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STARE DECISIS AND INTERSYSTEMIC ADJUDICATION

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Interpreting and following precedent is a complicated business. Various reasonable but conflicting methods of ascertaining the legal effect of precedent exist. Differences between practices of precedent or doctrines of stare decisis are particularly salient between legal systems or jurisdictions. For example, a state's judges might embrace different stare decisis norms than federal judges. This situation presents a major quandary for intersystemic jurisprudence that has been largely overlooked in the scholarly literature.

Are law-applying judges in the intersystemic context bound by the law-supplying jurisdiction's methods of interpreting precedent? For example, when the Seventh Circuit Court of Appeals adjudicates a question of Wisconsin state law, do the federal judges have to adopt the interpretive methodology that Wisconsin judges apply to judicial decisions? It is well-settled that the federal judges have to apply Wisconsin precedent, but whether the federal judges have to apply Wisconsin's doctrines of stare decisis is an open question. Since these doctrines may be highly outcome-determinative, the intuitive answer would seem to be that they are indeed interjurisdictionally binding. That answer, however, is too quick.

As this Article documents, in practice judges often do not defer to the law-supplying jurisdiction's stare decisis doctrine. Although this lack of deference may seem inappropriate, it is not always or necessarily a mistake. This Article presents a novel theory of stare decisis and interpretation in the intersystemic context, which connects the deference quandary to jurisprudential debates about the very nature of law, showing

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how different legal theories generate different answers to the question of whether, in a given case, methods of interpreting precedent are interjurisdictionally binding. The Article thus illuminates the integral relationship between analytical jurisprudence and a ubiquitous but undertheorized quandary about intersystemic adjudication.

INTRODUCTION

The interpretive approaches of judges differ substantially across jurisdictions. Some jurisdictions, for example, are more purposivist, whereas others lean more textualist. What is a court to do, then, in the intersystemic context when it is charged with adjudicating a dispute arising under the substantive law of another jurisdiction? For example, if the Seventh Circuit Court of Appeals exercises diversity jurisdiction over a Wisconsin state law dispute, is it bound by the methods that Wisconsin state judges would use to interpret state statutes and regulations, judicial decisions, and the state constitution?

This issue arises frequently, although often only implicitly, in all kinds of cases and courts. Federal courts have to interpret state law

whenever they exercise diversity or supplemental jurisdiction. State courts are often tasked with interpreting federal law or the law of other states. Sometimes courts are even charged with interpreting the law of foreign countries.

Judges, lawyers, and scholars generally agree that, in the intersystemic context, the law-applying or *forum* court is not permitted to just make up the law to be applied, nor to impose the law of its own jurisdiction. Instead, the forum court must treat the foreign jurisdiction as the law-supplier. The court has the task, accordingly, of interpreting and applying the law of the other jurisdiction, which involves identifying that jurisdiction's sources of law and determining their legal effect on the dispute at hand.

But must the forum court also apply the methods of interpretation that courts in the law-supplying jurisdiction would use? If the law-supplying jurisdiction embraces purposivism as a means of interpretation, then should the forum court follow interpretive suit? What if the forum court judges believe that textualism is a superior method of interpretation? And what if they are right about that?

This Article argues that the duty to apply the substantive law of another jurisdiction does not necessarily entail a duty to apply that jurisdiction's interpretive norms. The Article shows how one's answer to this question of interjurisdictional interpretation turns on one's theory of law. Although I focus on the U.S. federal-state context, my analysis should apply just as well to any other context where courts in one jurisdiction apply another jurisdiction's law. And so the conclusions reached here have critical implications for our legal system as well as others.

Under H.L.A. Hart's positivist theory of law, law-applying judges will generally have an obligation to defer to the interpretive methods of the judges in the law-supplying jurisdiction, although in some cases they will have discretion to depart from those methods and in other cases even an obligation to do so. In contrast, under Ronald Dworkin's competing theory of law as integrity, law-applying judges will often have an obligation to apply their own interpretive methods to a dispute arising under another jurisdiction's law, even if these methods differ from the interpretive methods of the judges in the law-supplying jurisdiction.

This Article thus demonstrates the critical relevance of analytical jurisprudence to conflict of laws theory and practice. To get traction on vital questions about interpretation in the intersystemic context, we have to address core philosophical questions about the nature of law, a point that has been neglected in the existing literature on interpretation in the intersystemic environment.

This Article focuses on judicial approaches or methods of interpreting and applying precedent that themselves are developed through judicial decisions; I refer to these norms broadly as doctrines of stare decisis. My main argument, though, should extend to other types of legal interpretation and application as well, including judicial approaches to statutory interpretation. I focus on the interpretation of precedent because the topic has received little attention compared to its statutory counterpart and has been surprisingly undertheorized, in both judicial opinions and legal scholarship. At the same time, conflicting views about the doctrine of stare decisis have come to a head in recent Supreme Court decisions, revealing deep meta-precedential disagreement among the Justices.[1] Conflicts in methods of statutory interpretation among jurisdictions, courts, and judges have been well-documented and widely discussed in legal scholarship, whereas conflicts in methods of precedential interpretation have seen much less scholarly attention.[2] Further, we already have a rich body of descriptive literature on whether courts treat methods of statutory interpretation as interjurisdictionally binding,[3] but the corollary question of interjurisdictional deference to methods of precedential interpretation has received little study.

And yet, a great deal rides on the latter question. The interpretive methods that judges apply to previously decided cases determine the rules of decision that those cases represent and accordingly the legal rights and duties that they provide or impose. And, methods of construing precedent, just like their statutory and constitutional

1 *See, e.g.*, Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118 (2020) (analyzing the Justices' incompatible views in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), about the precedential status of plurality decisions); Richard M. Re, *Reason and Rhetoric in* Edwards v. Vannoy, 17 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2022) (discussing the Justices' differing views in *Edwards v. Vannoy* on overruling precedent, extending precedent, and affording precedent retroactive effect).

2 *See, e.g.*, Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation*: Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013) (covering statutory, but not precedential, interpretation); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (same); Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 Geo. L.J. 1573 (2014) (same); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (same); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (same); George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285 (1993) (same).

3 *See, e.g.*, Gluck, *supra* note 2; Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011) [hereinafter Gluck, *Intersystemic Statutory Interpretation*]; Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) [hereinafter Gluck, *The States as Laboratories of Statutory Interpretation*]; Foster, *supra* note 2.

counterparts, can and do differ across jurisdictions and courts.[4] For example, some courts interpret plurality decisions as binding precedent and some do not; some courts take the median or middle opinion of a plurality decision as binding, even if only one judge endorsed that opinion, whereas other courts search for majority agreement across all the opinions; some judges insist that all judicial decisions, even those that are "unpublished," create binding precedent, but for others unpublished decisions are not precedential. This Article takes methods of interpreting plurality or fractured decisions as a central case study, since these methods tend to be relatively explicit in judicial opinions, whereas other methods of interpreting precedent—for example, techniques for separating holdings from dicta—are more elusive.

For illustrative purposes, I focus on cases of federal courts interpreting state judicial decisions and state courts interpreting federal ones. Under the monumental case of *Erie Railroad Co. v. Tompkins*, a federal court adjudicating a state claim has a legal duty to apply state substantive law, including the judge-made law contained in state judicial decisions.[5] But are the methods that a state's courts use to interpret judicial decisions part of the state's substantive law for *Erie* purposes? Likewise, state courts of course have to apply federal precedent to questions of federal law, but do they necessarily have to apply federal methods of interpretation in the process?[6] Commentators have generally assumed affirmative answers to both questions, collapsing second-order questions of meta-precedent with first-order questions of precedent.[7] Although that position may be intuitive, this Article shows that it is too quick.

Through a descriptive analysis of federal courts interpreting state precedent and vice versa, I show that federal judges often act as though they are *not* required to apply a state's doctrine of stare decisis to a question arising under the state's case law, even as they recognize a

4 *See infra* Sections I.B–C and II.A–B.

5 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *Erie* overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), under which federal courts were supposed to apply "federal general common law" instead of state judicial decisions to state claims that were not governed by state statutory or constitutional provisions. *Erie*, 304 U.S. at 78.

6 The doctrine known as "reverse-Erie" represents the flipside of *Erie*: state courts apply federal substantive law, but state procedure, to federal disputes. *See, e.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 453–56 (7th ed. 2015) (explaining that, as a general rule, state courts adjudicating federal claims "apply the same procedures that apply when state law rights are adjudicated"). The scenarios are not symmetrical, however, since federal law preempts conflicting state law under the Supremacy Clause.

7 *See infra* notes 29–30 and accompanying text.

duty to apply the state's substantive law and genuinely endeavor to fulfill that duty. State courts applying federal precedent demonstrate greater but far from unequivocal deference to federal stare decisis doctrine. In the intersystemic context, courts do not treat doctrines of stare decisis the same as other judge-made doctrines.

The theoretical account of interpretive methodology and intersystemic adjudication that this Article develops would explain, and justify, the judicial practices that we observe in the context of federal-state interjurisdictional interpretation. Moreover, my account can shed light on the implicit theoretical commitments of both judges and scholars. A judge's treatment of stare decisis doctrine in the interjurisdictional context is indicative of their underlying theory of law. Likewise, a scholar's view about the extent to which judges *should* defer to the law-supplying jurisdiction on stare decisis methodology reveals their implicit jurisprudential commitments.

Part I reviews the related literature, and explains how methods of interpreting precedent can and do conflict. Part II shows how, in practice, judges often acknowledge that they have a duty to apply the precedent of another jurisdiction without recognizing a corresponding duty to apply the other jurisdiction's doctrines of stare decisis. Part III argues that, as a theoretical matter, methods of interpreting precedent do not necessarily travel with the underlying law; I show how our answer to this question of interjurisdictional adjudication depends on our jurisprudential commitments regarding the nature of law.

I. PRECEDENT AND INTERPRETIVE METHODOLOGY

This Part begins by defining some key terms and reviewing the related literature on interpretive methodology and conflict of laws. It then turns to an explanation of how methods of interpreting precedent can and do differ across jurisdictions, and illuminates the problem with an example of a federal-state conflict in interpretive approach: the example shows how the same precedent may have different legal implications in federal and state court as a result of interjurisdictional differences in stare decisis doctrine.

A. Terminology

By *interpretation*, I mean the process of ascertaining the relevant sources of law as well as the legal meaning of those sources—that is, the legal rights and duties that they represent or generate. This is an admittedly capacious conception of interpretation, but it is not novel.[8]

8 *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 9 & n.29 (1994) (explaining that the two

In the context of adjudication, the interpretive process involves identifying the relevant legal materials and determining how they apply to a live legal dispute—the legal rights they supply and the duties they impose on the litigants. By *methods of interpretation*, then, I mean the techniques that judges use to identify sources of law and ascertain their legal meaning in the process of deciding cases. For the purposes of this Article, I focus on one type of legal source—judicial decisions—and so the methods I am interested in are methods of interpreting precedent or methods of *precedential interpretation*: that is, the techniques, tools, or algorithms that judges use to figure out the legal rules that past judicial decisions stand for and the effect those rules have on new disputes that the judges are tasked with adjudicating. I view these methods as part of stare decisis jurisprudence or doctrine, since they determine what it means for a court to follow or comply with stare decisis.

Methods of interpretation are often only implicit in practice, especially in relatively easy cases that do not raise interpretive disagreement. But under the broad conception of interpretation that this Article embraces, judges are engaged in interpretation even in clear-cut cases where reasonable people would not disagree about what the applicable legal sources prescribe.[9] Other commentators, for example Professor Andrei Marmor, define interpretation more narrowly; under Marmor's conception, the law calls for interpretation only "when its content is indeterminate in a particular case of its application" and judges have discretion over the outcome of the case.[10] For Marmor, then, interpretation comes into play in hard cases only. This semantic difference does not necessarily reflect any substantive difference in our views, however. I prefer the more expansive usage because it seems to align better with how judges conceive of adjudication—that is, as involving interpretation even in determinate cases. Indeed, I want to reserve judgment on the question of whether indeterminate cases even exist.[11] Even if indeterminacy in law were an illusion, interpretation would, I believe, remain in the adjudicative picture.

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steps of "identifying the relevant sources of law" and interpreting those sources "are interactive" and are both part of the broader process of interpretation in which judges engage).

9 *See, e.g.*, RUPERT CROSS, STATUTORY INTERPRETATION 1–2 (John Bell & Sir George Engle eds., 3d ed. 1995) (defining *interpretation* "in the broad sense" as "[t]he process of reading a statute and applying it").

10 ANDREI MARMOR, PHILOSOPHY OF LAW 145 (2011).

11 Some theorists (perhaps most notably Ronald Dworkin) have suggested that the law supplies a right answer in all legal disputes. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1977) (arguing, against critics, that "there is one right answer," even in hard cases).

Further, some commentators insist on a conceptual distinction between legal *interpretation* and *construction*, where the former refers to the discovery of the "linguistic meaning or semantic content of a legal text" and the latter to the translation of that content into legal meaning or doctrine.[12] I am hesitant to adopt this distinction, because it seems to me that legal texts do not necessarily have linguistic meaning apart from their legal context, and once linguistic meaning is informed by legal context, that meaning is already legal meaning.[13] In any event though, this Article's argument does not depend on a rejection of the distinction between interpretation and construction. Those who embrace that distinction should understand my interest here, despite my terminology, to be in legal *construction*: that is, the process of identifying and applying the legal rules that govern a particular dispute.

B. Related Literature

The scholarly literature on interpretive methodology revolves around statutory and constitutional interpretation.[14] And the problem of intersystemic conflicts in interpretive methodology has attracted extensive attention in those contexts.[15] Many scholars argue that

12 Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96, 103 (2010).

13 Professor Richard Fallon, I think, makes a similar point when he says that, "[i]f an utterance's linguistic meaning is its meaning in context, and if an utterance occurs in a legal context, then perhaps any relevant legal norms are elements of the context that generate linguistic meaning." Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 299 (2019).

14 For examples of this scholarly attention to statutory and constitutional interpretation, see *supra* note 2. Professor Craig Green is a notable exception to this trend. *See* Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 381 (2016) (observing that, in contrast to statutory and constitutional law, "methodological questions of how to interpret judicial decisions are widely ignored") [*hereinafter* Green, *Turning the Kaleidoscope*]; Craig Green, Erie *and Constitutional Structure: An Intellectual History*, 52 AKRON L. REV. 259, 272–73 (2018) (calling for greater attention to precedential interpretive methodology and asserting that methods of precedential interpretation "are just as unrecognized in practice as they are unnamed in theory"). In the former article, Green identifies different approaches to precedential interpretation, including originalism and "living precedentialism," and examines their implications for a few select precedents. Green, *Turning the Kaleidoscope*, *supra*. Using a different kind of schema, I have delineated various methodological options for following precedent in previous work. *See* Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS. 62 (2018).

15 *See, e.g.*, Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 3, at 1754 (arguing that the *Erie* doctrine should apply to methods of statutory interpretation); Foster, *supra* note 2, at 1870 (arguing that courts should "give stare decisis effect" to methods of statutory interpretation); Rutherglen, *supra* note 2, at 294 (1993) (suggesting that federal methods of statutory and constitutional interpretation represent common law

judges are entitled to use their own preferred methods of statutory interpretation, regardless of the body of law they happen to be interpreting.[16] As Professor James Thomas notes, "there are not too many legal scholars who would take the position that rules and maxims of statutory construction are legal rules [that bind judges]."[17] These scholars (and the many judges who agree with them) understand methods of statutory interpretation as "rules of thumb" or elements of judicial philosophy as opposed to binding norms and insist that judges could not carry out the judicial function or properly exercise the judicial power if they were bound to apply methods of statutory interpretation that they disapprove of.[18] The upshot of this position for the interjurisdictional context is that a law-applying court need not defer to the statutory interpretive methodology of the law-supplying jurisdiction.

Some commentators, taking a practical and consequentialist view of the issue, have suggested that the utility of a method of legal interpretation depends on details of the dispute that a court has been asked to resolve—details that will inevitably vary from case to case—and so methods of statutory interpretation are unlikely to have the

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doctrines); Criddle & Staszewski, *supra* note 2, at 1593 (arguing that "statutory interpretation methodology does not seem susceptible to the rule-like approach of stare decisis" (quoting Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1811 (2010))).

16 *See, e.g.*, James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Court of Appeals*, 58 WM. & MARY L. REV. 681, 763 (2017); Criddle & Staszewski, *supra* note 2, at 1576; William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321–22 (1990).

17 James C. Thomas, *Statutory Construction when Legislation is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191, 208 (1966); *see also* Gluck, *supra* note 2, at 757 (asserting that the idea that rules of statutory interpretation have or should have precedential effect "has been rejected by all federal courts and most scholars"). *But see* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) (arguing that interpretive methodology does constitute law).

