It is possible for the Supreme Court to predict that overruling a landmark case might require extensive responses by private stakeholders as well as regulatory and legislative bodies. It may likewise be possible to conclude that many onlookers who have no direct connection to a precedent would need to update their understandings of the legal backdrop if the precedent were overruled. And it may even be possible to view the combination of these effects as suggesting a marginal reduction in the stability of the legal equilibrium, thereby affecting broad norms of constancy, dependability, and the rule of law.¹⁸³ A court will never be able to express these disruptive impacts with

¹⁷⁹ Barnett, *supra* note 42, at 266 (“The problem with the reliance argument is not with its validity, but that it is usually applied much too broadly to cases where people have ‘relied’ in much too inchoate a sense.”).

¹⁸⁰ Nelson, *supra* note 118, at 63; *cf.* Lee, *supra* note 1, at 702 (“If private investment in contract and property interests is sufficient to demand adherence to arguably erroneous precedent, public investment in governmental structures should produce a similar effect.”).

¹⁸¹ On the concept of specific reliance, see *supra* Part IV.B.

¹⁸² *Cf.* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990) (“The previous decision on the subject may be clearly incorrect but nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now. This is a judgment addressed to the prudence of a court, but it is not the less valid for that.”).

¹⁸³ See DUXBURY, *supra* note 52, at 162 (“When courts decide consistently on the same facts they not only provide us with important information for the purposes of organizing our individual affairs but also make it more likely that citizens generally will negotiate the legal system with confidence . . .”).

absolute precision. It may, however, conclude that the effects are likely to be minor, moderate, or extreme, and it may strive to understand the myriad ways in which disruption is likely to occur.¹⁸⁴ That type of rough accounting is not perfect, but it is useful in capturing the disruptive costs to be weighed against the benefits of overruling a dubious precedent.

Steven Calabresi has advanced a very different argument for revising the doctrine of *stare decisis* based on considerations of institutional competence.¹⁸⁵ Professor Calabresi questioned the ability of courts to “[a]ssess[] the costs to society associated with retaining a precedent and weigh[] those costs against the reliance interests . . . that a precedent may have generated.”¹⁸⁶ That sort of enterprise, he argued, is “much more within the competence of the political branches of the federal government than it is within the competence of the Supreme Court.”¹⁸⁷ To translate these principles into practice, Professor Calabresi advocated a revised approach to precedent whereby courts refrain from invoking *stare decisis* in cases where a decision is challenged by the Executive or Legislative Branches.¹⁸⁸

Though Professor Calabresi’s criticisms have force, I harbor doubts about outfitting the political branches with the power to determine which judicial precedents are settled.¹⁸⁹ It is sensible for courts to give careful consideration to any data the government proffers regarding the consequences of overruling a precedent. It may even be sensible for courts to adopt a posture of deference toward the government’s empirical judgments made in light of such data. But the choice to retain or overrule a dubious precedent requires both diagnosis of a substantive error and appraisal of the error’s legally relevant implications.

¹⁸⁴ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 925–26 (2007) (Breyer, J., dissenting) (offering a useful illustration of such an approach, albeit one couched primarily in the backward-looking language of reliance rather than the forward-looking language of disruption).

¹⁸⁵ See Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 340–45 (2005).

¹⁸⁶ *Id.* at 340. Among the reasons Professor Calabresi offered was that “the political branches . . . have much better institutional tools for assessing the twin empirical questions of: 1) what costs is a precedent currently imposing on society and 2) to what extent have reliance interests grown up around a precedent suggesting it ought to be retained.” *Id.* at 341.

¹⁸⁷ *Id.* at 340.

¹⁸⁸ See *id.* at 344 (“[O]n the empirical and policy question of whether the benefits of overturning a precedent outweigh the reliance interests engendered by that precedent the Supreme Court ought always to defer to the judgment of politically elected officials . . . unless those democratically accountable officials can be shown to have acted irrationally.”).

¹⁸⁹ See *id.* (arguing that “the coordinate, coequal, political branches of government are constitutionally entitled to force the Supreme Court to rule on the merits and not to fall back on the policy of *stare decisis*”).

The process of identifying the “costs [that] a precedent is currently imposing on society”¹⁹⁰ requires a threshold determination of which costs are legally relevant—in other words, of what makes an erroneous precedent harmful.¹⁹¹ Such inquiries are properly charged to the judiciary in the post-*Marbury*¹⁹² world.

