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# Settled Versus Right: Constitutional Method and the Path of Precedent

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# Settled Versus Right: Constitutional Method and the Path of Precedent

Randy J. Kozel\*

*Constitutional precedents give rise to a jurisprudential tug-of-war. On one side is the value of adhering to precedent and allowing the law to remain settled. On the other side is the value of departing from precedent and allowing the law to improve. In this Article, I contend that negotiating the tension depends on bridging the divide between constitutional precedent and interpretive method.*

*My aim is to analyze the ways in which theories of precedent are, and are not, derivative of overarching methods of constitutional interpretation. I seek to demonstrate that although certain consequences of deviating from precedent can be studied in isolation, the ultimate choice between overruling and retaining a past decision requires the integration of a broader interpretive method. Moreover, because a single interpretive philosophy may be derived from varying normative baselines, constitutional lawyers must press beyond the threshold election of competing methodological schools to engage with the schools' respective foundations. Whether one's preferred approach is originalism, living constitutionalism, or otherwise, the importance of implementing a given constitutional rule depends on methodological commitments and the normative premises that inform them.*

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## Introduction

Text is what starts the engine of constitutional law, but precedent is what really makes it hum.<sup>1</sup> Legal briefs and judicial opinions are awash in efforts to marshal, characterize, and distinguish prior decisions. Even novel arguments are consistently framed to suggest that what seems like a break from the past is actually an enhancement of continuity.<sup>2</sup>

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1. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 33–36 (2010) (emphasizing the importance of precedent to constitutional adjudication); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 139 (1991) (“The gloss added to the Constitution in the form of precedents is an integral part of most dialogues among the Justices about the Constitution.”).

2. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”); *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005) (declining to follow a

The pervasiveness of precedent is equaled by the controversy it can engender. In its most robust form, the invocation of precedent can lead a court to issue rulings that run counter to what its decision would otherwise be. It is little wonder that the Supreme Court's approach to precedent—often referred to by the Latin shorthand, *stare decisis*<sup>3</sup>—drips with political valence and serves as a flashpoint during the vetting of every would-be Justice.<sup>4</sup>

The prevailing wisdom among Supreme Court Justices and academic commentators alike is that precedent has a critical role to play in shaping the trajectory of constitutional law.<sup>5</sup> Yet disagreement abounds over how to develop a theory of precedent that lends itself to principled application. Within the American legal system, no constitutional precedent is beyond judicial revocability, and the Supreme Court occasionally overrules its past decisions.<sup>6</sup> At other times, however, the existence of an applicable precedent leads the Justices to embrace a constitutional interpretation despite reservations about its soundness.<sup>7</sup> Justice Brandeis famously described the overarching tension as between the law's being "settled" and its being "settled right,"<sup>8</sup> though it is perhaps more illuminating to restate the dichotomy in terms of "settled and wrong" versus "unsettled and right." Some eight decades after Justice Brandeis's diagnosis of the problem, the solution continues to prove elusive. As Randy Barnett recently noted,

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precedent based in part on the view that the precedent was inconsistent with cases that came before and after it); *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (asserting in the course of overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), that the "foundations" of *Bowers* had already "sustained serious erosion" from more recent decisions).

3. The complete phrase is "*stare decisis et non quieta movere*—stand by the thing decided and do not disturb the calm." James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

4. See Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 30 (2010) ("[I]n their confirmation hearings both then-Judge Roberts and then-Judge Alito gave assurances about adherence to stare decisis."); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 156 (2006) ("In the Warren Court era, the political, judicial, and academic left seemed to view constitutional stare decisis as the enemy of progressive (living constitution) constitutionalism. In the Roberts Court era, stare decisis may be the last defense of Warren Court precedents against conservative (originalist) constitutionalism on the ascendancy.").

5. Though it is widely accepted as valid, the doctrine of stare decisis has attracted a handful of prominent opponents in the context of constitutional law. See *infra* section III(A)(1).

6. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 & n.1 (1991) (discussing the Court's record of overruling its constitutional decisions).

7. E.g., *Dep't of Revenue v. Davis*, 553 U.S. 328, 359–60 (2008) (Scalia, J., concurring in part); *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting); *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 571 (2001).