18 *See, e.g.*, Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 367–77, 394 (2005); Gluck, *supra* note 2, at 756 (observing that "[a]lmost all jurists and scholars resist the notion that [methods of statutory interpretation] are 'law.' Instead, most contend that these tools, often called 'canons' of interpretation, are 'rules of thumb'—a legal category that seems to sit in between law and individual judicial philosophy."). *But see* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 126, 129–30 (2020) (illustrating, through an empirical study of federal court practices, that lower federal courts generally treat interpretive methods advanced by the Supreme Court as binding; and suggesting that, although "one can find plenty of statements, from whatever court one likes, to the effect that canons are merely 'rules of thumb,'" "[s]uch statements usually mean, in context, that a canon is not determinative of a proper interpretation but must be considered in light of other relevant factors," and thus "such pronouncements do not undermine the canons' precedential status").

stability that we would expect from binding rules.[19] For example, Professors James Brudney and Lawrence Baum suggest that, because different circumstances call for different interpretive approaches, "it is not practicable to allocate degrees of authoritative status to interpretive resources on a systemic basis."[20]

Arguing to the contrary that methods of statutory interpretation can and should bind judges, and focusing on the federal-state context, Professor Abbe Gluck maintains that we need an "*Erie* for the age of statutes."[21] She does not mean that federal courts adjudicating state claims ought to apply state statutory law. That was true even before *Erie*. The *Erie* decision brought state judge-made law into the fold of federal deference.[22] Gluck means, rather, that we need an *Erie* for *methods of statutory interpretation*.[23] For Gluck, the methods of statutory interpretation regularly used by courts in some jurisdiction, say the state of Colorado, belong to the substantive law of Colorado, and any court tasked with interpreting Colorado statutes ought to apply the state's interpretive methods to those statutes. Whereas Gluck suggests that, as a descriptive matter, federal courts adjudicating state claims often disregard the states' interpretive methods, Professor Aaron-Andrew Bruhl has recently mounted substantial evidence indicating that federal courts generally *do* apply state methods of statutory interpretation to state claims.[24]

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19 *See, e.g.*, Brudney & Baum, *supra* note 16, at 751–52. Abbe Gluck and Richard Posner's recent survey study of federal appellate judges' perspectives on statutory interpretation methodology corroborates Brudney and Baum's central claims. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302–03, 1313–14 (2018) (finding that most federal appellate judges surveyed favored a pragmatist, common-sense, and eclectic approach to statutory interpretation, and most judges do not treat interpretive canons as precedential, but instead as guidelines or tools). *But see* Bruhl, *supra* note 18, at 126–32 (arguing that the practices and declarations of lower federal courts indicate that they see themselves as bound by interpretive canons laid out by the Supreme Court).

20 Brudney & Baum, *supra* note 16, at 692.

21 *See* Gluck, *supra* note 2, at 753; Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1997.

22 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The *Erie* Court grounded its decision in the Federal Judiciary Act of 1789, section 34, which provides that state law shall apply to state law claims, "except where the Constitution, treaties, or statutes of the United States otherwise require or provide." *Id.* at 71 (quoting Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92). This section of the Federal Judiciary Act comprises the Rules of Decision Act and has been codified in 28 U.S.C. § 1652 (2021).

23 *See, e.g.*, Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1990–91 (advocating for a conception of statutory interpretation methodology as substantive law and asserting that "federal courts should apply state statutory interpretation methodology to state statutory questions").

24 Aaron-Andrew P. Bruhl, *Solving Statutory Interpretation's* Erie *Problem*, 98 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 12–17), https://papers.ssrn.com/sol3

Scholars have largely glossed over the analogous intersystemic deference problem concerning the interpretation of precedents or judicial decisions.[25] Perhaps this is because methods of interpreting precedent tend to be more elusive than methods of interpreting statutes and constitutions. Judges often explicitly reflect on methods of statutory and constitutional interpretation in their opinions as well as their extra-judicial writings, debate the relative merits of various methods, and expressly commit to or identify with certain methods while rejecting others.[26] In contrast, judges regularly follow, distinguish, and overrule previous judicial decisions without justifying or even noting the interpretive choices that they make in the process.

And yet, these interpretive choices are ubiquitous. In almost all cases, judges are called upon to interpret previous judicial decisions directly. The same is not true of statutes. Even in cases that implicate a statute, judges often do not interpret the statutory provisions directly but instead rely on a previous decision's interpretation of those provisions. For this reason, some scholars refer to precedent itself as a tool, and even "the dominant" tool, of statutory interpretation.[27] Bruhl writes that "[t]he overwhelming importance of precedent in the lower courts today, combined with the rarity of cases of first impression, has left all *other* [statutory] interpretive tools . . . with less of a role to play."[28] In contrast, when it comes to precedent, even if judges can rely on a more recent decision's interpretation of some precedent, they still have to interpret the more recent decision.

/papers.cfm?abstract_id=3978040 (citing "published cases from every regional circuit and the D.C. Circuit stating that state statutes should be interpreted using state interpretive methods," and concluding that "federal courts generally understand themselves to be bound to apply state interpretive methods to state statutes").

25 *See, e.g.*, Gluck, *supra* note 2, at 757 (focusing on statutory interpretation); Criddle & Staszewski, *supra* note 2, at 1593 (same); Foster, *supra* note 2, at 1867 (same); Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1145 (1999) (same); Rutherglen, *supra* note 2, at 294 (focusing on statutory and constitutional interpretation); Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT (Christopher J. Peters ed., 2013) (focusing on constitutional interpretation).

26 *See e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997) (arguing in favor of textualism and originalism in statutory and constitutional interpretation).

27 Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 22 (2018) (explaining that, as "the important questions" raised by a new statute "are answered, precedent becomes the dominant interpretive tool and many disputes merely require application of settled law to particular facts").

28 *Id.* at 18. Moreover, as Bruhl notes, although "[t]he Court can of course overrule its precedents . . . stare decisis has particular force in statutory cases." *Id.* at 18 n.69.

To the extent that scholars address the issue of precedential interpretation in the interjurisdictional context, they generally assume that whether a court has a duty to apply a body of case law and whether the court must apply the interpretive methods of the jurisdiction responsible for that case law are one and the same question. According to Professor Richard Re, for example, "the [U.S. Supreme] Court generally lacks authority over interpretation of state court precedents."[29] Professor Ernest Young similarly asserts that, "if the law involved is really state law, then it is surely up to the state to determine" the content and scope that federal courts will afford the state's precedents.[30] This pervasive assumption is consistent with the version of *Erie* that we are taught in law school: a state has authority over its own substantive law, including decisional law, even when that law is applied in federal courts. If states have this kind of authority, they must also have authority to dictate how external courts will interpret their judicial decisions. On the prevailing view, then, the legal duty to apply a state's case law comes with an implicit legal duty to apply the state's methods of interpretation to that case law.

But the Court's decision in *Erie* specified only that federal judges must apply state substantive judge-made law. The Judiciary Act, which the Court interpreted in *Erie*, provides that "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision . . . in the courts of the United States," and is likewise silent on the question of *how* federal judges are to ascertain and apply state law.[31] Neither the Judiciary Act nor the *Erie* decision itself reveals whether federal courts must treat a state's methods of interpretation as part of the state's substantive law. And the Court hasn't addressed the issue in subsequent decisions either.

Gluck and others have shown, as a descriptive matter, that federal courts act inconsistently when they interpret state statutes: sometimes

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29 Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943, 1961 (2019); *see also* Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 97 n.18 (2002) (asserting that "it seems obvious that any court (state or federal) should apply *Marks* when construing a U.S. Supreme Court opinion"). For a discussion of the method of interpreting plurality decisions that the Supreme Court advanced in *Marks v. United States*, 430 U.S. 188 (1977), see *infra* notes 47–48 and accompanying text.

30 Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 54 (2013); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 982 (1986) (asserting that *Erie* "allows each state's highest court to be the ultimate arbiter of what state law means and thus defines our notion of what state law is"); Note, Erie v. Tompkins *and Federal Determinants of Place of Trial*, 37 IND. L.J. 352, 356 (1962) (stating that "the *Erie* principle . . . requires not only the application of state law but a state definition of that law as well").

31 28 U.S.C. § 1652 (2021).

they defer to state methods of statutory interpretation, sometimes they apply their own methods, and other times they rely on some combination of state and federal methods.[32] According to Gluck, courts generally do not approach the question of statutory interpretation as an *Erie* one: she observes that, "if federal courts understood [statutory] methodology as [substantive] common law," then "they would at least consider *Erie* when choosing how to interpret state statutes" but they do not do so.[33] As I show in Part II below, courts seem to approach the intersystemic interpretation of precedent in much the same way as they do statutes. Gluck and others observe that we do not have an *Erie* for statutory interpretation, and they insist that there is no good reason to single out statutory interpretation for special treatment.[34] But scholars have neglected to appreciate that the problem of conflicting methods of interpretation also arises in the context of applying precedent—and we do not have a robust *Erie* for precedential interpretation either.

So how do methods of interpretation manage to elude *Erie*'s grasp? After all, as Gluck and others have argued at length, there are good reasons to prefer a system in which any given body of law is interpreted using a uniform set of interpretive methods, no matter which court performs the interpretive task. If different courts apply different methods of interpretation to the same statute or judicial decision, then the legal effect of the source of law—the rights and duties it represents—might differ depending on which court happens to interpret it.[35] Although you could predict which body of substantive

32 *See, e.g.*, Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1933; Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 141 (2011) (observing that some federal courts adjudicating state claims employ the state's methods of statutory interpretation whereas others do not).

33 Gluck, *supra* note 2, at 787.

34 *See* Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 3, at 1847–48 (asserting that statutory interpretation should be no different from other types of interpretation and that "[a]s a matter of interpretive theory, this distinction [between methods of statutory interpretation and other types of interpretation] remains unjustified—or perhaps just unnoticed—in the legisprudence and the literature"); Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1898 (asserting that "[f]ederal courts routinely bypass state interpretive principles when they interpret state statutes, but almost always look to other state methodological principles"); Gluck, *supra* note 2, at 808 (suggesting that "[m]uch more work would have to be done to justify creating a special exception for statutory interpretation, while [affording legal status to] analogous interpretive . . . rules").

35 *See, e.g.*, Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1914, 1962 (suggesting that judicial resistance to treating methods of statutory interpretation as binding law that travels with first-order rules of decision enables unacceptable disuniformity in the application of law); *see also* Foster, *supra* note 2, at 1888 (appealing to "rule-of-law

law will apply to you—for example, if you are in conducting your affairs in Wisconsin, then Wisconsin state law will likely apply—you might not be able to predict whether your lawsuit will be adjudicated by a state or federal court. In turn, even assuming that you have familiarized yourself with Wisconsin law, you might not be able to predict the legal effect that it will have on your dispute. This lack of predictability would appear to be problematic for rule-of-law reasons.[36]

As I will argue, however, whether one believes that methods of interpretation are interjurisdictionally binding in a given case depends on one's theory of law. And, under at least two prominent legal theories—Hart's positivism and Dworkin's law as integrity—judges operating in the intersystemic setting are not necessarily bound by the interpretive methods of the law-supplying courts.

After presenting a descriptive account of intersystemic stare decisis in Part II, in Part III I take up the problem from a jurisprudential point of view. I develop a novel theory of interpretation in the intersystemic setting, which reveals the conditions that have to obtain for a jurisdiction's doctrine of stare decisis to be binding on judges operating outside that jurisdiction.

C. Conflicting Methods of Interpreting Precedent

In this section I discuss some of the most salient ways in which precedential interpretation can vary: (1) how broadly judicial decisions are construed; (2) how the number of judges who voted for the judgment of a case affects the case's force as a precedent; and (3) how, if at all, fractured decisions are binding. This list is nonexhaustive, however; doctrines of stare decisis can differ in other respects as well, including the status afforded unpublished decisions,[37] advisory opinions,[38] and the syllabi of decisions.[39]

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and coordination" considerations to argue that statutory interpretive methods should have legal status and should be subject to *Erie*).

36 *See, e.g.*, Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 12 (2012) (explaining how "the cluster of considerations concerned with predictability occupies a prominent place both in justifications of stare decisis and in various conceptions of the rule of law").

37 *See infra* notes 169–172 and accompanying text.

38 For example, from the perspective of Michigan state courts, "advisory opinions are not precedent." *In re* Apportionment of Wayne Cnty., Cnty. Bd. of Comm'rs–1982, 321 N.W.2d 615, 626 (Mich. 1982). And state courts generally "characterize advisory opinions as [technically] nonbinding," even though they often treat them as precedential. Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2266 (2017). An exception is Colorado, where the state Supreme Court has held that its advisory opinions constitute binding precedent. *Id.* at 2266 n.135.

39 For example, whereas the syllabi of U.S. Supreme Court decisions are not authoritative, Ohio courts have historically treated *only* the syllabi of Ohio Supreme Court

1. Scope

First, methods differ in terms of scope—that is, courts can interpret precedents more or less broadly.[40] On a broad approach, a court might determine that all or most legal propositions that a court articulates in a majority opinion are binding on subsequent cases, even propositions tangential to the precedent case's outcome. The traditional approach, though, is a narrower one, where only propositions integral to the outcome of a case make for binding law.[41] Another way of putting the point is that courts can draw the line between dicta and holdings differently, with some taking a more restrictive approach to holdings and others a more capacious one. To the extent that courts take differing approaches to precedential scope, and mounting empirical evidence suggests that they do, the question of whether methods of interpretation travel with substantive case law is of widespread consequence.[42]

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decisions as precedential (unless the court issues a per curiam opinion, in which case that is binding as well). For a discussion of the Ohio rule, see William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 323 n.71 ("At various points in its history, the syllabus rule seems to have been adopted as a rule of court or simply as case law. [The syllabus rule] also seems to draw some support from OHIO REV. CODE ANN. § 2503.20.").

40 Professor Randy J. Kozel discusses the matter of scope in depth in *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014).

41 Some courts purport to treat all "considered statements" contained in opinions issued by higher courts as binding law, whereas other courts subscribe to narrower views of vertical precedent. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2026 & nn.106–07 (1994) (presenting examples of U.S. federal courts that have differing views regarding precedential scope); *see also* Kozel, *supra* note 40, at 198 (observing that "[m]any lower courts have described Supreme Court statements as entitled to deference even when those statements were made in dicta" and that "[t]he strength of deference varies from court to court"). Kozel suggests, though, that currently the federal courts widely embrace "an *inclusive* paradigm of [U.S. Supreme Court] precedent in which binding effect attaches to a vast array of judicial propositions" and that this paradigm is in tension with "the more restrictive definition of precedent that is implied by the classic holding–dicta distinction." *Id.* at 183, 199. Charles Tyler finds that some courts, including the Ninth Circuit Court of Appeals, have adopted what he calls an "adjudicative model of precedent": on this model, which apparently expands the traditional scope of precedent, "any ruling expressly resolving an issue that was part of the case" is binding on subsequent cases, even if the outcome of the case did not turn on that issue. Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1551, 1554 (2020).

42 *See, e.g.*, Tyler, *supra* note 41, at 1575–84 (presenting empirical evidence to suggest that some courts take a systematically broader approach to precedent than others). See also *infra* notes 83–87 and accompanying text, for an example in which the U.S. Supreme Court used its own approach to the holding/dicta distinction to interpret a state case.

2. Voting

For many jurisdictions, a decision of the highest court has precedential effect so long as a majority of *participating* judges agreed on the judgment.[43] Michigan courts, for example, take this position, as do U.S. federal courts.[44] In some jurisdictions, however, it seems that a decision can only create precedent if a majority of the *whole* court agrees on the judgment. In North Carolina, with a Supreme Court comprised of seven justices, if less than a majority of that court agrees on a decision to affirm or reverse the North Carolina Court of Appeals—even if a majority of sitting Justices so agrees—then the Court of Appeals decision is automatically affirmed and the Supreme Court decision apparently does not carry precedential effect.[45]

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43 For an excellent analysis of the relationship between voting rules and precedent, see Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831 (2009).

44 *See, e.g.*, Negri v. Slotkin, 244 N.W.2d 98, 99–100 (Mich. 1976) (observing that "[w]ere we to hold that 3–2 or 3–1 decisions are not binding on the Court of Appeals and trial courts, the functioning of our judicial system would be adversely affected" and holding that, "lower courts [are] bound by majority decisions of this Court of less than four justices"); *see also* Nash, *supra* note 43, at 833–37 (discussing how the U.S. Supreme Court treats, for purposes of precedent, cases decided by a majority of the sitting justices but less than a majority of the whole court, which he calls "minority-majority" decisions). Since the Judiciary Act of 1789, Congress has set a floor on the number of U.S. Supreme Court justices required to decide a case, and the quorum since 1911 has been six. 28 U.S.C. § 1 (2021); *see also* Nash, *supra* note 43, at 843–44 (documenting how Supreme Court quorum requirements have changed over time). However, Congress has not prescribed methodological rules for stare decisis. Some commentators have suggested that such legislative directives would violate separation of powers principles. *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 588, 596 (2001) (suggesting that stare decisis represents "an authorized aspect of the 'judicial Power' conferred by Article III" and accordingly "deserves recognition as a legitimate, constitutionally authorized doctrine beyond Congress's power to control").