Judicial assessments of the net effects of deviating from precedent may be informed by the same types of evidence of disruptive impact that Congress would utilize in making its own determination. Yet the ultimate comparison of the value of settlement versus the value of adjudicative change is better left to the courts as a component of “[t]he judicial Power” that they are charged with exercising.¹⁹³

B. *The Systemic Perspective as Applied: The Case of Citizens United*

In exploring the implications of the shift from reliance to disruption and the attendant adoption of a systemic perspective, an additional example will be helpful. The Supreme Court recently provided a fascinating illustration of precedent in action in *Citizens United v. FEC*.¹⁹⁴ The case represents a significant, controversial, and eminently debatable decision to depart from settled law.

Citizens United was a remarkable case in numerous respects. It generated significant popular criticism and legislative reform efforts,¹⁹⁵ not to mention a prime-time, face-to-face scolding during the State of the Union address.¹⁹⁶ The case dealt mainly with the regulation of political speech, but principles of stare decisis also played a prominent role. To set the stage: In *Austin v. Michigan Chamber of Commerce*, the Court upheld a ban on using corporate treasury

¹⁹⁰ *Id.* at 341.

¹⁹¹ See generally Kozel, *supra* note 50.

¹⁹² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁹³ U.S. CONST. art. III, § 1.

¹⁹⁴ 130 S. Ct. 876 (2010).

¹⁹⁵ See, e.g., DISCLOSE Act, H.R. 5175, 111th Cong. (2010); Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 (“With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century.”).

¹⁹⁶ See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 531 (2012) (“Barack Obama not only denounced the Court’s opinion in *Citizens United*, he did so in front of several Justices.”); Friedman, *supra* note 13, at 39 (“*Citizens United* serves only to underscore the sort of publicity explicit overruling of important precedents can engender. The case was front-page news virtually everywhere.”).

expenditures to endorse or oppose candidates for state office.¹⁹⁷ That decision was based largely on “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”¹⁹⁸ When it reconsidered the issue in 2010, the *Citizens United* Court flatly rejected *Austin*. A divided Court dismissed the notion that “political speech may be banned based on the speaker’s corporate identity.”¹⁹⁹ While the “[g]overnment may regulate corporate political speech through disclaimer and disclosure requirements,” the Court reasoned, “it may not suppress that speech altogether.”²⁰⁰

Despite its decision to expressly overrule a relatively recent precedent, the majority in *Citizens United* offered only a brief discussion of *stare decisis*, leaving a fuller exposition to Chief Justice Roberts in his concurrence.²⁰¹ But what the majority did say was noteworthy. Most intriguingly, and true to the tenor of prior debates over precedent,²⁰² the majority asked whether the protection of reliance expectations might justify abiding by *Austin* notwithstanding that opinion’s wrongness on the merits.²⁰³ The majority answered in the negative. It found that “[n]o serious reliance interests are at stake,” a fact that distinguished *Austin* from “property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions.”²⁰⁴ The majority also downplayed the role of legislative reliance. Though it acknowledged that “[l]egislatures may have enacted bans on corporate expenditures believing that those bans were constitutional,” it concluded that such reliance is “not a compelling interest for *stare decisis*.”²⁰⁵ To rule otherwise would be to allow “legislative acts [to] prevent us from overruling our own precedents, thereby interfering with our duty ‘to say what the law is.’”²⁰⁶

¹⁹⁷ 494 U.S. 652, 655 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

¹⁹⁸ *Id.* at 660; *see also id.* (reasoning that “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions”).

¹⁹⁹ *Citizens United*, 130 S. Ct. at 886.

²⁰⁰ *Id.*

²⁰¹ *See id.* at 920–24 (Roberts, C.J., concurring).

²⁰² *See supra* Part I.

²⁰³ *Citizens United*, 130 S. Ct. at 913.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

As for the Chief Justice, he depicted *Austin* as a contested “aberration” that itself represented a departure from settled law.²⁰⁷ He also criticized *Austin* as embodying the “destabilizing” proposition that the government may prohibit “political speech by a category of speakers in the name of equality.”²⁰⁸ And he characterized the Solicitor General’s attempt to defend *Austin* on a new rationale—that is, a rationale the *Austin* Court had not itself adopted—as undermining any claim that *Austin* was entitled to deference.²⁰⁹ According to the Chief Justice, “There is . . . no basis for the Court to give precedential sway to reasoning that it has never accepted.”²¹⁰ That statement echoed a similar point raised by the majority but phrased in the milder terms of “diminished” deference for precedents that are defended on novel rationales.²¹¹