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

“[h]ow and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence.”<sup>9</sup>

My initial goal in this Article is to link the conceptual ambiguity that surrounds theories of precedent to their estrangement from interpretive method. Judicial opinions and scholarly commentary have yielded well-theorized accounts of certain consequences of departing from precedent, including the disruption of settled expectations. But even an exhaustive analysis of those effects would be inadequate because they deal only with the importance of leaving the law *settled*. Before determining whether to retain or reject a flawed precedent, there must also be an inquiry into the importance of getting the law *right*—in other words, of replacing one constitutional rule with another.<sup>10</sup> Conducting that latter assessment is enmeshed with the process of selecting a method of constitutional interpretation.

Precedents are neither good nor bad; it is interpretive method that makes them so.<sup>11</sup> The urgency of rectifying a misapplication of the law will look very different as between an originalist who takes her touchstone as the Constitution’s original public meaning and a living constitutionalist who accepts the primacy of contemporary understandings and mores. Further, multiple perspectives commonly emerge *within* interpretive schools as the result of varying normative premises. For example, some proponents of originalism defend that approach on consequentialist grounds, while others describe it as reflecting the role of popular sovereignty in legitimating judicial review.<sup>12</sup> Their respective normative premises lead the consequentialist and popular-sovereigntist strands of originalism to adopt divergent views regarding the severity of constitutional errors. The phenomenon is not unique to originalism; it applies across constitutional

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9. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 261 (2005).

10. See, e.g., *Casey*, 505 U.S. at 854 (noting the importance of assessing “the respective costs of reaffirming and overruling a prior case”); *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring) (“When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.”); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (“To overturn a decision settling one such matter simply because we might believe that decision is no longer ‘right’ would inevitably reflect a willingness to reconsider others.”).

11. Cf. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 2, sc. 2 (E.K. Chambers ed., D.C. Heath & Co. 1917) (1603) (“[T]here is nothing either good or bad, but thinking makes it so . . .”).

12. Compare John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 804–05 (2009) (adopting a consequentialist approach to originalism), with Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1446–47 (2007) (adopting an approach to originalism based on popular sovereignty).

theories. The perceived benefit of deviating from precedent is always derivative of one's interpretive method and normative priors.<sup>13</sup>

This recognition can be useful in organizing the various ramifications of precedent according to their relationship with interpretive philosophy. Considerations such as the disruptiveness of overruling a settled rule are *independent* of constitutional method. They are amenable to meaningful discussion outside the context of any particular interpretive philosophy, though interpretive philosophy will determine their relevance in the final calculus of whether to overrule. By contrast, the direct harms caused by the ongoing retention of a flawed precedent are *dependent* effects; they generate their content only upon being situated within a broader interpretive framework. If one believes that the First Amendment prohibits discrimination against corporate speakers, one's theory of precedent requires an apparatus for gauging how harmful it would be to retain the contrary rule.<sup>14</sup> So, too, if one believes that the Constitution protects a right of intimate conduct between people of the same gender,<sup>15</sup> that it lacks any right to nontherapeutic abortions,<sup>16</sup> or that it forbids the utilization of race-conscious admissions in higher education.<sup>17</sup> The determinants of precedential durability include the relevant costs of perpetuating an erroneous rule. How those costs are defined depends on methodological and normative commitments.

What, then, of contemporary constitutional practice? The Supreme Court has resisted the adoption of any unified methodology for resolving constitutional disputes.<sup>18</sup> The Court occasionally ascribes controlling significance to the Constitution's original meaning, as in its recent discussion of the Second Amendment's right to bear arms.<sup>19</sup> In other cases original meaning is a nonfactor, leaving room for theoretical, prudential, or doctrinal considerations to move to the forefront.<sup>20</sup> The inconsistency is partly the product of the Court's status as a multiparty institution whose members

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13. See Lash, *supra* note 12, at 1439 (contending that "an ultimate theory of stare decisis necessarily reflects the normative commitments underlying a particular interpretive approach").

14. See *Citizens United*, 558 U.S. at 365 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

15. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

16. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992) (reaffirming the "central holding" of *Roe v. Wade*, 410 U.S. 113 (1973)).

17. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (reconsidering *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978)).

18. See, e.g., Cass R. Sunstein, Foreword, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 13 (1996) (noting that "[a]s an institution, the Supreme Court has not made an official choice" among competing theories of constitutional interpretation).

19. See *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (adopting an interpretation based on "the original understanding of the Second Amendment").