45 *See* Nw. Bank v. Roseman, 354 S.E.2d 238, 238 (N.C. 1987) (per curiam) (asserting that, since only five members of the court participated in the decision and they divided 3-2 on all issues, there thus "being no majority of the Court voting to either affirm or reverse, the decision of the Court of Appeals is left undisturbed"); Costner v. A.A. Ramsey & Sons, Inc., 351 S.E.2d 299, 299 (N.C. 1987) (per curiam) (same)). The North Carolina Supreme Court asserted in both of these cases that, since a majority of the Court could not agree on any of the issues, the lower court decision stood "without precedential value." *Id.*; *Roseman*, 354 S.E.2d at 238. However, in subsequent cases both state and federal courts have seemingly disregarded the latter point. *See, e.g.*, Flanary v. Wilkerson, No. COA10–1401, 2011 WL 5540195, at *5 (N.C. Ct. App. Nov. 15, 2011) (treating the North Carolina Court of Appeals decision in *Roseman* no differently for the purposes of precedent than Court of Appeals decisions that were not reviewed by the Supreme Court); Clark v. B.H. Holland Co., 852 F. Supp. 1268, 1278–79 (E.D.N.C. 1994) (same). Nash argues that courts should afford "minority-majority" decisions limited and narrow precedential effect. Nash, *supra* note 43, at 888.

3. Fractured Decisions

Most state and federal courts treat at least some types of plurality decisions as binding, but the methods that courts employ for this purpose differ considerably.[46] The U.S. Supreme Court has advanced multiple methods of following plurality decisions. In *Marks v. United States*, the Court announced that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[47] What exactly "narrowest grounds" means is not important for our purposes here.[48] In later cases—for example *Moses H. Cone Memorial Hospital v. Mercury Construction* and *United States v. Jacobsen*—the Court advanced a different view of the precedential effect of plurality decisions, suggesting that dissenting opinions count and majority agreement at the level of rationale or principle establishes binding norms.[49]

The federal circuits have failed to converge on any single approach to the interpretation of plurality decisions. Although a majority of the circuits now employ the Marks rule at least some of the time, they understand its prescriptions differently.[50] Some circuit

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46 A *plurality decision* is a decision with no majority opinion, and a *plurality opinion* is the opinion in a plurality decision that received the most votes of all opinions concurring in the judgment of the court.

47 Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). In *Marks*, the Court had the task of construing the plurality decision of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *Marks*, 430 U.S. at 190.

48 For diverse perspectives on the meaning and merit of the *Marks* rule, see Re, *supra* note 29; Maxwell Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. 461 (2021); Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 299–305 (2019); Ryan C. Williams, *Questioning* Marks: *Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017).

49 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983) (taking reasons endorsed by the concurrence and dissent in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 667 (1978) (Blackmun, J., concurring), *id.* at 668 (Burger, C.J., dissenting), as controlling); United States v. Jacobsen, 466 U.S. 109, 115–16 (1984) (suggesting that agreement between the lead and dissenting opinions in *Walter v. United States*, 447 U.S. 649, 657 (1980) (opinion of Stevens, J.), *id.* at 663–64 (Blackmun, J., dissenting), is authoritative).

50 *See, e.g.*, United States v. Hughes, 849 F.3d 1008, 1015 (11th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 1765, 1778 (2018) (applying *Marks* to *Freeman v. United States*, 564 U.S. 522 (2011), and determining that *Freeman*'s concurrence of one represents the binding opinion); United States v. Rivera-Martínez, 665 F.3d 344, 348 (1st Cir. 2011) (same); United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc) (determining that *Freeman* contains no narrowest view that would be binding under *Marks*); United States v. Epps, 707 F.3d 337, 350 (D.C. Cir. 2013) (same). The current Supreme Court Justices also disagree

courts take methodological guidance from cases where the Supreme Court has included dissents in the precedent calculus,[51] while others cite Marks to support the claim that dissents cannot count for the purposes of precedent.[52] Still others at least sometimes treat the plurality opinion as authoritative, apparently simply because it attracted the most votes of the opinions that agreed with the judgment.[53] In the next Section, I discuss an example of an important case that federal and state courts have construed differently as a result of different approaches to stare decisis.

D. Illustration

The Supreme Court case of *Kirby v. Illinois*[54] addressed whether a criminal suspect who has been arrested and confronted with the crime victim for identification purposes (at a police station "show-up"), but not yet indicted, has a right to counsel under the Sixth Amendment; and whether, if the suspect was deprived of that right, testimony related to the eyewitness identification must be excluded from the trial.[55] When Thomas Kirby and a friend were stopped by police officers on the street and asked for identification, Kirby produced the wallet of one Willie Shard.[56] The officers arrested the men and brought them to the police station, at which point the officers learned that Shard had reported that he had been robbed.[57] Shard came to the station and identified Kirby and his friend as the assailants.[58] Neither of the suspects had lawyers, nor had they been informed of a

on the meaning of the *Marks* rule, a disagreement on display in the recent case of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). For a discussion, see Varsava, *supra* note 1.

51 *See, e.g.*, United States v. Johnson, 467 F.3d 56, 64–66 (1st Cir. 2006) (applying the dissent-inclusive method to Supreme Court precedent); Wright v. North Carolina, 787 F.3d 256, 268–69 (4th Cir. 2015) (same); Alperin v. Vatican Bank, 410 F.3d 532, 552–53 (9th Cir. 2005) (same); Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1578–79 (Fed. Cir. 1997) (same).

52 *See, e.g.*, United States v. Cundiff, 555 F.3d 200, 209 (6th Cir. 2009) (asserting that the "'narrowest' opinion refers to the one which relies on the 'least' doctrinally 'far-reaching-common ground' *among the Justices in the majority*") (emphasis added); King v. Palmer, 950 F.2d 771, 783–84 (D.C. Cir. 1991).

53 *See, e.g.*, *In re* Kozeny, 236 F.3d 615, 620–21 (10th Cir. 2000) (treating the view expressed in the plurality opinion of *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), as the holding of the case, even though the concurrence and dissent in *Will* agreed on a different view and both disagreed with the plurality's reasoning); Sexton v. Kennedy, 523 F.2d 1311, 1314 (6th Cir. 1975) (treating the plurality opinion from *Arnett v. Kennedy*, 416 U.S. 134 (1974), as controlling).

54 406 U.S. 682 (1972).

55 *Id.* at 684 (plurality opinion).

56 *Id.*

57 *Id.*

58 *Id.* at 684–85.

right to counsel.[59] Kirby was convicted in Illinois state court and appealed—ultimately to the U.S. Supreme Court—on the grounds that he had been denied his constitutional right to counsel and that evidence regarding the identification event should have accordingly been excluded from the trial.[60]

The Supreme Court issued a 4–1–(3)–(1) decision. (Parentheses signify dissenting votes.) Justice Stewart wrote the plurality opinion, determining that, under the relevant precedent, an individual does not have the right to assistance of counsel until he has been indicted and that, therefore, admitting testimony from an identification event that occurred prior to indictment did not violate the Sixth Amendment.[61] Chief Justice Burger joined the plurality opinion in full, but wrote separately to emphasize that "the right to counsel attaches as soon as criminal charges are formally made against an accused."[62] Justice Powell concurred in the judgment only and wrote a one-line opinion explaining that his agreement was based on the exclusionary rule; he did not express any opinion on the right to counsel question (i.e., whether defendants have such a right before being indicted).[63] Justice Brennan wrote a dissenting opinion in which he applied the reasoning of prior Supreme Court decisions, determined that Kirby had a right to counsel during the pre-indictment confrontation, and concluded that evidence regarding the confrontation thus should have been excluded.[64] Justice White wrote a separate dissent, which simply listed previous cases that he understood to govern the present one and to necessitate a decision in favor of the defendant.[65]

Following the Court's decision in *Kirby*, multiple federal courts treated Justice Stewart's plurality opinion as controlling and cited it to support the claim that criminal defendants do not have a right to counsel before being indicted.[66] From the point of view of some states,

59 *Id.* at 685.

60 *Id.* at 686–87.

61 *Id.* at 688–90.

62 *Id.* at 691 (Burger, C.J., concurring).

63 *See id.* (Powell, J., concurring in the result).

64 *Id.* at 692–705 (Brennan, J., dissenting).

65 *Id.* at 705 (White, J., dissenting).

66 *See, e.g.*, United States v. Mitlo, 714 F.2d 294, 296 (3d Cir. 1983) ("The sixth amendment affords the right of counsel in all criminal prosecutions," and "[t]his right attaches '[a]t or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting *Kirby*, 406 U.S. at 689 (plurality opinion))); United States v. Harrison, 213 F.3d 1206, 1209 (9th Cir. 2000) ("The Supreme Court has held that the Sixth Amendment right to counsel attaches 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or

though, *Kirby* never represented an authoritative source of federal law on the right to counsel question. Michigan courts, for example, take a principle from a judicial decision as binding only if a majority of the court agreed "on a ground for decision."[67] As the Michigan Supreme Court has explained, "[i]f there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties."[68] In keeping with this approach to precedent, the Michigan Supreme Court declined to follow *Kirby* on the right to assistance of counsel, and even asserted that it was "not permitted to follow *Kirby* as authoritative precedent" in that regard.[69]

In general, federal courts have been much more amenable than Michigan ones to treating propositions from plurality opinions as authoritative. *Kirby*, then, has a different legal meaning from the perspective of Michigan courts than at least some federal ones. From Michigan's point of view, *Kirby* had no effect on the law concerning the right to counsel. For example, consider the Michigan case of *People v. Anderson*. A rape victim was asked to identify her assailant on multiple occasions, but the accused was not provided with counsel or informed of a right to counsel during this pre-indictment period.[70] Based on its reading of other cases, which aligned with the understanding of the main dissenting opinion in *Kirby*, the Michigan Supreme Court determined that the accused had a right to counsel *under federal law* prior to indictment.[71] For at least some federal courts, however, *Kirby*'s

arraignment.'" (quoting *Kirby*, 406 U.S. at 689 (plurality opinion))); United States v. Percy, 250 F.3d 720, 725 (9th Cir. 2001) (same).

67 People v. Anderson, 205 N.W.2d 461, 467 (Mich. 1973), *overruled on other grounds by* People v. Hickman, 684 N.W.2d 267 (Mich. 2004) (asserting that "[t]he clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases"); *see also* People v. Ackley, No. 336063, 2021 WL 1150195, at *2 n.2 (Mich. Ct. App. Mar. 25, 2021) ("In cases where there is no majority opinion, any proposition or reasoning agreed to by a majority of the Justices, in any combination, is binding precedent as to that narrow point of agreement.").

68 *Anderson*, 205 N.W.2d at 467.

69 *Id.* (declaring that "[s]ince there is no agreement by a majority of the United States Supreme Court regarding the limitation of right to counsel in *Kirby*, we are not permitted to follow *Kirby* as authoritative precedent on the question of counsel"). In support of this proposition, the Michigan Supreme Court asserted that it represents "[t]he clear rule in Michigan" and cited six Michigan state cases as well as the legal encyclopedia *Michigan Law & Practices* (and "cases cited [therein]"). *Id.* The court did state that "[t]he same rules of decision govern the permissible construction by states of decisions of the United States Supreme Court[,]" but to support that proposition it relied on *United States v. Pink*, 315 U.S. 203, 216 (1942), where the U.S. Supreme Court declared that decisions by an equally divided Court are not binding precedent without addressing plurality decisions. *Anderson*, 205 N.W.2d at 467.

70 *Anderson*, 205 N.W.2d at 463–66.

71 *Id.* at 465–76.

plurality opinion was authoritative; for those courts, the decision provided that defendants do *not* have a right to counsel until judicial criminal proceedings have been initiated.

The question of whether a law-applying court ought to apply the substantive precedent of a law-supplying jurisdiction is conceptually distinct from the question of whether that court ought to apply the law-supplying jurisdiction's stare decisis jurisprudence. As the case of *Kirby* illustrates, these questions come apart in practice too. In the next Part, I show that *Kirby* is not an anomaly in this regard. Courts often proceed as though they are bound by the precedent of another jurisdiction without deferring to the other jurisdiction's doctrine of precedent.

II. INTERSYSTEMIC INTERPRETATION IN PRACTICE

In practice, judges sometimes follow their own or their own jurisdiction's interpretive approach to precedent, even when judges in the law-supplying jurisdiction take a different approach, and they do not seem to feel a need to explain or justify that course of action. Other times judges do defer to the interpretive approach of the law-supplying jurisdiction, even when it differs from the approach they would apply to their own jurisdiction's law. My review of federal and state judicial practices in the concurrent jurisdiction context suggests that federal courts adjudicating state claims often do not defer to state methods of interpreting case law. State courts are more deferential to federal interpretive methods than federal courts are to state ones, but in many cases state courts apply their own stare decisis doctrines no matter which body of law they are interpreting. In this Part, I focus on a few states to illuminate the range of federal and state court approaches to the interjurisdictional interpretation of precedent.

A. Federal Courts Interpreting State Cases

Federal courts applying state law often disregard state stare decisis doctrines entirely. Michigan provides an especially stark example. Michigan state courts have been relatively explicit and steadfast, since the 1970s at least, in their approach to the interpretation of plurality decisions. Under the state's prevailing norm, precedent-bound courts search for majority agreement at the level of principle or rationale across all opinions of the precedent case and treat any such agreement (and only that) as authoritative.[72] But federal courts nevertheless

72 *See* Negri v. Slotkin, 244 N.W.2d 98, 100 (Mich. 1976) ("Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of *stare decisis*."); Nat. Aggregates Corp. v. Brighton Twp., 539 N.W.2d 761, 767 (Mich. Ct. App. 1995) (asserting that, if "a

disregard this approach, even when seeking the precedential import of Michigan plurality decisions—a task that the Sixth Circuit has confronted on many occasions.[73] Sixth Circuit courts sometimes treat the plurality opinions of these decisions as authoritative without any special explanation or justification, even though those opinions do not enjoy precedential status under Michigan's own stare decisis jurisprudence.[74]

It is unclear whether the federal courts ignore Michigan's approach intentionally or out of ignorance. If a litigant were to make

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majority of justices [does] not concur with the reasoning of [an] opinion," then that opinion "is not binding precedent under the doctrine of stare decisis" (citing *Negri*, 244 N.W.2d at 100)); Liquia v. Antler Bar Amusements, LLC, No. 348087, 2020 WL 4381870, at *5 (Mich. Ct. App. July 30, 2020) (asserting that "we are not bound by plurality decisions of our Supreme Court where no majority of the justices participating concur in the reasoning" (citing *Negri*, 244 N.W.2d at 100)); *see also supra* note 67. The question directly before the court in *Negri* was whether "lower courts [are] bound by majority decisions of [the Michigan Supreme Court] of less than four justices[,]" which it answered affirmatively, but the case has come to be known in Michigan for its discussion of the precedential status of plurality decisions. *Negri*, 244 N.W.2d at 100.

73 I have not been able to find any federal cases that recognize Michigan's norm about the precedential effect of plurality decisions. I conducted the following targeted Westlaw searches on September 5, 2021: "Negri" AND "Michigan law"; "397 Mich. 105" AND "Michigan law"; "Negri" AND "plurality"; "397 Mich. 105" AND "plurality." I searched for references to *Negri* because Michigan courts often cite that case for its propositions about the precedential status of plurality decisions. These searches turned up two federal cases citing *Negri*, one (*In re* Newpower, 229 B.R. 691, 697–98 (W.D. Mich. 1999), *aff'd in part, rev'd in part*, 233 F.3d 922 (6th Cir. 2000)), regarding the precedential effect of closely divided (3–2) decisions and the other (Upjohn Co. v. Aetna Cas. & Sur. Co., 850 F. Supp. 1342, 1345 (W.D. Mich. 1993)) regarding the precedential effect of equally divided decisions. I also searched for federal court citations to *People v. Anderson*, cited *supra* note 67, but did not find any federal cases citing *Anderson* on the construction of plurality decisions. In a study focusing on the methods of statutory interpretation that Sixth Circuit courts apply to Michigan state statutes, J. Stephen Tagert likewise found that very few of the federal decisions applying Michigan statutes cite a Michigan statutory methodology case, and he determined that federal courts generally do not follow Michigan's methods of statutory interpretation. J. Stephen Tagert, Note, *To* Erie *or Not to* Erie: *Do Federal Courts Follow State Statutory Interpretation Methodologies?*, 66 DUKE L.J. 211, 217, 257 (2016). Although federal courts do not seem interested in Michigan's approach to the precedential effect of plurality decisions, the two cases citing *Negri* do indicate that some federal courts are open to applying at least some elements of Michigan's stare decisis doctrine.

74 *Compare* Gustafson v. City of Lake Angelus, 76 F.3d 778, 790–91 (6th Cir. 1996) ("The test under Michigan law for determining whether an ordinance is reasonable requires an assessment of the existence of a rational relationship between the exercise of police power and the public health, safety, morals, or general welfare in a particular manner in a given case." (citing Square Lake Hills Condo. Ass'n v. Bloomfield Twp., 471 N.W.2d 321, 324 (Mich. 1991))), *with Nat. Aggregates Corp.*, 539 N.W.2d at 767 ("We note that a majority of justices did not concur with the reasoning of Justice Riley's opinion in *Square Lake,* and that the Riley opinion thus, is not binding precedent under the doctrine of stare decisis." (citing *Negri*, 244 N.W.2d at 100)).

an argument in federal court that relies on Michigan's rule for construing plurality decisions, that would provide a good test case. Accordingly, I searched Westlaw for litigant briefs filed in the Sixth Circuit for references to that rule. The search turned up one result: an appellee brief arguing that a Michigan plurality decision that the appellant relied on is not binding under Michigan law, given the state's understanding of the precedential effect of plurality decisions.[75] The case was ultimately dismissed and settled through mediation, however, so we do not know what the Court of Appeals made or would have made of the point.