Writing in partial dissent, Justice Stevens asserted that the reliance interests that are relevant to the stare decisis inquiry are not limited to “personal rights involving property or contract.”²¹² To the contrary, the implicated interests include “the ability of the elected branches to shape their laws in an effective and coherent fashion.”²¹³ In the case at hand, Justice Stevens deemed it significant that state legislatures and Congress had relied on the distinction between corporate and individual speakers that was embraced in *Austin* in crafting their campaign finance laws.²¹⁴ He also contended that “[b]y removing one of its central components, today’s ruling makes a hash out of [the Bipartisan Campaign Reform Act’s] ‘delicate and interconnected regulatory scheme.’”²¹⁵

Compared to the majority opinion and the Chief Justice’s concurrence, Justice Stevens’s partial dissent ascribed greater import to the consequences of deviating from precedent for parties beyond those directly affected by the *Austin* rule. Even so, his position would have been bolstered by a more comprehensive account of *Austin*’s systemic effects, as well as a reorientation

²⁰⁷ *Id.* at 921 (Roberts, C.J., concurring) (internal quotation marks omitted).

²⁰⁸ *Id.* at 922.

²⁰⁹ *See id.* at 924 (“To be clear: The Court in *Austin* nowhere relied upon the only arguments the Government now raises to support that decision.”).

²¹⁰ *Id.* Chief Justice Roberts added that “the Government’s new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent.” *Id.*

²¹¹ *Id.* at 912 (majority opinion) (“When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.”).

²¹² *Id.* at 940 (Stevens, J., concurring in part and dissenting in part).

²¹³ *Id.*

²¹⁴ *Id.*; *see also id.* at 930 (“The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin* . . .”).

²¹⁵ *Id.* at 940 (quoting *McConnell v. FEC*, 540 U.S. 93, 172 (2003)).

from backward-looking reliance to forward-looking disruption. Assuming *Austin*'s incorrectness on the substantive merits, the most straightforward argument for retaining it is not that legislators and citizens previously took actions in reliance upon its future validity. As explained above, whether such reliance deserves judicial solicitude is a complex and debatable question.²¹⁶

The more powerful rationale is that the Court's jettisoning of *Austin* would undoubtedly require extensive modification to behaviors and understandings going forward. In the legislative sphere, the departure from *Austin* requires a new approach to campaign finance regulation that is constructed around disclosures and disclaimers rather than expenditure bans. This is true regardless of whether state and federal legislative officials should have foreseen the overruling of *Austin* as a realistic possibility when they were engaged in their previous efforts to regulate campaign finance. Further, the First Amendment transition brought about by *Citizens United* carried effects for society at large. Onlookers whose conduct and investments were not directly affected by the rejection of *Austin* nevertheless were required to process a meaningful change to the content of the legal backdrop governing political elections, an issue that touches the lives of all Americans. That, too, is a transition cost of adjudicative change.

It does not necessarily follow that these considerations should have precluded the overruling of *Austin*. The resolution of that issue depends on the relationship between the benefits of overruling *Austin* and the disruptive effects it would create. Whatever the proper result in the ultimate reckoning, the foregoing discussion of *Citizens United* illustrates the type of inquiry that is called for by a systemic approach to the disruption caused by adjudicative reversals.

C. Change, Adjudicative and Otherwise

A modification of the legal order can carry destabilizing effects regardless of the precipitating actor—be it a court, legislature, or administrative agency.²¹⁷ The frequency with which legal changes are initiated by the Executive and Legislative Branches makes it important to consider whether the

²¹⁶ See *supra* Part III.

²¹⁷ See Kaplow, *supra* note 43, at 614–15 (“Changes in government policy often impose gains and losses on those who made investments prior to reform. This observation holds true regardless of whether the changes are implemented, modified, or clarified by courts, regulatory agencies, or legislatures; it also applies to changes in the likelihood that such actions will be taken.”); Kozel & Pojanowski, *supra* note 19, at 155–58 (discussing the costs that can result from policy reversals by administrative agencies).

disruption-based, systemic perspective that I have advocated should extend beyond the judiciary.