20. See STRAUSS, *supra* note 1, at 33 (arguing that "original understandings play a role only occasionally [in Supreme Court cases], and usually they are makeweights, or the Court admits that they are inconclusive").

exhibit varying jurisprudential sympathies. It also reflects the skepticism of some individual Justices toward unified theories of interpretation.<sup>21</sup> These institutional and individual considerations have converged to establish the Court's approach to constitutional interpretation as fundamentally *pluralistic*.

Even if one is initially inclined to accept pluralism as a valid adjudicative approach, I am going to suggest that when viewed in light of the Court's doctrine of *stare decisis*, pluralism is problematic. Evaluating the severity of a given constitutional mistake requires invoking a particular interpretive method and a corresponding set of normative premises. Without those anchors, the value of constitutional accuracy is left undefined. Rejecting all interpretive theories in favor of pluralism undermines efforts to compare the costs and benefits of precedential continuity because pluralism affords no metric by which to gauge their relative importance.

This Article begins in Part I by introducing the diverse roles of precedent in constitutional discourse. In Parts II and III, I categorize salient implications of precedent-based adjudication based on their degree of connection with interpretive method. Part II describes the independent effects of precedential continuity, which are amenable to preliminary analysis without the overlay of interpretive method. Juxtaposed against these considerations are the dependent effects of continuity, which are discussed in Part III. Drawing on leading movements in constitutional theory, I argue that the dependent effects are necessarily bound up with considerations of interpretive method. In proper operation, the foundational premises that drive one's approach to constitutional interpretation should exert a centripetal force on one's approach to precedent, causing both theories to revolve around the same normative core.

Part IV explores the implications for constitutional adjudication at the U.S. Supreme Court. I hope to illuminate the dissonance between interpretive pluralism and precedent-based adjudication, a dissonance that exposes some vulnerabilities of pluralism as an interpretive approach. Finally, Part V addresses the objection that integrating interpretive method with deference to precedent is intrinsically corrupting of constitutional theory. The Part also considers potential extensions of the Article's analysis beyond the sphere of constitutional precedent.

Before closing this Introduction, I offer three further notes. First, for purposes of what follows, I use the concept of an "interpretive method" to refer to any consistent and overarching strategy for determining the meaning of the U.S. Constitution. For example, two of the most prominent strategies in the modern academic discourse are originalism and living constitutionalism, both of which are discussed in the pages below. At the broadest level, the former is characterized by a desire to effectuate the Constitution's original meaning, while the latter contemplates a leading role

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21. *See infra* subpart IV(C).

for contemporary sensibilities and policy judgments in resolving constitutional disputes.<sup>22</sup> The selection of those two schools of interpretation is merely illustrative, and it raises a more general question: whether a judge or constitutional lawyer must make a commitment to *some* interpretive method in order to properly analyze the ramifications of precedent.

Second, I am using the concepts of accuracy, rightness, and error as something like terms of art. I employ them in reference to the interpretations that a jurist would have voted to implement in the absence of contrary precedent. I acknowledge the argument that some revisions of the law that are preferred by subsequent judges may reflect the empowerment of new coalitions with new judicial philosophies more so than the identification of genuine “error.”<sup>23</sup> Regardless, circumstances will arise in which a judge believes that existing precedent ought to be revised or replaced. The pivotal question remains unchanged: When should deference to precedent dissuade a decisionmaker from pursuing the result that she would otherwise view as preferable? Indeed, an important part of my project is exploring the path a judge must travel before concluding that a given constitutional ruling is warranted despite the fact that the same ruling would be unjustified if certain precedents were not on the books.

Third, I also acknowledge the argument that constitutional precedent is itself constitutive of law,<sup>24</sup> such that it is not coherent to ask what result would have followed in the absence of controlling precedent. Even under that approach to constitutional law, courts will regularly confront the question of whether to depart from a line of precedent. Answering that question requires a theory of what types of effects are legally salient—a theory, in other words, about the normative objectives of constitutional law. As a result, the arguments I advance about the connection between interpretive method and *stare decisis* continue to apply.

## I. Precedent’s Place in Constitutional Discourse

Given the latent nuance in terms like “precedent” and “*stare decisis*,” it is worthwhile to take a moment to describe the diverse functions of precedent in modern constitutional discourse.<sup>25</sup>

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22. See *infra* subpart III(A).

23. For a more general discussion of the potential distinction between legal change and legal progress in the context of transition theory, see Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 239–49 (2003).