When dealing with federal plurality decisions, Sixth Circuit courts have applied the *Marks* narrowest grounds rule on multiple occasions. But they have also noted the limitations of the rule and its inapplicability to certain cases.[76] Sixth Circuit courts have sometimes simply treated plurality opinions of federal decisions as controlling without any explanation, just as they have done with Michigan plurality opinions.[77]

Sometimes federal courts apply stare decisis methodology advanced by the U.S. Supreme Court to state decisions. In a case concerning Alabama law, for example, the Eleventh Circuit Court of Appeals used the *Marks* rule to interpret a plurality decision from the Alabama Supreme Court. The federal court analyzed the overlap between the plurality opinion and two concurring justices in the state decision, and concluded that the position of the concurring justices is authoritative, since it represents "the narrowest grounds" for the decision under *Marks v. United States*.[78] Alabama courts, however, do not apply the narrowest grounds approach to their own decisions and

75 UFS's Corrected Appellee Brief at 40–41, Secura Ins. v. DTE Gas Servs. Co., No. 15-1321 (6th Cir. July 15, 2015).

76 United States v. Cundiff, 555 F.3d 200, 209 (6th Cir. 2009) ("Where no standard put forth in a concurring opinion is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes, *Marks* breaks down."); United States v. Ray, 803 F.3d 244, 272 (6th Cir. 2015) ("Because . . . the plurality and dissent each received only four votes, we conclude that [*Missouri v. Seibert*, 542 U.S. 600 (2004),] did not announce a binding rule of law.").

77 *See, e.g.*, *In re* Payton, No. 00-5204, 2000 WL 572056, at *2 (6th Cir. May 1, 2000) (relying on the plurality opinion from *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978)); Halliburton v. United States, 59 F. App'x 55, 57 (6th Cir. 2003) (same); Sexton v. Kennedy, 523 F.2d 1311, 1314 (6th Cir. 1975) (relying on the plurality opinion from *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion)).

78 Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1188 & n.2 (11th Cir. 2004). The Court of Appeals in this case was interpreting a decision that the Alabama Supreme Court had issued in response to a certified question. This example shows that the certification process, even if it were always available as an option (which it isn't), would not resolve the problem of conflicting methods of interpretation. Even when federal courts certify questions to state courts, they have to interpret the state decisions issued in response.

would be unlikely to find authority where the federal court found it in this case.[79]

Some federal courts at least some of the time do defer to state norms of constructing plurality decisions. The Third Circuit Court of Appeals, for example, has followed Pennsylvania's approach, determining that a particular plurality case "does not represent a majority view" and is therefore "not considered controlling precedent under Pennsylvania law."[80] But such examples of federal judicial decisionmaking seem to be relatively rare.

Although I focus here on interpretive methodology for plurality decisions, stare decisis doctrines vary across jurisdictions in other ways too, raising the same kind of questions about intersystemic deference. For a particularly salient example, consider how Louisiana, unlike other jurisdictions in the U.S., does not treat judicial interpretations of statutes as binding sources of law.[81] This difference seems to affect how federal courts treat Louisiana cases when deciding questions arising under the state's law. In disputes involving the interpretation of Louisiana state legislation, the Fifth Circuit Court of Appeals maintains that it is "guided by decisions rendered by the Louisiana appellate courts," but is "not strictly bound by them."[82]

The holding/dicta distinction presents another opportunity for law-applying courts to defer, or not, to the law-supplying jurisdiction's approach to stare decisis. Whenever a court interprets a judicial decision for the purposes of precedent, even if the decision has a

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79 *Ex parte* Disc. Foods, Inc., 789 So. 2d 842, 845 (Ala. 2001) (asserting that "[t]he precedential value of the reasoning in a plurality opinion is questionable at best"); *Ex parte* Achenbach, 783 So. 2d 4, 7 (Ala. 2000) (same). I searched Alabama state court decisions for citations to *Marks*, and all of the cases citing it for the narrowest grounds rule concern the construction of federal plurality decisions, except for one in which a concurring justice, writing only for himself, suggested that the *Marks* rule should be applied to the Alabama case at issue. E.W. v. Jefferson Cnty. Dep't of Hum. Res., 872 So. 2d 167, 173 (Ala. Civ. App. 2003) (Crawley, J., concurring specially). Judge Crawley's claim was explicitly rejected in the majority opinion. *Id.* at 170 (majority opinion).

80 Borman v. Raymark Indus., Inc., 960 F.2d 327, 333 (3d Cir. 1992).

81 *See, e.g.*, Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co., 953 F.2d 985, 988 (5th Cir. 1992) (observing that "[t]he concept of *stare decisis* is foreign to the Civil Law, including Louisiana").

82 *Id.* For a discussion of the Fifth Circuit's deference to Louisiana on the matter of interpretation, see Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 713 (1995). Gluck relies exclusively on this example to support the claim that courts understand stare decisis practices as substantive law and that federal courts defer to state interpretive practices under *Erie*. Gluck, *supra* note 2, at 796 n.158. Louisiana represents a special case, however, and we should be wary of extrapolating too much from it. The state is anomalous in the U.S. insofar as it is a civil law jurisdiction, and the Fifth Circuit might be inclined to defer to Louisiana methodologically because of the fundamental differences between civil and common-law systems.

majority opinion, the court has to sort holdings from dicta. Federal courts seem to rely on their own approach to doing so even when dealing with questions of state law, apparently without second thought.[83] For example, as Professor Michael Dorf recounts, in *Carroll v. Lessee of Carroll*,[84] the Supreme Court "invoked the principles applicable to construing the scope of its own holdings in deciding whether to treat language in a state [Maryland] court opinion as holding or dictum."[85] The Court acknowledged that it had a duty to apply the Maryland decision,[86] but then appealed to its own norms for separating holdings from dicta in order to ascertain the precedential effect of that decision. The Justices looked to previous Supreme Court decisions—decisions concerning the interpretation of *federal* precedent—for principles that would guide their interpretation of the state precedent at issue. The Court observed that it "has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."[87] The Justices concluded that, accordingly, they would not treat the portion of the state opinion at issue as binding, since the norms articulated there were dicta under the Court's own stare decisis jurisprudence.

B. State Courts Interpreting Federal Cases

When state courts adjudicate federal claims, some of them at least some of the time apply federal doctrines of stare decisis to federal cases. For example, on numerous occasions state courts have applied the *Marks* rule to federal plurality decisions.[88] Some states employ a

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83 *See* Dorf, *supra* note 41, at 2001 n.16 (noting that "the United States Supreme Court does not distinguish between state and federal courts in its attempts to separate dicta from holdings").

84 57 U.S. (11 How.) 275 (1853).

85 Dorf, *supra* note 41, at 2001 n.16 (emphasis omitted). In another article, Dorf observes that federal courts treat the question of how to ascertain state law as a federal question. *See* Dorf, *supra* note 82, at 710.

86 *Carroll*, 57 U.S. at 286 (explaining that "the thirty-fourth section of the Judiciary Act, (1 Statutes at Large, 92,) . . . makes the laws of the several States the rules of decision in trials at the common law; and inasmuch as the States have committed to their respective judiciaries the power to construe and fix the meaning of the statutes passed by their legislatures, this court has taken such constructions as part of the law of the State, and has administered the law as thus construed").

87 *Id.* at 287. The Court went on to quote Chief Justice Marshall in *Cohens v. Virginia* and to declare that expressions in a judicial opinion that "go beyond the case . . . may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented." *Id.* (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821)).

88 *See, e.g.*, Callihan v. Commonwealth, 142 S.W.3d 123, 126 (Ky. 2004) (applying the *Marks* rule to *Missouri v. Seibert*, 542 U.S. 600 (2004), and concluding that Justice Kennedy's

version of the *Marks* rule that accords with their own internal understanding of the precedential status of plurality decisions. For example, even when Michigan courts cite *Marks* (which they appear to have done only once in the context of interpreting a federal plurality decision), they look for majority agreement across all opinions in the plurality decision—just as they would do if *Marks* was out of the picture and they were dealing with a Michigan state plurality decision.[89]

Michigan courts have also explicitly applied Michigan's own stare decisis doctrine to questions of federal law, ignoring *Marks* entirely. For example, in *People v. Perlos*, the Michigan Court of Appeals maintained that, despite the defendants' contention that "we are not bound by a plurality decision of the United States Supreme Court," "[w]e find that we are so bound."[90] The Michigan court did not appeal to any federal authority for this claim, but instead cited a Michigan case.[91]

Some state courts have rejected or simply ignored *Marks* when constructing federal plurality decisions. The Georgia Supreme Court declined to apply the *Marks* rule to a U.S. Supreme Court case based on its determination that "it would not be useful" to do so when the apparent narrowest grounds view of the case was endorsed by only one Justice, even though federal courts do treat single-Justice opinions as binding under *Marks* when those opinions represent the narrowest

concurring opinion represents *Seibert*'s holding, since his opinion set forth "the narrowest grounds" for the judgment); *In re* Amendments to the Rules Regulating the Fla. Bar–Advert., 971 So. 2d 763, 766–67 (Fla. 2007) (applying *Marks* to *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), and concluding that Justice Marshall's concurrence represents the *Peel* holding, as the narrowest opinion that concurred in the judgment); State v. Griep, 863 N.W.2d 567, 579 & n.16 (Wis. 2015) (asserting that *Marks* excludes consideration of dissenting opinions and concluding accordingly that the concurrence-dissent alignment of *Williams v. Illinois*, 567 U.S. 50 (2012), is not controlling).

89 I searched on Westlaw for Michigan state decisions citing *Marks v. United States* and reviewed the twelve results. The only case concerning the construction of a federal plurality decision determined that "the more limited holding" on which "a majority of the United States Supreme Court agreed . . . is binding law" and cited *Marks* to support this conclusion. Long Lake Twp. v. Maxon, No. 349230, 2021 WL 1047366, at *5 & n.3 (Mich. Ct. App. Mar. 18, 2021).

90 People v. Perlos, 442 N.W.2d 734, 735 (Mich. Ct. App. 1989) (stating that, although "[t]he defendants have argued that we are not bound by a plurality decision of the United States Supreme Court," "[w]e find that we are so bound," and citing the Michigan case of *Negri v. Slotkin*, 244 N.W.2d 98 (Mich. 1976), as the only authority to support that claim), *aff'd in part, rev'd in part*, 462 N.W.2d 310 (Mich. 1990).

91 *Perlos*, 442 N.W.2d at 735; *see also* People v. Bell, 702 N.W.2d 128, 147 (Kelly, J., dissenting) (suggesting that the Michigan case of *Negri* governs the construction of federal plurality decisions), *opinion corrected on reh'g*, 704 N.W.2d 69 (Mich. 2005).

grounds for the decision.[92] The Georgia court went on to assert, without further justification, that instead of following the narrowest view presented in the case, it would "consider the analysis presented in the plurality opinion to be that mandated by the United States Supreme Court."[93]

Some state courts in at least some cases follow the plurality opinions of federal plurality decisions as if they were normal majority opinions, without citing any authority to support the approach.[94] Other state courts have used a dissent-inclusive method to interpret federal plurality decisions, without appealing to federal authority to support the approach. For example, the Pennsylvania Supreme Court has included dissenting opinions in its analysis of federal precedent in an effort to reach the conclusion that the precedent-setting court would have reached if it were deciding the case presented.[95] In doing so, the Pennsylvania court offered only the conclusory justification that its "analysis is based simply on a fair reading of each of the [opinions issued in the precedent case]."[96]

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92 State v. Pye, 653 S.E.2d 450, 453 n.6 (Ga. 2007) (citing *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), regarding the limitations of *Marks*). For a list of federal decisions treating single-Justice opinions as binding under *Marks*, see Varsava, *supra* note 1, at 122 n.24.

93 *Pye*, 653 S.E.2d at 453 n.6.

94 For example, some states have treated the plurality opinion of *Will v. Calvert Fire Ins.*, 437 U.S. 655 (1978), as controlling. *See, e.g.*, Clark v. Sullivan, No. 110,394, 2014 WL 4627587 at *8 (Kan. Ct. App. Sept. 12, 2014); *In re* Petition for Writ of Prohibition, 539 A.2d 664, 687 (Md. 1988), *disapproved of by* State v. Manck, 870 A.2d 196, 207 (Md. 2005). State courts have done the same with the plurality opinion of *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion). *See, e.g.*, Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 176 (Neb. 2007); Lobato v. State, 218 P.3d 358, 377 (Colo. 2009) (en banc); Wilson v. Fallin, 262 P.3d 741, 749 (Okla. 2011).

95 Commonwealth v. Thomas, 507 A.2d 57, 60–61 (Pa. 1986) (applying the reasoning of each opinion issued by the U.S. Supreme Court in the plurality decision of *Baldasar v. Illinois*, 446 U.S. 222 (1980) (plurality opinion)).

96 *Id.* at 60–61 & n.10 ("Viewing the facts of [*Baldasar*] in light of [its] concurring and dissenting opinions, it is clear that appellants' claims must fail" since "a majority of the Supreme Court [would reject them]."). The Pennsylvania Court noted that "[t]he opinions in *Baldasar* do not lend themselves to an application of the 'narrowest grounds' test," that "[t]he Supreme Court has never explained what constitutes 'narrow grounds,'" and that "it is not apparent from a reading of the opinions in *Baldasar* that any of them is narrower than the others." *Id.* at 60 n.10. As Professor Maxwell Stearns has shown, *supra* note 48, at 210, Pennsylvania courts sometimes use the *Marks* narrowest grounds rule on their own decisions. However, they are not consistent in this practice; and they have expressed a commitment to a strict majority-agreement approach with respect to both federal and state plurality decisions, in which a plurality decision is binding only to the extent that a majority of the court agreed on some legal propositions. *See, e.g.*, Pap's A.M. v. City of Erie, 719 A.2d 273, 278 (Pa. 1998) (asserting that, it is "permissible to find that a Justice's opinion which stands for the 'narrowest grounds' is precedential, but only where those 'narrowest grounds' are a sub-set of ideas expressed by a majority of other members of the Court" and "[t]he mere finding that one Justice expressed a narrower belief than others does not

In similar fashion, in its effort to interpret the U.S. Supreme Court case of *Medtronic v. Lohr*,[97] the Texas Supreme Court announced that it would take rationales that were endorsed by a majority of Justices as authoritative, even though those Justices parted ways on the judgment.[98] To justify this approach, the Texas justices simply asserted that they "believe [they] should treat as authoritative the matters on which [the majority of Justices] agree."[99]

The Illinois Supreme Court has perhaps been more explicit than any other state court in denying the force of *Marks* over its own decisionmaking, even in the adjudication of federal questions. That court has directly asserted that only federal courts are bound by the *Marks* method of interpreting plurality decisions, and it has accordingly declined to apply *Marks* to a U.S. Supreme Court decision despite multiple federal court decisions having done so.[100]

* * *

Courts in the U.S., then, often proceed as though they are entitled and even obligated to apply their own stare decisis jurisprudence to the judicial decisions of other jurisdictions. Federal courts deciding questions of state law seem only rarely to take up state methods of interpreting precedent. And in many cases, state courts likewise apply

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dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent"), *rev'd*, 529 U.S. 277 (2000).

97 518 U.S. 470 (1996).

98 Worthy v. Collagen Corp., 967 S.W.2d 360, 368 (Tex. 1998).

99 *Id.* (asserting that "we believe we should treat as authoritative the matters on which Justice Breyer and Justice O'Connor agree," even though they "do not concur fully in the judgment"). The California Supreme Court took the same tack in *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 511 (Cal. 2016) (treating a point of agreement between the lead and dissenting opinions in the Supreme Court plurality decision of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), as authoritative).

100 People v. Gutman, 959 N.E.2d 621, 627–28 (Ill. 2011) (asserting that, whereas the *federal* courts must follow Justice Stevens's concurrence in *United States v. Santos*, 553 U.S. 507, 526 (2008) (Stevens, J., concurring), as the narrowest grounds opinion under *Marks*, as a state court it was under no duty itself to "attempt to apply [that opinion]"). Oddly, some state courts have suggested that they believe themselves to be bound by *Marks* not only in the interpretation of federal decisions but also state ones. *See, e.g.*, Morgan v. City of Ruleville, 627 So. 2d 275, 278 (Miss. 1993) (suggesting that the *Marks* narrowest grounds rule is general "settled jurisprudence"); State v. Deadwiller, 834 N.W.2d 362, 373 (Wis. 2013); Crocker v. Roethling, 675 S.E.2d 625, 635 & n.1 (N.C. 2009); Tomczak v. Bailey, 578 N.W.2d 166, 183 (Wis. 1998) (Crooks, J., concurring) ("I assert that the opinion of this court in *Makos* is of precedential value, and that its legal authority should be determined in accord with the United States Supreme Court's decision in *Marks*."). Perhaps some judges implicitly take the interpretation of precedent to be governed by general common law or universal legal principles and believe that the federal Supreme Court has special insight into or expertise in such general law.

their own interpretive approaches to federal judicial decisions. Neither federal nor state courts, however, have offered a compelling theoretical justification for their lack of deference to the stare decisis doctrine of a law-supplying jurisdiction.