Disruptive impacts can result from any change to the legal regime. The desire to promote stability and minimize tumult accordingly might be viewed as creating a general preference for legal continuity across all branches of government. With respect to legislative and executive actors, however, there is a competing interest in political responsiveness. The people enact their policy preferences through their elected representatives, and the effectuation of the democratic will serves as a counterweight against the pull of constancy.²¹⁸

In the context of judicial decision making, the value of political responsiveness dissolves. The role of the judge is in large part defined by the need to resist shifting political tides. Though the federal process of judicial appointment and confirmation is steeped in political considerations,²¹⁹ the Constitution provides the Justices with substantial insulation from popular accountability for their decisions.²²⁰ That structural arrangement reflects a vision of judging as separate from politically responsive lawmaking.²²¹ It justifies the maintenance of a special inclination in favor of continuity within the judiciary notwithstanding the ebb and flow of politics.²²²

Even so, respect for precedent and a general preference for stability continue to possess some value within the political branches.²²³ While the role of democratic responsiveness will affect the degree to which change is deemed

²¹⁸ Cf. Graetz, *supra* note 80, at 78–79 (“[A] requirement that once a law is enacted it must remain unchanged raises fairness problems itself, particularly in a system of laws produced by representative democratic political institutions, subject to periodic changes in representation and political leadership.”).

²¹⁹ I suspect the same principles would apply even to elected judges on state courts, on the rationale that their decisions should not be affected by considerations of political accountability.

²²⁰ See U.S. CONST. art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”); Dorf, *supra* note 2, at 209 (“By the deliberate design of Article III, federal judges cannot be held accountable to political pressures.”).

²²¹ See Kozel & Pojanowski, *supra* note 19, at 148 (“One pillar of the rule of law is the ideal that governmental pronouncements about the intrinsic meaning of legal texts should aspire to be impersonal and principled rather than results-oriented and political.”).

²²² Along similar lines, Jeremy Waldron has suggested that the potential rapidity of adjudicative change creates a greater need for constancy within the judiciary. See Waldron, *supra* note 29, at 28 (“So far as legislation is concerned, the processes are cumbersome and hard to mobilize But judicial decisions are made every day, each one with the potential to change the law.”).

²²³ See, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION 48 (2010) (“[W]hen Congress or the executive branch has the last word on constitutional issues in the United States . . . they often use a precedent-based, common law approach.”).

desirable, this Article's urging of an analytical focus on disruption and systemic effects is equally applicable to any department of government.²²⁴

D. Contextualizing Disruption

The disruptive consequences of adjudicative change are only one element of the stare decisis enterprise. As Justice Brandeis's aphorism about the distinction between "settled" and "settled right" reminds us, there are other aspects to consider.²²⁵ Under the Supreme Court's doctrine of stare decisis, the choice to retain a dubious precedent depends on evaluating both the interest in preserving what was previously decided and the interest in implementing a sound interpretation of the law.²²⁶ Once the Court has assessed the disruptive effects likely to accompany a deviation from precedent, it must decide whether those effects are outweighed by the harms associated with keeping the offending precedent on the books.²²⁷ Though this Article has dealt with matters of reliance and disruption, it is worth spending a moment to bring the competing considerations into view.

Repudiating a dubious precedent can yield benefits as well as costs.²²⁸ The most obvious gain is the replacement of the flawed legal rule with a superior one. Perpetuation of the flawed rule may create actual costs that could be avoided by its repudiation. The continued failure to implement the correct rule may also create opportunity costs by denying society the advantages that would accrue if the law were interpreted correctly. These points are predicated on the assumption that the subsequent court is accurate in its conclusion regarding which legal rule is substantively correct, as well as the assumption

²²⁴ The Legislative and Executive Branches also have greater powers than the courts to strike compromises that may result in more equitable distribution of the costs and benefits of legal change. Those powers could affect the calculus of whether a given change reflects desirable policy, though they do not dilute the importance of adopting a systemic perspective toward the disruptive impact of overrulings.

²²⁵ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

²²⁶ *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) ("When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.").

²²⁷ *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) ("To be sure, reliance on a judicial opinion is a significant reason to adhere to it The reliance interests here, however, . . . cannot justify an inefficient rule" (citations omitted)).

²²⁸ *Cf. Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 199 (2006) ("Let's assume that the rule of law provides very great benefits. We can nonetheless imagine that the benefits of the rule of law can be outweighed if the substance of the legal status quo is sufficiently bad.").

that implementing the correct rule really is a good thing for society.²²⁹ Both assumptions may be questioned,²³⁰ but if one believes that correct interpretations of the law are presumptively beneficial and that subsequent courts possess the ability to identify where their predecessors went astray, permitting breaks from settled precedent can be desirable—at least when the disruptive impacts of change are not overwhelming.