24. Cf. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (contending that binding judicial authority “is not merely evidence of what the law is,” but rather “caselaw on point *is* the law”).

25. The topic of this Part is the variety of ways in which precedent is deployed in the context of constitutional litigation and adjudication. Judicial precedents also have manifold consequences beyond the courthouse doors for elected officials, administrative agencies, and the public at large. For a thoughtful treatment of those effects, see MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 147–76 (2008).



One function of precedent is *hierarchical control*.<sup>26</sup> A court of superior rank issues an opinion interpreting the Constitution. Thereafter, inferior courts face a binding obligation to treat that interpretation as controlling. The obligation persists even if an inferior-court judge views the precedent as incorrect<sup>27</sup> or reasonably predicts that the superior court itself is no longer likely to follow it.<sup>28</sup> Within American constitutional law, the rule of hierarchical precedent—also called vertical precedent—is indefeasible and absolute.<sup>29</sup> As we shall see, this rigidity differs markedly from the Supreme Court's approach to its own, horizontal precedents.

A court's prior decisions can also exert influence on future adjudicators by means of *persuasion*: Though the later court is not required to follow the opinion in question, it is able to study the opinion's reasoning, thereby benefiting from the analytical work already done by other judges. Likewise, the later court can examine whether its predecessors' empirical assumptions and projections have been borne out over time. Unlike hierarchical control, the persuasive function of precedent does not portray the mere issuance of a precedent as carrying independent significance.<sup>30</sup> Sooner or later, a court that looks to precedent in a persuasive fashion must gauge the soundness of its reasoning. As Justice Scalia has noted, "If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement."<sup>31</sup> The consultation of precedents for persuasive purposes continues to be useful in helping later courts to understand and evaluate competing arguments. Notwithstanding this utility,

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26. I draw the description of lower-court constraint as representing the "hierarchical" use of precedent from Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 819 (1994).

27. See, e.g., Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1008 (2009) ("Lower court judges are frequently subject to mediated constitutional constraints, reflecting their obligations to accept the Supreme Court's interpretation of the Constitution even when they believe the Court has erred.").

28. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

29. See, e.g., *Solum*, *supra* note 4, at 188 ("When it comes to vertical stare decisis, the conventional notion is that the decisions of higher courts are binding on lower courts. A court of appeals may not decide to overrule a Supreme Court decision because the advantages of the better rule outweigh the costs of changing legal rules."). For a comparative perspective on the bindingness of vertical precedent, see generally Santiago Legarre, *Precedent in Argentine Law*, 57 LOY. L. REV. 781 (2011).

30. See Frederick Schauer, Essay, *Authority and Authorities*, 94 VA. L. REV. 1931, 1943 (2008) ("[I]f an agent is genuinely persuaded of some conclusion because she has come to accept the substantive reasons offered for that conclusion by someone else, then authority has nothing to do with it.").

31. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting).

however, the persuasive function of precedent never requires a court to issue a ruling whose substantive merit it doubts.<sup>32</sup>

What initially appears to be a persuasive invocation of precedent often reveals itself as something different: an exercise in *stage setting*. In constitutional disputes, as in other forms of litigation, judges (like the attorneys who litigate before them) utilize precedents as a means of framing and bolstering their arguments. The implication is not necessarily that the reviewing court believes that it *must* follow the precedents. Nor is it that the precedents warrant consideration due solely to the persuasiveness of their reasoning. Instead, the existence of the precedents is used to suggest that the subsequent court's ruling represents an unremarkable application of established principles.<sup>33</sup> Though the prior decisions may not have spoken to the precise question under review, they are depicted as setting the doctrinal stage and suggesting the appropriate result by analogy or modest extension.<sup>34</sup>

Like the persuasive function of precedent, the use of precedent for stage setting is nonconstraining. A court that describes past decisions as consistent with its holding does not necessarily indicate that its ruling would have been different but for the existence of precedent. To the contrary, the court might well agree with the decisions' rationales. Stage setting influences the superstructure of judicial rhetoric and reason giving. It may even supply an element of "lawyerly authenticity."<sup>35</sup> But it does not affect the bottom line by requiring a judge to accept a constitutional interpretation that she disfavors on the merits.