In the next Part, I show how our answer to the question of whether and when methods of interpreting precedent are intersystemically binding depends on our theory of law. My theoretical account explains how judges charged with interpreting another jurisdiction's case law might sometimes be legally permitted and even obligated to reject that jurisdiction's interpretive methods.

III. INTERSYSTEMIC INTERPRETATION IN THEORY

This Part first shows that, if we analyze stare decisis doctrine under the substance-versus-procedure framework of *Erie*, it would count as substantive rather than procedural law. If stare decisis doctrine is substantive for *Erie* purposes, then a federal court applying state law has a legal duty to apply the state's doctrines of stare decisis, including its methods of interpreting precedent. I next argue, however, that stare decisis jurisprudence eludes the *Erie* framework—that is, the *Erie* doctrine is not applicable to it. This is the case even if a jurisdiction's own judges believe that their methods of interpreting precedent constitute binding norms under their own law. Whether a law-applying judge is bound by the interpretive methods of the law-supplying jurisdiction depends on the nature of those methods and their relationship to the rest of the jurisdiction's law. The question depends further on the nature of law itself: we might disagree on whether methods of interpreting precedent are intersystemically binding in a given case, then, because we subscribe to different theories of law. And so disagreements about intersystemic interpretive deference, I suggest, are indicative of more fundamental jurisprudential conflicts.

As I will show, for neither a positivist nor a Dworkinian is stare decisis doctrine unconditionally binding in the intersystemic context. I suggest further that under a positivist theory of law, a law-applying court is more likely to be bound by the stare decisis methodology of the law-supplying jurisdiction than under law as integrity. Another way to put the point is that a judge's departure from the stare decisis methodology of the law-supplying jurisdiction in a given case is more likely to be justifiable under law as integrity than under positivism. Given the multiple plausible and competing theories of law on offer, including but not limited to positivism and law as integrity, the enduring disagreement among scholars and judges about the status of interpretive methodology in intersystemic adjudication is no wonder. This Part of the Article sheds new light on that disagreement, revealing the theoretical assumptions that underlie the arguments on either side

and illuminating the terms of the debate at the most fundamental level.

A. Substance versus Procedure

Considerations including predictability, uniformity, fairness, and state autonomy or sovereignty motivated the Supreme Court in *Erie* to expand the power of state courts over state law.[101] The *Erie* doctrine provides that federal courts adjudicating state claims are to apply state substantive law, including judge-made law, but federal procedural law.[102] While the *Erie* doctrine concerns adjudication in federal courts, what has come to be known as "reverse-Erie" applies to adjudication in state courts: it provides that, when those courts decide questions of federal law, they must apply federal substantive law, including federal precedent, but are free to use state procedural rules.[103]

On the one hand, as a second-order concern about how a court makes its decisions, stare decisis would seem to be procedural for the purposes of an *Erie* analysis and accordingly under the authority of the forum jurisdiction. Indeed, commentators sometimes classify stare decisis as procedural law.[104] On the other hand, though, the approach that a court takes to stare decisis determines the first-order substantive rights that past decisions represent, which suggests that methods of following precedent are properly viewed as substantive for *Erie* purposes, regardless of whether they are "procedural" in some technical or conventional sense.

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101 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1237 (1999) (noting that reasons including "uniformity of outcome," "predictability," "fairness to the parties," and "federalism" underlie the *Erie* doctrine); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 964–74 (2013) (discussing and critiquing the uniformity, fairness, and federalism considerations that Justice Brandeis appealed to in *Erie*'s majority opinion); Joshua P. Zoffer, Note, *An Avoidance Canon for* Erie*: Using Federalism to Resolve* Shady Grove*'s Conflicts Analysis Problem*, 128 YALE L.J. 482, 543 (2018) (recognizing *Erie*'s "goals of federalism and uniformity"); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 374 (1980) (noting the "fairness value" underlying *Erie*); Bruhl, *supra* note 24 (manuscript at 29–30) (explaining that the *Erie* doctrine "is rooted, at least in part, on concern for state sovereignty").

102 *Erie* questions arise in cases of diversity jurisdiction and supplemental jurisdiction. *See* 28 U.S.C. § 1332 (2021) (granting federal courts jurisdiction over diversity cases); *id.* § 1367 (granting federal courts "supplemental" jurisdiction over certain state claims).

103 *See supra* note 6.

104 *See, e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 823–24 (2008) (discussing stare decisis as an example of procedural common law and suggesting that it is "conventionally treated as 'procedural'"); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 511–12 (2000) (describing rules of precedent as "part of the internal operating procedures of the courts").

Distinguishing substance from procedure has proven to be a tricky business, and the Supreme Court has attempted to offer guidance across a series of cases. The outcome-determination test of *Guaranty Trust Co. v. York* directs federal courts to consider whether a federal rule that is ostensibly procedural would "significantly affect the result of a litigation."[105] If the rule would so affect the result, then the federal court should refrain from applying it and should use the state alternative instead. According to the Court in *Guaranty Trust*, "the outcome of the litigation in the federal court should be substantially the same [as the outcome in state court], so far as legal rules determine the outcome of a litigation."[106]

In subsequent decisions, though, the Court has recognized difficulties with the outcome-determination test of *Guaranty Trust*; these decisions emphasize certain principles underlying *Erie* and elaborate the outcome-determination test with those principles in mind. The Court asserted in *Hanna v. Plumer* that "[t]he 'outcome-determination' test . . . cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[107] The result has been a more complicated and elusive, but perhaps also more justifiable, approach to distinguishing procedure from substance.

In addition to the fairness or equal treatment objective, uniformity in application of a given body of law is meant to serve reliance interests—"reduc[ing] the costly complexity that arises from legal heterogeneity[,] and facilitat[ing] nationwide planning across states and other subjurisdictions."[108] According to the classic casebook *Hart and Wechsler's the Federal Courts and the Federal System*, *Erie* represents the Court's response to "the problems of conflicting applications of common law principles": "the rules by which [people] are to be

105 Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945). For subsequent cases taking up the outcome-determination test, see, for example, *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 536–37 (1958) (asserting that "cases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule"); Hanna v. Plumer, 380 U.S. 460, 465–66 (1965) (observing that *Guaranty Trust* "made it clear that *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction").

106 326 U.S. at 109; *see also* Sampson v. Channell, 110 F.2d 754, 756 (1st Cir. 1940) (observing that "it is unfair and unseemly to have the outcome of litigation substantially affected by the fortuitous existence of diversity of citizenship").

107 380 U.S. at 468.

108 Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 945 (2016).

judged" are not supposed to "depend upon the unpredictable circumstance of what court they can get into, or may be haled into."[109]

Further, *Erie* stands for the idea that, in areas under legitimate state control, state officials (whether legislators or judges) are supposed to have exclusive authority to determine the rules of conduct to which people are subject. The *Erie* decision was meant to protect and expand state sovereignty by recognizing that states are entitled to define rights and duties under state law not only through statutory and constitutional provisions, but also by way of judicial decisions.

The methods that courts use to interpret case law determine the rules of decision that cases represent, and accordingly the substantive rights and duties that litigants have under those cases. As Bruhl explains in his discussion of intersystemic statutory interpretation, the question of whether a court operating in the intersystemic context understands itself as bound by the interpretive approach of the law-supplying jurisdiction is "not merely of theoretical interest, as case outcomes can change depending on the governing rules."[110] This goes for methods of precedential interpretation just as well as those of statutory interpretation.

Imagine that a federal court sitting in diversity and adjudicating a claim arising under Kentucky law applies the *Marks* narrowest grounds rule to a Kentucky plurality decision.[111] Let's say that the narrowest view represented in that decision would grant relief to the plaintiff in the present case. The federal court, then, following the Kentucky decision, would rule in favor of the plaintiff. Kentucky courts, though, do not give precedential effect to plurality decisions.[112] From Kentucky's point of view, then, the state right that the federal court would grant the plaintiff might not exist. Accordingly, a plaintiff in federal court might be afforded rights that an otherwise identically situated plaintiff in state court would be denied, even if both plaintiffs brought their claims under the same body of law.

In sum, viewed within the *Erie* framework, stare decisis doctrine would seem to be a better candidate for substance than for procedure.[113] If stare decisis doctrine was substantive law for *Erie*

109 FALLON ET AL., *supra* note 6, at 580–81.

110 Bruhl, *supra* note 24 (manuscript at 3–4).

111 *See supra* subsection I.C.3 for a discussion of the *Marks* rule.

112 *See, e.g.*, Ware v. Commonwealth, 47 S.W.3d 333, 335 (Ky. 2001) (asserting that "[a] minority opinion has no binding precedential value . . . [and] if a majority of the court agreed on a decision in the case, but less than a majority could agree on the reasoning for that decision, the decision has no stare decisis effect" (quoting 20 AM. JUR. 2D *Courts* § 159 (1995) (current version at 20 AM. JUR. 2D *Courts* § 134 (West 2021)))); *see also* Fugate v. Commonwealth, 62 S.W.3d 15, 19 (Ky. 2001) (quoting *Ware*, 47 S.W.3d at 335).

113 For the same kinds of reasons, Gluck argues that "many, if not all, rules of statutory interpretation" ought to be taken as "substantive" for *Erie* purposes. Gluck, *Intersystemic*

purposes, then federal courts would be bound by state methods of interpretation when construing state judicial decisions.

In the next Section, however, I explain why we should not end our inquiry with the *Erie* analysis. The *Erie* framework is meant to resolve questions about whether some state judicial practice is best understood as substantive or procedural law. But *Erie* does not address the preliminary matter of whether some state practice constitutes a legally binding norm in the first place. Nor does it make space for the possibility that the authoritative status of a practice may depend not only on which body of law is under interpretation but also on characteristics of the interpreting body. The next Sections elaborate the different conditions under which stare decisis doctrine will be intersystemically binding under two prominent theories of law.

B. Interpretive Methodology and Theories of Law

Methods of legal interpretation are correct to the extent that they correctly identify and ascertain what the law prescribes.[114] But whether an interpretive method does accurately identify the law's prescriptions depends on how the law itself is constituted.[115] A claim about which methods of interpretation are the proper ones, then, presupposes the truth of some theory or conception of law.[116] This proposition should not be mysterious or surprising. After all, a claim that some interpretive method is correct or appropriate amounts to a claim that the method is an effective means of making out the content of the law;[117] if an interpretive method is effective in that way, it must be faithful to that which constitutes the law. As Professor Mark Greenberg

Statutory Interpretation, *supra* note 3, at 1924. *See also* Bruhl, *supra* note 24 (manuscript at 35) (suggesting that "methods of statutory interpretation come closer to the substance pole than the procedure pole").

114 *See* Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 106 (2017) (arguing that "what makes a method of legal interpretation correct is that it accurately identifies the law"); *see also* Pojanowski, *supra* note 2, at 514–21 (pointing out that one's approach to statutory interpretation is parasitic on one's "beliefs about the nature of law").

115 Greenberg, *supra* note 114, at 107–12.

116 Mark Greenberg, Principles of Legal Interpretation 22 (2016) (unpublished manuscript), http://philosophy.ucla.edu/wp-content/uploads/2016/08/Principles-of-Legal-Interpretation-2016.pdf [https://perma.cc/HVA6-GZHB] (discussing how "[t]he way in which the content of law is determined at the most fundamental level is a controversial issue in the philosophy of law").

117 Following Greenberg, I take "content of the law" to refer to "all of the legal obligations, powers, and so on in a given jurisdiction at a given time." Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1295 (2014).

puts it, "an account of how to figure out the properties of particular Xs must be appropriately based on what Xs are."[118]

The question of how law is constituted, though, is a fundamental and unsettled question in legal philosophy, which legal theories such as positivism, law as integrity, and natural law theories attempt to answer.[119] For example, consider Greenberg's own Moral Impact Theory of Law. On that theory, it is in the nature of law itself "that a legal system is supposed to change our moral obligations in order to improve our moral situation."[120] If the Moral Impact Theory is correct as a theory of law, then the correct method of precedential interpretation would seek to ascertain the impact that a judicial decision has had on the moral obligations of the people subject to the jurisdiction's law.[121] A method of interpretation with that aim, and so a correct method of interpretation according to the Moral Impact Theory, will not necessarily coincide with a correct method of interpretation according to an alternative theory, which understands the content of law differently. Another way to put the point is that the method(s) of interpretation that will be successful on Greenberg's theory of law may well differ from the method(s) that will be successful on an alternative theory of law, such as positivism.[122] A particular method of interpretation, then, might be justified or correct under one theory of law but not others.

Returning to the intersystemic setting, then, a given jurisdiction's judges might use a set of interpretive methods that is not connected in the right way to the content of law as some plausible legal theory—call it theory θ—envisions it. According to θ, then, the jurisdiction's interpretive methods might not yield the correct legal rules or standards to apply in a given case, and so might not yield the correct legal answer either. In the event that external judges are charged with applying the jurisdiction's law, and those judges subscribe to θ as their

118 Greenberg, *supra* note 116, at 12.

119 *See id.* at 22–24.

120 Greenberg, *supra* note 117, at 1294.

121 *See id.* at 1293.

122 As Greenberg himself notes, "prominent accounts of how the content of the law is determined in fact have extremely different implications for legal interpretation." Greenberg, *supra* note 116, at 23. It is certainly possible, however, that judges committed to different theories of law will agree, and likewise that judges committed to the same theory will disagree, on interpretive methodology. As Professors Cass Sunstein and Adrian Vermeule argue, even judges with different theoretical commitments might "converge on" an interpretive approach; and a single approach might be best under diverse theories of law, given empirical realities including "institutional facts about judges' capacities." Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889, 909 (2003).

theory of law, then they will have good reason not to apply the interpretive methods of the law-supplying courts.

H.L.A. Hart's positivism and Ronald Dworkin's law as integrity represent two of the most prominent contemporary theories of law.[123] And Dworkin is widely seen as Hart's main "antagonist," advancing a forceful alternative to Hart's highly influential view.[124] Jurisprudential theories of this sort are concerned with the very nature of law: they try to answer the question of what law is or how it is constituted.[125] At the same time, they offer solutions to the closely related question of how adjudicators are to make out the content of the law. Positivism and law as integrity call for different approaches to ascertaining the legal rights and duties that exist in a given jurisdiction.[126] These theories, as I will explain, accordingly generate different answers to the question of whether and when stare decisis doctrine is intersystemically binding.[127]

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123 *See, e.g.*, Greenberg, *supra* note 116, at 18 (suggesting that Hart's version of positivism is "the most widely held theory of law" today); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 365 (1997) (describing Dworkin's theory of law as integrity as "one of the most influential extant theories of adjudication").

124 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 27 (2006) ("Ronald Dworkin is often taken to be H.L.A. Hart's antagonist, urging an approach that Dworkin calls 'integrity,' meant to be an alternative to Hart's form of positivism."); *see also* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 623 (1987) (noting that Hart's account has faced challenges, "most notably by Ronald Dworkin").

125 *See, e.g.*, RONALD DWORKIN, JUSTICE IN ROBES 145 (2006) (observing that he and Hart "are in the same boat" in an important respect, since "both believe that [they] will understand legal practice and phenomena better if [they] undertake to study, not law in some particular manifestation . . . but the very concept of law").

126 *Id.* (explaining that he and Hart advance different theories of "how law is to be identified").

127 In an article arguing that state methods of interpreting state statutes should diverge from federal methods of interpreting federal statutes because of the greater common-law powers of state courts, Professor Jeffrey Pojanowski begins to make progress on the problem of interjurisdictional statutory interpretation as well. Pojanowski, *supra* note 2, at 540–41. Although he does not develop his position on this front in any detail, he does provocatively suggest that "the intersystemic question may turn on the theorist's standpoint regarding the nature of interpretation and law," and that a positivist interpreter can perhaps "treat another jurisdiction's interpretive method as binding," whereas a Dworkinian "may argue that a faithful interpreter has no choice but to read any statute in light of background purposes and the best reading of that community's principles of political morality." *Id.* at 540. For reasons that I elaborate in the next two Sections, I believe that Pojanowski's suggestion here is roughly right, although positivism will sometimes allow and sometimes even require a judge's interpretive methods to differ from those practiced in the law-supplying jurisdiction and law as integrity will sometimes require a judge to apply the methods of the law-supplying jurisdiction. Gluck also observes, in passing, a connection between the question of interjurisdictional interpretive deference and the nature of law. She suggests that, if we view law "positivistically" (which she seems to take for granted is the dominant and correct view), then a law-applying court should apply the interpretive

If you believe, with Hart, that a valid legal rule in a given jurisdiction is one that meets the conditions of the jurisdiction's rule of recognition—which is a social or conventional rule—then a judge applying a foreign jurisdiction's law will generally be bound by the interpretive practices of the foreign jurisdiction's judges. If you believe instead, with Dworkin, that the correct answer to a legal dispute is the one that follows from the principles that best fit and justify the law-supplying jurisdiction's entire body of judicial decisions, statutes, and the like, then a judge may or may not have a duty to follow the interpretive methods of the foreign judges in any given case. The existence of such a duty would depend on whether the methods in question were necessary for the judge to achieve the feat of fit and justification that law as integrity demands.