Discarding a cumbersome precedent may also yield benefits in terms of decisional efficiency and predictability by supplanting a rule that has proved unworkable in application.²³¹ In addition, when two discrete lines of precedent come into apparent conflict, discarding one of the lines can enhance the coherence and rationality of the legal backdrop by eliminating a glaring incompatibility.²³² There are also potential rule-of-law benefits to maintaining the legal system's ability to adapt, self-correct, and respond to reasoned argument.²³³ The judiciary's resolute retention of a flawed precedent might occasionally do more to hamper the rule of law than to promote it.²³⁴ In those cases the courts can provide “greater reassurance of the rule of law by eliminating [rather] than by retaining” a problematic decision.²³⁵ Finally,

²²⁹ Cf. Fisch, *supra* note 59, at 103 (“Modern transition analysis is premised on the assumption that legal change generally improves the law”); Kaplow, *supra* note 43, at 521 (noting that if the relevant legal changes “were undesirable, transition policies that inhibited reforms to the greatest extent possible would be beneficial”).

²³⁰ See Logue, *supra* note 84, at 236 (noting the importance of distinguishing situations where “we can expect law to make distinct, identifiable, long-term progress over time” from situations “where the law is expected instead to cycle back and forth between various policies either based on alternative and mutually exclusive visions of the good or, less optimistically, based on shifting coalitions among interest groups”).

²³¹ See, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009) (“[T]he fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.” (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).

²³² See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 232 (1995) (O'Connor, J.) (“We cannot adhere to our most recent decision without colliding with an accepted and established doctrine.”).

²³³ See Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 8–9 (2008) (“Instead of the certainty that makes private freedom possible, the procedural aspects of the Rule of Law seem to value opportunities for active engagement in the administration of public affairs.”).

²³⁴ See Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37, 40–41 (2013).

²³⁵ *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); see also *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting) (“It damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions.”); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970) (“[A] judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy.”); Waldron, *supra* note 29, at 7 (noting that adherence to precedent might create rule-of-law costs by forcing a judge to “submit to the continuing effect of the decisions

correcting an erroneous interpretation can “promote[] ‘democratic values’ by bringing the law enforced in court closer to the collective judgments that our representatives have authoritatively expressed.”²³⁶

The objective of this superficial overview is simply to underscore the breadth of factors that may inform the stare decisis enterprise. Depending on their theories of interpretation and adjudication, different judges and commentators will give varying import to these factors.²³⁷ Different judges and commentators will also adopt different views of the comparative significance of minimizing societal disruption. This Article does not presuppose or advocate any particular view of the relative weight to which considerations of disruption should be entitled in the doctrinal calculus. My point is simply this: any judge or commentator who is inclined to give some regard to settled expectations needs a theoretical justification for paying attention to such expectations and an analytical framework for assessing them.

CONCLUSION

In a previous article, I argued that reliance considerations are even more important to the Supreme Court’s stare decisis jurisprudence than is commonly noted, but that the inquiry into reliance is often conducted indirectly and superficially.²³⁸ The conception of reliance I offered was broad, encompassing past behaviors as well as forward-looking effects.²³⁹

This Article has added two dimensions to that argument. The first entails grappling with the threshold question of why reliance on precedent warrants judicial attention in the first place. I have contended that there are several potential answers, but that all of them face serious challenges. The Article’s second undertaking has been to urge an analytical shift from backward-looking reliance to the forward-looking transition costs of adjudicative change. Defining the problem in terms of disruption emphasizes the focus of stare decisis on managing social costs rather than protecting individual rights and

of people in the past even though (as he sees it) their decisions are taking us in a direction contrary to that required by the independent source of law”).

²³⁶ Nelson, *supra* note 118, at 61–62 (also arguing that “the primary reason we want courts to avoid erroneous interpretations of the written law is that we value democracy”).

²³⁷ See generally Kozel, *supra* note 50 (analyzing the ways in which theories of precedent are derivative of methods of legal interpretation).

²³⁸ See Kozel, *supra* note 136, at 414 (arguing that many of the factors that are relevant to the Supreme Court’s application of stare decisis are better viewed as proxies for the implicated reliance interests).

²³⁹ See *id.* at 453–64.

investment-backed expectations. It accordingly provides a means of indirectly validating the doctrinal focus on stakeholder expectations without needing to answer the thorny question of whether stakeholder reliance warrants protection on moral, pragmatic, economic, or other grounds.