In the next Sections, I take up these two competing theories of law—positivism and law as integrity—in turn, to show how they generate different answers to questions of intersystemic interpretation. I do not take a position on which, if either, of these legal theories is correct, but wish only to show how our position on the binding effect of stare decisis jurisprudence in the intersystemic setting ultimately and inevitably depends on our theory of law.[128]

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practices of judges in the law-supplying jurisdiction. Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1901–02, 1978, 1988. Gluck does not elaborate in any detail, however, on the relationship between the intersystemic interpretation problem on the one side and theories of law on the other.

128 Note also that I do not make any all-things-considered claims about the methods of interpretation that a court should apply when deciding a question that arises under the law of another jurisdiction. There are, after all, many reasons why judges might be permitted or even required to defy their legal obligations—the most obvious one being that the law requires a morally objectionable decision. It is possible that in a given case a court ultimately should not defer to the methods of interpretation that courts in the law-supplying jurisdiction would use, even if the court is legally obligated to so defer. And, even if deference is not legally required in a given case, a court might have another kind of obligation to defer. For example, such deference might be critical to the perceived legitimacy of judicial decisionmaking, which judges might have a duty to protect. Professor Anuj Desai makes this kind of point in response to Bruhl's proposal that courts at different levels within a judicial hierarchy should, for institutional reasons including epistemic ones, use different methods of statutory interpretation. Anuj C. Desai, *Heterogeneity, Legislative History, and the Costs of Litigation: A Brief Comment on Bruhl's "Hierarchy and Heterogeneity"*, 3 WIS. L. REV. ONLINE 15, 16 (2013) (suggesting that "telling lower federal courts to interpret statutes differently from the Supreme Court would contradict the common American conception of what courts do, something that *might* . . . undermine confidence in the courts"); *see also* Bruhl, *supra* note 2, at 470 (arguing that, since "[d]ifferent courts have different competencies and capacities," "[t]he best approach for one court, with its particular strengths and weaknesses, might not be the best approach for another"). For the purposes of this Article, I focus on the intersystemic context and set aside the related question of whether a lower court in a judicial hierarchy is bound by the interpretive practices of the apex court in that hierarchy.

C. Positivism

For legal positivists, legal systems have *rules of recognition*, which are "secondary rules" that delineate the criteria of validity for legal rules of conduct or "primary rules":[129] a primary rule is valid (and so an actual legal rule in the system) if and only if it satisfies these criteria of validity.[130] A rule of recognition itself is a social or conventional rule, which exists only if a society's legal officials in fact practice and accept it.[131] This means that (1) the society's officials conform to the rule, as evidenced by their behavior, (2) they feel or perceive an obligation to follow the rule, and (3) "the general conformity" to the rule among the society's officials is one of the reasons that the officials have for following it.[132] The latter two conditions capture the *internal* attitude or point of view. As Professor Scott Shapiro explains, "[t]he internal point of view is the practical attitude of rule acceptance": "people who accept the rule[] . . . are disposed to guide and evaluate [their] conduct in accordance with [it]."[133]

The rule of recognition in a legal system provides a test of validity for the system's primary rules; it provides "authoritative criteria for identifying primary rules of obligation."[134] But "there is no rule providing criteria for the assessment of [the rule of recognition's] own legal validity."[135] The rule of recognition is foundational in that sense. For example, the British rule of recognition provides that "what the Queen in Parliament enacts is law."[136] We know that this is a rule of recognition because it "provides criteria for the assessment of the validity of other rules"; unlike those other rules, "there is no rule providing criteria for the assessment of its own legal validity"; and U.K. officials—those charged with applying U.K. law—in fact treat whatever the Queen enacts as law and understand themselves and one another as obligated to do so at least in part because doing so is customary or conventional.[137]

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129 Note that there may be intermediate secondary rules between the rule of recognition and primary rules of conduct. For more on this, see *infra* note 140.

130 H.L.A. HART, THE CONCEPT OF LAW 103 (2d ed. 1994).

131 *See id.* at 110, 250, 256.

132 *See id.* at 101, 117, 255–58.

133 Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1157 (2006).

134 HART, *supra* note 130, at 100.

135 *Id.* at 107.

136 *Id.*

137 *Id.*

1. Stare Decisis as Rule of Recognition

Let's return to the example of precedent and plurality decisions. As we saw above in Part II, in some jurisdictions, legal officials—judges—have converged on particular methods of construing plurality decisions. And, in some instances, judges have converged on these methods not merely as a matter of practice or habit, but also as a matter of obligation to a shared practice. Such norms for interpreting plurality decisions constitute a doctrine of stare decisis (or are part of a broader doctrine of stare decisis). The interpretive rule for plurality decisions supplies criteria for the identification of primary legal rules, specifically for evaluating the legal validity of principles and propositions contained in judicial decisions, and thus forms part of a jurisdiction's rule of recognition.[138] Rules for separating holdings from dicta supply further conditions of legal validity (and represent another part of stare decisis doctrine) since judges follow these rules to determine which parts of a judicial opinion constitute legally binding norms and which do not.

Let's take Michigan as an example. Michigan courts look for majority agreement on principle or rationale across all opinions issued in the plurality decision, including dissents, and treat majority-endorsed principles as binding. And Michigan judges follow this approach as a conventional norm: they proceed as though they have an obligation to follow it, an obligation that is at least in part constituted by the fact that they and other judges have done so in the past.[139] Michigan's interpretive approach for plurality decisions belongs to the state's rule of recognition. As Hart explained, the rule of recognition is "constituted by the uniform practice of the courts in accepting it as a guide to their law-applying and law-enforcing operations."[140]

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138 *See* JOSEPH RAZ, *Law and Value in Adjudication*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 180, 184 n.8 (1979) (noting that "the doctrine of precedent" is "part of the rule of recognition"). Methods of statutory interpretation have likewise been understood to "provide criteria for identifying legal rules, and [to] belong to the category of 'secondary rules' of the legal system, to which H L A Hart assigns what he terms 'rules of recognition.'" CROSS, *supra* note 9, at 42.

139 *See, e.g.*, People v. Anderson, 205 N.W.2d 461, 467 (Mich. 1973) (stating that "[t]he clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases"), *overruled on other grounds by* People v. Hickman, 684 N.W.2d 267 (Mich. 2004); Soufane v. Wu, No. 279227, 2009 WL 3789979, at *6 (Mich. Ct. App. Nov. 12, 2009) (asserting that "a decision of four or more of our [seven] Supreme Court justices on a specific point of law is binding upon this Court with regard to that point of law").

140 HART, *supra* note 130, at 258. As other scholars have stressed, the rule of recognition supplies criteria of validity not only for primary rules or rules of conduct, but also for other secondary rules, which might in turn supply criteria of validity for primary rules. *See* JOSEPH RAZ, *The Identity of Legal Systems*, *in* THE AUTHORITY OF LAW: ESSAYS ON

In contrast to Michigan, Kentucky courts do not count dissenting views for the purposes of precedent and do not take themselves to be bound by true plurality decisions.[141] Kentucky's rule of recognition, then—in particular its test for determining the legally-binding effect of previous judicial decisions—differs from Michigan's. It is unclear whether Kentucky affords no binding effect to plurality decisions as a rule or only as a practice. But we can tell from the behavior of Kentucky judges that, in contrast to Michigan, they do not have a doctrine of precedent that would require them to treat components of plurality decisions as binding law. To this extent at least, the states have different tests of legal validity and so different rules of recognition.

We can now turn to the context of an outside court—for example a federal court—adjudicating a claim arising under a state's law. Let's start with Michigan. The federal court has a legal duty to apply the substantive law of Michigan, including judge-made law. Assuming that the federal court wishes to fulfill its legal duty, should it follow Michigan's interpretive methods? Insofar as Michigan's legal officials have converged on and accept some interpretive approach as a rule, then the federal court should follow that approach.[142] This is because Michigan's interpretive approach comprises key tests of legal validity

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LAW AND MORALITY 78, 95 (1979) (explaining how it is not only the rule of recognition, but also other laws that can "set criteria of validity"); *see also* Brian Leiter, Critical Remarks on Shapiro's *Legality* and the "Grounding Turn" in Recent Jurisprudence, 17 (Sept. 16, 2020) (unpublished manuscript), https://ssrn.com/abstract=3700513. Interpretive methods will sometimes take the form of secondary rules distinct from rules of recognition; some interpretive method might be a valid legal rule if it is established, for example, by a statute or judicial decision that is itself binding under the rule of recognition. A judicial decision might set out some method of interpretation that constitutes a valid law just because the state's rule of recognition provides that judicial decisions are themselves binding law. In that case, the method would be a secondary rule as opposed to part of the jurisdiction's rule of recognition. I set aside this technical distinction for the purposes of my analysis here. It is relevant to the situation I am addressing only, I believe, in the following sense. Whereas the rule of recognition is a valid legal rule only if it is in fact followed by a jurisdiction's legal officials, derivative rules do not come with this condition and are valid just in virtue of the rule of recognition. If a particular method of interpretation is a secondary but derivative rule in this sense and not part of the jurisdiction's rule of recognition—which is arguably true of Michigan's *Negri* rule as well as the federal *Marks* rule—then a law-applying court might be legally bound by the method of interpretation even if the jurisdiction's own judges neglected to follow it.

141 *See, e.g.*, Ware v. Commonwealth, 47 S.W.3d 333, 335 (Ky. 2001) (declaring that a decision without a majority opinion "has no stare decisis effect" (quoting 20 AM. JUR. 2D *Courts* § 159 (1995) (current version at 20 AM. JUR. 2D *Courts* § 134 (West 2021)))).

142 If the judges treat some method of interpretation as "simply [a] tradition[] of good practice," or rule of thumb, however, as opposed to an obligatory norm, the method would not constitute part of the rule of recognition and law-applying judges would not be bound by it. CROSS, *supra* note 9, at 40.

for the jurisdiction of Michigan. If federal courts apply some other approach to Michigan's plurality decisions—for example, one that takes the plurality opinion as binding, which they have in fact done[143]—then they will inaccurately identify certain norms as binding that are not actually binding under Michigan's rule of recognition and will fail to identify certain binding norms as such. In this respect, the federal court's approach to ascertaining legal rules of conduct, as applied to Michigan precedent, would result in both false positives and false negatives.

What about Kentucky, then? Based on Kentucky's approach to plurality decisions, as demonstrated in Kentucky judicial opinions that address those decisions, we can tell that Kentucky's rule of recognition does *not* require judges to find legally valid rules in plurality decisions. What is unclear is whether judges are nevertheless permitted to do so. As long as Kentucky's rule of recognition does not prohibit plurality decisions from serving as precedent, the rule leaves judges with discretion over the construction of plurality decisions. This would be an instance of what Hart called law's "open texture."[144] If the law is open textured with respect to a particular dispute, then it does not supply a singularly correct answer to the legal question presented. In this event, a judge's decision will not be fully determined by pre-existing legal norms, and she must exercise discretion in deciding which rules to apply and conclusion to reach.

If Kentucky judges are exercising their discretion when they choose not to follow plurality decisions as precedent, then there is no legally binding rule on the matter, and federal judges deciding questions of Kentucky law would also have discretion. If the past Kentucky case that most closely resembles the present dispute was decided by a plurality decision, then the federal judges might decline to follow the plurality decision—perhaps for the sake of consistency, since that is what Kentucky judges would likely do—or they might decide to rely on the Kentucky plurality decision in one way or another, which would serve consistency on another level. Under Hartian positivism, either of those approaches would be legally permissible.[145]

143 *See supra* notes Section II.A.

144 *See* HART, *supra* note 130, at 124–36 (explaining how both statutory and precedential rules are open-textured, and describing the discretion of judges in light of this open texture).

145 As Hart explained, a judge's discretion in light of law's open texture "may be very wide; so that if [the judge] applies [a particular rule], the conclusion, even though it may not be arbitrary or irrational, is in effect a choice." *Id.* at 127.

2. Indeterminacy

Another possibility is that the federal rule of recognition requires federal judges to apply a particular method of interpretation in the event of a gap in the state's law. We know that federal courts, under *Erie*—so as a matter of *federal* law—have a legal duty to apply state substantive law to state disputes. The *Erie* decision itself did not resolve the question of how a federal court is supposed to proceed in the event that state law on an issue is indeterminate. But subsequent cases indicate that federal courts deciding questions of state law do not necessarily have discretion wherever their state counterparts would: this is a matter of federal conflict of laws jurisprudence. Federal courts generally take themselves as legally obligated to apply their best prediction of how a state's courts would decide the case at hand or will decide similar cases.[146] This prediction doctrine is part of the federal rule of recognition in the context of deciding questions of state law, even if it is not part of any state's rule of recognition for ascertaining its own law. Under positivism, then, interpretive methods between the law-supplying and law-applying jurisdictions can come apart when the law of the law-supplying jurisdiction is indeterminate.

3. Mistakes

For positivists, law is, at bottom, a product of the social rules that a jurisdiction's legal officials practice and accept.[147] For this reason, a court interpreting another jurisdiction's law has to follow the social rules—which can include interpretive methods—of the jurisdiction's judges, as if those rules were its own. Under positivism, then, judges do not have the kind of interpretive autonomy that would permit them to ignore or reject the interpretive norms of a law-supplying jurisdiction.

A jurisdiction's judges might on occasion, however, incorrectly attribute legal validity to some rules that are actually invalid under their own jurisdiction's rule of recognition and they might likewise fail to recognize the legal validity of certain rules. Legal officials are fallible actors—a reality that positivism accommodates. As Hart explained, "[n]o rules can be guaranteed against breach or repudiation; for it is never psychologically or physically impossible for human beings to

146 *See, e.g.*, Becker v. Interstate Props., 569 F.2d 1203, 1205 (3d Cir. 1977) ("Inasmuch as no New Jersey cases are squarely on point, it is important to make clear that our disposition of this case must be governed by a prediction of what a New Jersey court would do if confronted with the facts before us."); Wankier v. Crown Equip. Corp., 353 F.3d 862, 866 (10th Cir. 2003) ("Where no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do.").

147 *See supra* Section III.C.

break or repudiate them."[148] For example, Michigan courts might from time to time treat plurality opinions from fractured Michigan decisions as controlling, which would violate Michigan's rule of recognition and would likely result in mistaken judgments. As long as this type of conduct was sporadic or relatively anomalous, then Michigan's rule of recognition requiring majority support for the creation of valid precedent would survive it and federal courts trying to ascertain Michigan law should not try to reproduce it.[149] And so even under positivism, federal judges adjudicating a state dispute should not simply try to mimic what their counterparts in the relevant state's courts would do.

Chronic, systemic interpretive errors, however, are impossible under positivism, provided that interpretive methods are part of the rule of recognition.[150] This is because the existence of a rule of recognition requires that officials in fact follow it. Once officials customarily fail to recognize the rule, it no longer exists.[151] If a jurisdiction's courts make enough mistakes under some rule of recognition, then, the rule of recognition will change. This kind of change in a jurisdiction's rule of recognition may be difficult for external courts to detect, but they should nevertheless be on the lookout for such a change if they wish to get the jurisdiction's law right.

In sum, under Hartian positivism, a court seeking to identify the legal rules of a foreign jurisdiction should inquire into the actual interpretive behavior and attitudes of legal officials in that jurisdiction. To the extent that the jurisdiction's legal officials have converged on some interpretive norms, which the officials follow in order to ascertain the legally valid rules that past judicial decisions represent, the law-applying court ought to follow those norms as well—if, that is, it wishes to correctly ascertain the foreign jurisdiction's law.[152]

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148 HART, *supra* note 130, at 146.

149 *See id.* at 116 (explaining that "[i]ndividual courts of the system though they may, on occasion, deviate from [the system's rule of recognition] must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public").

150 For a qualification, see *id.* at 258.

151 *See id.* at 146; *see also* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1152 (1999) (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)) ("A Rule of Recognition is a social rule meaning that, at a minimum, it is constituted by social facts about how officials (i.e., judges) decide questions about what the law is"; this means "that there can *not* be too great a gap between what the law is in a particular society and how judges decide cases, for the very idea of 'what the law is' is (for positivism) conceptually dependent on the actual practice of officials (including judges) in deciding 'what the law is.'").

152 This is not to say that it would be impossible for a law-applying court to get a foreign jurisdiction's law right under positivism without attending to that jurisdiction's interpretive norms. After all, many jurisdictions follow overlapping interpretive norms—so that, for

D. Law as Integrity

According to Dworkin's theory of law as integrity, judges arrive at the right answer to legal questions through the process of *constructive interpretation*, which aims to construct a jurisdiction's whole body of law such that it is both coherent and justified. "According to law as integrity," Dworkin explained, "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[153] For Dworkin, a judge must follow law as integrity as a general or high-level interpretive approach so long as the pre-interpretive legal materials in a jurisdiction are not so incoherent or unjust that a constructive interpretation is impossible.[154]

1. Constructive Interpretation and Stare Decisis

A jurisdiction's own judges might be wrong about what their law requires in a given case for any number of reasons, including flaws in their doctrines of stare decisis. To the extent that the judges of some jurisdiction—say the state of Iowa—employ interpretive methods that generate principles and propositions that do not provide the best constructive interpretations of Iowa's legal practices, external judges tasked with applying Iowa law will have no obligation to follow—and will even have an obligation *not to* follow—Iowa's interpretive methodology.

Under law as integrity, a judge should certainly take the law-supplying jurisdiction's prevailing doctrines of precedent into account. This is because doing so might help the judge to interpret the law in a way that is consistent with the jurisdiction's legal practices, or to recognize and enforce principles that are embedded in those practices. If, for example, a jurisdiction widely embraces a system of precedent under which majority agreement among judges is necessary

example, a federal court applying a federal interpretive method might get a state's law right because the state uses the same interpretive method. Moreover, sometimes different interpretive methods will yield the same legally valid rules. For example, take a plurality decision in which the plurality opinion endorses some key principle, *p*, that a dissenting opinion also endorses. As long as the judges joining the plurality and dissenting opinions comprise a majority of the court, then an interpreter that treats key principles from the plurality opinion as binding and an interpreter that treats only majority-endorsed principles as binding will each find that principle *p* is a legally valid one, even though the interpreters took different paths to get there.

153 RONALD DWORKIN, LAW'S EMPIRE 225 (1986).

154 For example, Dworkin suggests that the Nazis had law only in a pre-interpretive sense, because there is no conceivable interpretation of Nazi legal practices that has "any justifying power at all." *Id.* at 101–02.

to establish a legally binding rule, then a Dworkinian judge interpreting that jurisdiction's law will aim to make decisions that are consistent with that majoritarian principle.[155] According to law as integrity, "[i]ndividuals have a right to the consistent enforcement of the principles upon which their institutions rely."[156] If, however, a jurisdiction embraces a principle of majoritarian decisionmaking, but its courts also engage in some interpretive practice that conflicts with this principle and cannot be redeemed under others—for example, it treats plurality opinions or "narrowest grounds" opinions from fractured decisions as controlling—then a judge tasked with applying the jurisdiction's law ought to recognize the practice as an aberration and refrain from following it. Whether or not the jurisdiction's own courts would classify the aberrational practice as legally binding is not dispositive as to how the law-applying court should proceed. The jurisdiction's stare decisis jurisprudence could be mistaken.[157]

In the early case of *Bell v. Morrison*, the Supreme Court noted that the "rules of interpretation" that a state's tribunals use on their own statutes "must be presumed to be founded upon a more just and accurate view of their own jurisprudence, than those of any foreign tribunal, however respectable."[158] That statement nicely captures a Dworkinian point of view on interpretation: it is not that a state's own interpretive methods must be followed simply because they are the state's methods, but rather because those methods will produce the best constructive interpretation of the state's own law. This idea

155 The Texas court that construed the federal plurality decision of *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1995), to stand for the majority-endorsed principles contained in it might have been moved by the recognition that federal courts generally follow a majoritarian approach to precedent formation. *See supra* notes 97–99 and accompanying text. The court's approach to the federal decision perhaps demonstrates an attempt to realize that majoritarian principle despite the fractured nature of the decision. Evidence that the majoritarian principle underlies the federal system of precedent includes the federal practice of looking to majority opinions for holdings, as well as judicial pronouncements that majority views and only those create binding precedent. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) (observing that the reasoning contained in an opinion is binding if and only if it "represent[s] the views of a majority of the Court"); United States v. Pink, 315 U.S. 203, 216 (1942) (asserting that "the lack of an agreement by a majority of the Court on the principles of law involved prevents [a decision] from being an authoritative determination for other cases"); *see also* Williams, *supra* note 48, at 845 (characterizing a "commitment to majority decisionmaking" as a "broadly accepted convention[] of Supreme Court decisionmaking that [is] highly relevant to assessing the precedential significance of the Court's pronouncements").

156 DWORKIN, *supra* note 11, at 126.

157 As Dworkin explained, judges can make mistakes "either because they rely on poor background moral or political theory, or because they make more pedestrian errors of analysis." *Id.* at 313.

158 Bell v. Morrison, 26 U.S. (1 Pet.) 351, 359–60 (1828).

assumes that a state's own judges are good law-as-integrity judges, something we should perhaps not take for granted; accordingly, we might add the qualification that law-applying judges should defer to the law-supplying judges' interpretive methods *to the extent that* they are "founded upon a more just and accurate view of their own jurisprudence" than those of any outside tribunal.[159]

Indeed, the *Bell* Court, which was applying Kentucky statutory law, went on to observe that it has a "duty to follow out the *spirit* of [Kentucky's judicial decisions], so far as [it is] enabled to gather the principles on which they are founded, and apply them to the case at bar."[160] The Court thereby indicated that it was not limited to the text of Kentucky's judicial decisions or narrow holdings expressed there, even though Kentucky's own courts might interpret precedent in a more literal or textualist way. Sounding very Dworkinian indeed, the Supreme Court here suggests a particular approach to ascertaining the precedential effect of judicial decisions that might well depart somewhat from the approach of Kentucky courts and uses the approach to ascertain the legal effect of Kentucky decisions. Dworkin's theory of law entails an account of "how law is to be identified" that incorporates the value of integrity.[161] In *Bell*, the Court attempts to make out Kentucky law in a way that realizes, and prioritizes, integrity; from a Dworkinian point of view, the federal court might thereby diverge somewhat from Kentucky courts in its interpretive approach and at the same time fulfill its duty to apply Kentucky law.

Since interpretive methodology is itself a legal practice, a law-applying court should include a jurisdiction's interpretive methods as input in the constructive interpretation enterprise: this may or may not require the court to apply a particular interpretive method of the law-supplying jurisdiction, depending on its content and the relationship between that content and the all the other legal practices that the court must take into account in the process of constructive interpretation. In some cases, a law-applying jurisdiction might have a legal duty to apply the law-supplying jurisdiction's interpretive methods even if from the point of view of law as integrity it would be better for the law-supplying jurisdiction to use a different interpretive methodology. The law-applying judges have to take the source jurisdiction's legal materials, including stare decisis doctrines, as they find them.

In many cases, though, under law as integrity a law-applying court should refrain from following the interpretive protocols of the law-supplying jurisdiction. Some of the methods for interpreting plurality

159 *Id.* at 360.

160 *Id.* at 365 (emphasis added).

161 DWORKIN, *supra* note 125, at 145, 177.

decisions that courts have embraced are both difficult to justify and fail to fit well with other existing legal practices. For example, the narrowest grounds rule would afford binding effect to the view of a minority of judges on the court, defying the majoritarian principle that underlies the system of precedent (in U.S. jurisdictions at least) and moreover giving precedential weight to rationales that are unlikely to actually best justify the decision.[162] Consider the Supreme Court's decision in *Freeman v. United States*, where the Justices divided 4–1–(4).[163] Until *Freeman* was overruled,[164] most of the lower federal courts treated the concurring opinion of Justice Sotomayor as binding, since it advanced the narrowest rationales in favor of the judgment in the case.[165] No other justices agreed with her opinion, however, and so it is unlikely that her reasoning in fact represents the principles that best justify the outcome of the case. The principles endorsed by the four justices joining the plurality opinion likely represent a better justification for the decision. Accordingly, if a state judge is charged with deciding a question of federal law, law as integrity might counsel against the judge following the narrowest grounds rule, even though that rule represents the dominant approach in the federal courts. As Dworkin explained, it is the "set of principles" that in fact "best justif[y] the precedents" that are binding in subsequent cases.[166]

For Dworkin, the system of precedent itself is best justified by the principle of fairness: "[t]he gravitational force of a precedent may be explained by appeal . . . to the fairness of treating like cases alike."[167] Courts, then, are not permitted to pick and choose which judicial decisions will be precedential—that behavior would not fit a practice that rests on the principle of fairness. If a new dispute resembles a past one, then judges should treat them the same. Nevertheless, many courts declare and treat certain subsets of decisions as non-precedential. For some courts, plurality decisions are nonbinding.[168] Of greater consequence, both state and federal intermediate appellate courts mark a large proportion of their decisions as "unpublished" and

162 *See supra* subsection I.C.3 for an overview of the narrowest grounds rule.

163 564 U.S. 522, 524 (2011). As before, parentheses signify dissenting votes.

164 The Supreme Court overruled *Freeman* in *Hughes v. United States*, 138 S. Ct. 1765 (2018).

165 *See, e.g.*, United States v. Hughes, 849 F.3d 1008, 1013 (11th Cir. 2017) (determining that Justice Sotomayor's *Freeman* opinion controls under *Marks* and noting that "eight sister circuits" have made the same determination), *rev'd on other grounds*, 138 S. Ct. at 1778.

166 DWORKIN, *supra* note 11, at 116–118.

167 *Id.* at 113; *see also id.* at 116 (asserting that "the general justification of the practice of precedent" is "fairness").

168 *See, e.g.*, *supra* note 112 and accompanying text.

deny precedential authority to those decisions.[169] A good Dworkinian judge might disregard that directive and recognize the force that all of a jurisdiction's previous decisions have over subsequent cases. A federal court, for instance, should perhaps treat an unpublished decision of a state court as an authoritative piece of state law even if the state's own courts deny authority to unpublished decisions.

Without naming it as such, some judges have expressed this Dworkinian point of view in response to the increasingly common judicial practice of issuing unpublished decisions. Justice Markman of the Michigan Supreme Court, for example, opined against a proposed amendment to the Michigan Court Rules that would "provide that citing an unpublished opinion is 'disfavored'": Markman maintained that a legitimate judicial decision will necessarily carry the force of law and that the court accordingly has no basis on which to discourage parties from citing any such decision.[170] Judge Arnold of the Eighth Circuit Court of Appeals has similarly maintained that whenever judges exercise the judicial power they necessarily make declarations of law that are binding in subsequent cases.[171] A judge cannot do the former without also doing the latter. For both Markman and Arnold, then, a court cannot change the precedential nature of a decision by marking the opinion as *unpublished* and acting as though unpublished decisions are not legally binding. When courts do act in that way, they are violating the law, not defining it.

Consistent with Markman's and Arnold's views, when courts interpret the law of another jurisdiction, they sometimes treat past decisions made by the other jurisdiction's courts as precedential regardless of the other jurisdiction's stance on the binding force of those decisions. In the adjudication of state law questions, federal courts sometimes treat unpublished state decisions as authorities, even if the states have practices or rules that deny precedential status to

169 *See, e.g.*, David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667 (2005) (discussing the phenomenon of unpublished and nonprecedential opinions in the federal courts of appeals); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003) (discussing unpublished opinions in both state and federal appellate courts).

170 Order Proposing Amendment of Rule 7.215 of the Michigan Court Rules, ADM File No. 2014-09, at 3–4 (Feb. 18, 2015) (Markman, J., concurring in part and dissenting in part) (asserting that any "legitimate product of the 'judicial power'" carries the force of law and that, regardless of the form in which a court expresses its decision, so long as a case has been decided, that decision "will constitute the bona fide law of this state and will contribute . . . to defining the body of law from which the precedents of this state must be identified").

171 Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *opinion vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

unpublished decisions and sometimes even if the states have rules prohibiting citation to such decisions.[172] These federal practices may be appropriate from a Dworkinian point of view. If the doctrines of precedent that we see in the United States, despite some differences among them, are generally justified by a principle of fairness, then under the theory of law as integrity judges ought to afford precedential weight to all of a jurisdiction's judicial decisions, even in cases where the jurisdiction's own courts would fail to do so.

Many commentators have suggested, to the contrary, that when a court applies the law of another jurisdiction, that court ought to step into the place of a court in the foreign jurisdiction—to act as the foreign court would—since a jurisdiction is sovereign over its own body of law. According to Professor Lea Brilmayer, "[w]hen applying another state's law, . . . judges are supposed to exercise no creative judgment, but rather implement mechanically whatever a relevant state court has decided to do with the issue": judges must make decisions that "avoid[] intrusions into other states' sovereignty, minimiz[e] forum shopping through the pursuit of decisional uniformity, [and] maximiz[e] predictability."[173] Indeed, these considerations represent basic choice-of-law values.[174]

We can accept, however, that a jurisdiction is sovereign over its own body of law without accepting that a federal court adjudicating a

172 *See, e.g.*, Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 152 n.6 (3d Cir. 1988) (relying on an unpublished New Jersey Court of Appeals decision; noting that a New Jersey Rule "precludes a court from citing such an opinion"; and asserting that "[t]he New Jersey rules are, of course, binding only on the New Jersey courts, and we would be remiss in our duty to apply New Jersey law were we to ignore a New Jersey case where the relevant issue is identical"); Aviles v. Burgos, 783 F.2d 270, 283 n.4 (1st Cir. 1986) (following an unpublished decision from the Supreme Court of Puerto Rico; noting a Puerto Rico Rule providing that it is "improper to cite as an authority or precedent [such a decision]"; and stating that they "have relied upon it" anyway, since "all the parties have had access to the opinion and because it is a well-reasoned and complete opinion"); *see also In re* Schmelzer, 480 F.2d 1074, 1076 n.1 (6th Cir. 1973) (citing an unreported Ohio case, noting that an Ohio statute "requires that an opinion be reported in the official reports before it is recognized by and given the official sanction of any court" and asserting that the statute "does not seem to be enforced by the Ohio Courts . . . or by our Court"); Gustin v. Sun Life Assur. Co., 154 F.2d 961, 962 (6th Cir. 1946) (asserting that "it is the duty of the federal courts 'in every case to ascertain from all the available data what the state law is and apply it'" and concluding that it would follow an unreported Ohio state decision even if Ohio courts would disregard the decision given its unreported status (quoting West v. Am. Tel. & Tel. Co., 311 U.S. 223, 225 (1940))), *cert. denied*, 328 U.S. 866 (1946). Dorf discusses this kind of federal court practice in *Prediction and the Rule of Law.* Dorf, *supra* note 82, at 713–14.

173 Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031, 2063, 2067 (2019).

174 *See id.* at 2063; *see also* Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233, 236 (1991).

state claim should act as though it is a court of the state and emulate the interpretive approach that the state's courts would use. As Dworkin would put it, the job of Hercules is not "to replicate what other judges do," but rather "to enforce the genuine institutional rights of those who came to his court."[175] From a Dworkinian point of view, a federal court might even exhibit greater deference to the state's law by declining to wholly follow that state's stare decisis doctrine. Suppose, for example, that the courts of some state, say Nevada, issue unpublished opinions and disavow the legal authority of those opinions. If a federal court nonetheless attributes precedential force to all Nevada decisions (and if Dworkin and others are correct that judicial decisions necessarily carry this force), then the federal court might be more likely than a Nevada state court to resolve a particular new case correctly under Nevada law. Federal courts can thus respect a state's sovereignty and its autonomy over its own body of law without necessarily deferring to the state's doctrines of stare decisis.

Further, when applying the law of another jurisdiction, judges may be justified in exercising more creative leeway in interpretation than judges applying their own law. Discussing the choice-of-law context, Brilmayer and Charles Seidell assert just the opposite: "[a] common law cause of action arising under forum law can be treated with much greater freedom of judgment than a common law cause of action arising under the law of another state."[176] And they observe that, "[t]his phenomenon has been noted frequently in analogous jurisdictional situations, such as when a federal judge is charged with applying the law of the state in which she sits."[177] If a court is tasked with applying the law of another jurisdiction and does not have the power to overrule that other jurisdiction's precedent, however, then the court might have to interpret the law creatively—reading prior cases in a way that makes them justifiable and consistent with one another—in order to reach decisions in new cases that satisfy the law as integrity aims of justification and fit. In contrast, when judges interpret their own jurisdiction's law, they may not need to exercise as

175 DWORKIN, *supra* note 11, at 123.

176 Brilmayer & Seidell, *supra* note 173, at 2066. Professor Anthony Bellia presents empirical evidence suggesting that state judges historically viewed themselves as having greater freedom of judgment when interpreting their own law compared to federal law. Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501 (2006). He finds that "state courts historically interpreted 'their own' statutes 'more freely' than they interpreted federal statutes," and in particular that state courts used "forms of equitable interpretation" on their own statutes but not on federal statutes. *Id.* at 1552, 1507, 1515–29.

177 Brilmayer & Seidell, *supra* note 173, at 2067; *see also* Brilmayer, *supra* note 174, at 234 ("When a judge applies the law of another jurisdiction, his or her creative leeway is fairly circumscribed.").

much creativity, provided that they (or judges on courts above them) have the power to overturn aberrational cases. From a Dworkinian point of view, then, judges engaged in intersystemic interpretation might sometimes have a legal duty to diverge from the law-supplying jurisdiction's approach to stare decisis.

2. Epistemology and Interpretive Methodology

On the other hand, for epistemic reasons, law as integrity might sometimes counsel courts in the intersystemic context to set aside particular precedents of the law-supplying jurisdiction rather than attempting to salvage them through a creative interpretation. As Gluck observes, federal courts interpreting state statutes often decline to apply creative methods of statutory interpretation, such as constitutional avoidance, "despite the fact that federal courts often apply those doctrines in federal cases and . . . state courts themselves apply those canons in their own cases."[178] In *Ways v. City of Lincoln*, for example, the Eighth Circuit Court of Appeals determined that a Nebraska ordinance concerning sexual entertainment was unconstitutionally broad without attempting to save the ordinance through a strained interpretation.[179] While acknowledging the possibility of a limiting construction, the federal court stated that such "constructions of state and local legislation are more appropriately done by a state court or an enforcement agency."[180] The canon of constitutional avoidance calls upon courts to construe a statute that would seem to present constitutional problems as if it were consistent with the constitution.[181] Perhaps, under law as integrity, judges should hesitate to apply constitutional avoidance to another jurisdiction's statutes, even if the other jurisdiction's courts embrace the canon, since they

178 Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1904.

179 274 F.3d 514, 519 (8th Cir. 2001).

180 *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 795–96 (1989)). For criticism of this case and others where federal courts have seemed reluctant to apply the constitutional avoidance canon to state statutes, see Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1953.

181 More precisely, constitutional avoidance comes in two versions: the first "concerns situations in which a statute would be actually unconstitutional if interpreted in one way but not another," in which case "the canon directs the court to choose the construction that saves the statute, even if it is a worse or even quite strained reading, so long as the saving construction is possible"; the second version of the canon, which is applicable more often, "does not require that one of the candidate interpretations would render the statute actually unconstitutional but instead requires only that the interpretation would raise serious constitutional *doubts*." Bruhl, *supra* note 2, at 467–68.

might be ill-equipped to come up with a creative interpretation that provides a good fit with the rest of the relevant body of law.[182]

The same line of reasoning applies to doctrines of precedent: some methods of construing precedents are difficult for judges to apply even to their own court's precedent—for example, the *Marks* narrowest grounds rule—let alone another jurisdiction's precedent. A judge attempting to generate a constructive interpretation of another jurisdiction's law might be more likely to succeed if she sets aside fractured decisions, even if those decisions would be binding under the stare decisis doctrine of the law-supplying jurisdiction.

Dworkin's theory of law as integrity is often criticized for being overly demanding of judges, since it calls on them to make decisions that both fit and justify the entire relevant body of existing law: as Dworkin put it, "law as integrity . . . requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."[183] Dworkin conceded that "[n]o actual judge could compose anything approaching a full interpretation of all his community's law at once."[184] He suggested, however, that "an experienced judge will have a sufficient sense of the terrain surrounding his immediate problem to know instinctively which interpretation of a small set of cases would survive if the range it must fit were expanded."[185] But Dworkin took for granted that judges interpret the law of the society in which they are embedded, and he neglected to contemplate the intersystemic

182 For the same reason, federal courts should be wary of interpreting state statutes using a *dynamic* approach, whereby judges update or refine statutes "to reach unforeseen problems"; indeed, federal courts have declined to use the dynamic approach on state legislation even in cases where the state's supreme court would interpret the statute at issue dynamically. Gluck, *Intersystemic Statutory Interpretation*, *supra* note 3, at 1927 (discussing this phenomenon). The same argument could be made for severability—"a judicially created doctrine which recognizes a court's obligation to uphold the constitutionality of legislative enactments where it is possible to remove the unconstitutional portions" while preserving the rest. State v. Catalano, 104 So. 3d 1069, 1080 (Fla. 2012) (quoting Fla. Dep't of State v. Mangat, 43 So. 3d 642, 649 (Fla. 2010)); *see also* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) ("[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion))). Epistemic constraints might also explain why the lower federal courts rely less on the canon of constitutional avoidance than the U.S. Supreme Court. *See* Bruhl, *supra* note 27, at 44 (providing empirical evidence to this effect).

183 DWORKIN, *supra* note 153, at 245. *But see, e.g.*, Sunstein & Vermeule, *supra* note 122, at 939–40 (suggesting that judges "are not well-equipped to engage in [the kind of] theoretically ambitious tasks" that Dworkin set out for them).

184 DWORKIN, *supra* note 153, at 245.

185 *Id.*

context in which judges interpret the laws of other jurisdictions. In this context judges might do better under law as integrity to set some decisions aside rather than strain to fit them within their constructive interpretation, even if the law-supplying jurisdiction's own judges would preserve them. For example, it may be futile for judges to attempt to reconstruct a fractured decision from another jurisdiction such that it is both justified and coherent in light of all of the jurisdiction's other legal practices.

Further, stare decisis methodology itself tends to be both complicated and elusive, and more prone to obscurity than first-order rules of decision and even than methods of statutory interpretation. Even though judges employ methods of following precedent all the time, they typically do so without justifying or otherwise reflecting on their interpretive moves.[186] For outsider judges then, a jurisdiction's prevailing stare decisis doctrine may be particularly difficult to discern and implement effectively. Outsider judges, compared to insider ones, have epistemic disadvantages with respect to ascertaining and applying the applicable law, which might sometimes justify a difference in interpretive approach.[187]

In sum, under the theory of law as integrity, a federal court deciding a question of state law should not necessarily follow the state's

186 *See supra* notes 25–26 and accompanying text.

187 Other scholars have suggested similarly that epistemic differences between judges of different courts might justify the application of different interpretive methods to the same body of law. Focusing on the intrajurisdictional context, Bruhl argues that lower federal courts should and in fact do use different (less complicated and fewer) methods of interpretation than the Supreme Court because, among other reasons, the courts differ in terms of resources, competencies, and access to materials. *See supra* notes 2, 27. For some of the same reasons Bruhl delineates, courts applying another jurisdiction's law might do a better job if they use methods of interpretation that differ from those that the law's home courts would use. *See also* Pojanowski, *supra* note 2, at 502–07 (describing the idea of "calibrat[ing] interpretive method with the practical competences of the interpreter" and suggesting that state court methods of interpreting state statutes should perhaps diverge from federal methods of interpreting federal statutes because state and federal judges have different competencies). These considerations also suggest that federal judges interpreting state statutes should not necessarily take up state interpretive methods. *Id.* at 539. For example, suppose that a state embraces a purposive approach to interpretation and regularly relies on legislative history to ascertain the purpose of its statutes; a federal court or another state might be poorly positioned, at least relative to the state's home courts, to ascertain the state's legislative purpose. *See, e.g.*, Somers v. Com. Fin. Corp., 139 N.E. 837, 839 (Mass. 1923) ("We cannot speak with the same confidence of the intention and the policy of the Legislature of another state as we might of those of our own." (quoting Folger v. Columbian Ins. Co., 99 Mass. 267, 275 (1868))). Sunstein & Vermeule, *supra* note 122, argue along similar lines that evaluations of interpretive methodology should be sensitive to institutional competencies, and in particular that different types of interpreter—for example judges and agencies—have different capacities, which warrant different interpretive approaches.

stare decisis doctrines because those doctrines might impede the court's ability to produce the best constructive interpretation of the state's law.

3. Are U.S. Judges Dworkinians?

Gluck observes that, for many judges, interpretive methods "do not 'feel' like other types of substantive law."[188] "Perhaps because some judges view interpretation as a core aspect of the judicial function," she suggests, they believe that rules meant to govern interpretive methodology interfere with a judge's ability to exercise the judicial power.[189] Lending support to this idea, in an empirical study of judicial perspectives on the status of interpretive methodology, Gluck and former Judge Richard Posner found that U.S. federal appellate judges generally believe that they are not bound by interpretive methods advanced by the U.S. Supreme Court.[190] Some of the judges whom Gluck and Posner surveyed went so far as to suggest that exercising interpretive freedom is "the essence of being a judge": for these respondents, judging means applying the interpretive method that will yield "the *best reading*" of the law at issue, and interpretive protocols prescribed by others will not necessarily yield the best reading.[191]

This view is justifiable under law as integrity: to realize the vision of Dworkin's theory of law, judges need to have discretion to apply whatever methods of interpretation will best enable them to ascertain the principles that support a jurisdiction's legal practices as a whole and to decide a given case consistently with those principles. This insight is critical to the interpretation of precedent in the intersystemic context because, as I have shown, the prevailing doctrines of stare decisis in the law-supplying jurisdiction may or may not meet the demands of law as integrity, especially when outsider judges are the ones in charge of applying the law.

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188 Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 3, at 1827.

189 *Id.*; *see also* Bernard W. Bell, *Mademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 27 (1999) (arguing that "[t]he task of interpreting statutes requires the interpreter to determine the interpretive principles it will employ"); James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 379 (2019) (observing that legislated rules of statutory interpretation "trench on an interpretive domain that tends to be zealously guarded by the courts for separation of powers reasons").

190 Gluck & Posner, *supra* note 19, at 1343–48.

191 *Id.* at 1314, 1320. *But see* Bruhl, *supra* note 18, at 162 (finding, through an empirical study of decisionmaking in the federal courts, that "[t]he [methodological precedent] we currently have is meaningful," and that lower federal courts in particular view propositions and canons of statutory interpretation as binding law).

4. Is Interpretive Methodology Special?

One might reasonably wonder whether my Dworkinian analysis of interpretation in the intersystemic context proves too much: if law-applying judges are not bound by the stare decisis doctrine of the law-supplying jurisdiction, on what basis are they bound to apply any of the norms, including rules of conduct, that are legally binding from the point of view of the law-supplying jurisdiction's own legal officials?

Indeed, under law as integrity, a law-applying judge is not necessarily bound to follow even a given rule of conduct that represents a legally binding norm from the point of view of officials in the law-supplying jurisdiction. The law-supplying courts might be mistaken not only about interpretive methodology, but also any other legal norms, including those governing primary conduct. Nevertheless, I believe that doctrines of precedent are meaningfully different from first-order precedent for the purposes of a Dworkinian analysis of the intersystemic deference problem.

This is because, for one, even when courts treat or appear to treat methods of interpretation as legal rules, they often arise from the personal opinions and philosophies of judges. For example, Professor Rupert Cross described methods of interpretation as "statements of attitude," "approach," or "position," and as "examples of judicial practice," which reflect "opinion[s] about the proper judicial role": in this sense, Cross viewed interpretive methods as importantly different from other types of legal rules and principles.[192] Even when a jurisdiction converges on some transsubstantive method of interpretation, the convergence seems often to be a consequence of historical happenstance or the personal views of particular judges, or a combination of the two, which supports Cross's view of the distinction between interpretive methodology and other types of legal norms.

For example, in *Marks v. United States*, the Supreme Court relied on the narrowest grounds rule to construe a plurality decision, apparently without much thought and in any event without offering any justification for the rule. A justification has not appeared in subsequent cases and is hard to come by, although some commentators have tried.[193] The *Marks* rule seems to be a matter of historical happenstance, and it is not clear that it serves any deep or systemic

192 CROSS, *supra* note 9, at 42–43, 197; *see also* Greenawalt, *supra* note 124, at 657 (suggesting that the "prevailing interpretive standards typically exercise less constraint than clear precedents that establish rules of law" and that a prevailing standard of interpretation "does make a difference, but even such a standard does not bind as strongly as authoritative constitutional or statutory materials or even as strongly as typical precedential rules of law").

193 *See, e.g.*, Stearns, *supra* note 48.

principles that would justify applying it over alternatives, at least from a law as integrity point of view.

For an example of how interpretive methodology may be driven by the personal ideologies or philosophies of judges, consider Michigan Supreme Court's history of statutory interpretation. Gluck delineates how, in the late 1990s, four "self-described textualist[s]" joined the court "with a mission to change the way the state court approached statutory interpretation" and the state's courts accordingly came to embrace a predominantly textualist methodology.[194] "[B]ickering over methodological choice continue[d] among the [Michigan] justices," however, given that some purposivists remained on the court and continued to express their purposivist views.[195] As Gluck observes, examples of philosophically or ideologically divided courts make one wonder "to what extent even an apparently neutral methodological regime can constrain courts with major internal divisions."[196]

Relatedly, judges seem to readily overrule methodological precedents (or to deny that they are actually precedents), perhaps because judges view interpretation as both personal and philosophical. Judges seem to be more comfortable applying some substantive doctrine—say, a rule of contract law—that they believe is unwise than applying an interpretive approach that they object to. For example, Justice Zarella of the Connecticut Supreme Court has described interpretive disagreement within her court as "philosophical disagreement" and has suggested that methods of statutory interpretation such as the "plain meaning rule" are not amenable to precedential effect.[197]

Jurists have made similar assertions about stare decisis methodology. For example, during oral argument in *Hughes v. United*

194 Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 3, at 1804.

195 *Id.* at 1808.

196 *Id.* at 1798.

197 State v. Courchesne, 816 A.2d 562, 610–11 (Conn. 2003) (Zarella, J., dissenting); *see also* Petersen v. Magna Corp., 773 N.W.2d 564, 570 n.36 (Mich. 2009) (Kelly, J., concurring) (asserting that the "tools of statutory interpretation . . . are not 'binding' in the same sense as is the holding . . . and stare decisis does not apply to them"); Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring) (suggesting that transsubstantive interpretive methods such as the *Auer* rule "exceed the limits of stare decisis" (quoting Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1159 (2019))). As Adrian Vermeule observes, "interpretive doctrine appears markedly unstable, fluctuating rather dramatically over short periods"; the Supreme Court "has changed its practice, and sometimes the formally stated rules," "on subjects such as the role of purposive considerations in interpretation, the use of extrinsic (or nontextual) sources, and the role of particular canons of construction . . . with remarkable frequency." Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001).

States, where the Court was asked to clarify the meaning of the *Marks* narrowest grounds rule, Justice Breyer suggested that doing so was inadvisable if not impossible, given that the role of judges in a common law system is to determine for themselves how best to make sense of and follow precedent: "There are no absolute rules" for the purpose, Breyer asserted.[198]

Law as integrity does not require judges to necessarily follow the law-supplying jurisdiction's stare decisis doctrine, but rather to rely on it only to the extent that doing so would help them come up with a successful constructive interpretation of the rest of the jurisdiction's legal practices. To the extent that stare decisis methodology reflects deep philosophical commitments including about the very nature of law, we cannot expect a judge's approach to depend entirely on which jurisdiction's law they happen to be interpreting; instead, we should expect some transsystemic constancy in a particular judge's stare decisis jurisprudence.

Further, as I discussed in subsection 2 above, a jurisdiction's preferred or prevailing interpretive approach—and especially methods of interpreting precedent—are likely to be more difficult for outsider judges to ascertain and apply than the jurisdiction's primary rules of conduct. The epistemological differences between law-applying and law-supplying judges in the intersystemic context suggest that judges adjudicating a dispute might be less likely to reach the right answer if they attempt to follow the stare decisis methodology of the law-supplying jurisdiction.

From the point of view of law as integrity, then, interpretive methodology may differ fundamentally from other types of legal practice.

* * *

In this Part, I have argued that we cannot answer the question of whether and in what cases doctrines of precedent are inter-jurisdictionally binding without resolving fundamental and long-disputed questions about the nature of law. I have shown how, under neither positivism nor law as integrity is the law-supplying jurisdiction's stare decisis methodology unconditionally binding on the law-applying court, although for a positivist it typically will be.

My account suggests that many judges in the U.S. do not view intersystemic adjudication as a positivist should, but that their conduct

198 Transcript of Oral Argument at 32, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155).

is consistent with the alternative legal theory of law as integrity.[199] In contrast, scholars who claim that judges legally ought to defer to the interpretive methods of the law-supplying jurisdiction, whatever they may be, would seem to be unsympathetic to law as integrity, which does not support that claim. The widespread, if often only implicit, commitment to positivism among legal scholars today might explain why many of them insist that a good law-applying judge will faithfully adopt the interpretive methods of the law-supplying jurisdiction.[200]

CONCLUSION

State judges have the prerogative, under principles of federalism and *Erie*'s interpretation of the Rules of Decision Act, to establish state decisional law that is applicable in both state and federal courts: a federal court "cannot afford recovery if the right to recover is made unavailable by the State."[201] But how is a federal judge to determine whether a right to recover is made available by state precedent? Federal courts confront this issue when they exercise diversity or supplemental jurisdiction over state law claims. And state courts face the same kind of question when they adjudicate cases arising under federal or another state's law, as do courts when they apply the laws of foreign countries. This problem, although fundamental and ubiquitous, has been surprisingly undertheorized.

Scholars have generally assumed that a jurisdiction's right to create its own body of precedent entails the right to determine how legal meaning will be derived from its judicial decisions, wherever that meaning may be derived—whether by internal or external courts—such that a law-applying court is bound by the law-supplying jurisdiction's stare decisis methodology. This Article has revealed the limitations of that admittedly intuitive assumption, showing how different legal theories generate different answers to the question of whether, in a given case, a law-applying court legally ought to employ the stare decisis jurisprudence of courts in the law-supplying jurisdiction. The Article thus illuminates the integral relationship between

199 I do not mean to suggest that all or even most judges self-consciously identify with particular theories of law. As Professor Liam Murphy observes, "[m]ost judges . . . neither announce their theory of law in their opinions nor write books or articles about the judicial process, so it is hard to know what theory of law they hold." LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 10 (2014). I do believe, however, that most judges at least implicitly accept some theory of law, and that a judge's approach to decisionmaking—including, for example, the kinds of justifications that she takes as appropriate—can reveal her underlying legal theoretic commitments.

200 *See* Greenberg, *supra* note 116, at 18, 50 (suggesting that Hart's version of positivism is "the most widely held theory of law" among legal theorists).

201 Guar. Tr. Co. v. York, 326 U.S. 99, 108–09 (1945).

analytical jurisprudence and a ubiquitous quandary concerning intersystemic adjudication.

Although this Article focused on methods of interpreting precedent in the intersystemic context, its line of analysis could be extended in various directions: for example, to statutory and constitutional interpretation in the intersystemic context; to all kinds of interpretation across courts within jurisdictions, across judges within courts, and even across cases within judges; and perhaps to other types of meta norms and practices as well.