Between the poles of absolute constraint on the one hand and persuasion and stage setting on the other are those functions of precedent that affect the substance of judicial rulings without imposing an inexorable duty to reaffirm existing law. For starters, respect for precedent can promote incrementalism and continuity by acting as a *braking* mechanism that encourages judges to

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32. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25 (1994) (noting the differing implications of the persuasive and self-constraining functions of precedent).

33. See Schauer, *supra* note 30, at 1951 ("The author of a brief or opinion who uses support to deny genuine novelty is asking the reader to take the supported proposition as being at least slightly more plausible because it has been said before than had it not been.").

34. Compare Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2590 (2012) ("Our precedents recognize Congress's power to regulate 'class[es] of activities,' not classes of individuals, apart from any activity in which they are engaged." (citations omitted) (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005))), with *id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm."), and *id.* at 2646 (Scalia, J., dissenting) ("At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants.").

35. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 329 (2005).

be moderate and gradual in their decisionmaking.<sup>36</sup> The underlying theory, which coheres with principles of common law adjudication, is that it is generally preferable for courts to make changes at the margins and exert pressure on the forward trajectory of the law rather than overhauling what was previously settled.<sup>37</sup> Respect for precedent assists in this mission by encouraging judges to seek out plausible bases of distinguishing past decisions instead of abandoning them outright.<sup>38</sup>

The motivation for a court's incrementalism may be the belief, often associated with the political philosophy of Edmund Burke, that caution is prudent because "new departures are likely to have unanticipated adverse consequences."<sup>39</sup> Alternatively, incrementalism may reflect the intuition that change will tend to be less disruptive and controversial when it is achieved gradually over time.<sup>40</sup> In either case, incrementalism differs from persuasion and stage setting through its ability to make a tangible impact on the subsequent court's decision. A judge who is inclined to announce a dramatic legal change but who adopts the incrementalist mindset will be deterred by the prospect of overruling numerous precedents. As a compromise, the judge will articulate the appropriate rule to govern cases like the one at bar without going further by sweeping away multiple decisions or extending the law in revolutionary new ways.<sup>41</sup> A commitment to incrementalism accordingly carries the potential to affect the scope of judicial decisions. Note, however, that incrementalism still permits the reviewing court to reach whatever result it deems appropriate in the case at hand, even if that means overruling an

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36. See Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 96 (2003) ("Over a series of decisions, a precedent that is never formally overruled may lose much of its force through incremental judicial decisionmaking.").

37. See, e.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 403 (2011) ("Judges in the United States . . . are embedded within a common law tradition of incremental policymaking through the slow accretion of a body of principles, standards, and rules that we collectively call 'the law.'"); Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944) ("[S]tare decisis is an old friend of the common lawyer.").

38. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 169 (1999) ("An originalist Court need not seek to overturn the existing corpus of constitutional law overnight, or even over a decade. . . . [M]odification of existing precedent can take place over a series of cases over a period of years without unduly damaging either the judiciary or the structure of constitutional law.").

39. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 402 (2006); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 426 (2012) ("To a Burkean, historical practice is important in part because of its potential to reflect collective wisdom generated by the judgments of numerous actors over time."); Sunstein, *supra*, at 368 (arguing that "Burkean courts attempt a delegation of power from individual judges to firmly rooted traditions" or to "the judiciary's own past").

40. Cf. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (describing the value of "accommodating change to the larger, essentially stable context in which it occurs").

41. Cf. Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1237 (2010) ("Each constitutional decision of the Supreme Court . . . invariably shifts constitutional practice in some small way . . . . Most of this change is interstitial, even glacial—the gradual working out of doctrine and principle.").

applicable precedent. The incrementalist mindset is a technique for mediating change, not preventing it.

The role of precedent undergoes a metamorphosis when a court endorses a constitutional decision whose soundness it doubts in an effort to maintain consistency with its past self. In such a case, the court treats precedent as *self-binding*: The litigated dispute would have had a different outcome but for the precedent's existence. The explanation is not that the subsequent court has come to agree with the precedent's reasoning due to its irresistible logic and persuasiveness. What is crucial about the precedent is its issuance at some prior time.<sup>42</sup> That temporal priority converts the precedent into a "fundamental restraint" on the subsequent court's power to effectuate its own understanding of the Constitution's meaning.<sup>43</sup> By contemplating the perpetuation of dubious or suboptimal interpretations, the self-binding function of precedent raises serious challenges grounded in both constitutional structure and the nature of the judicial process.<sup>44</sup> It is that function to which the balance of this Article is directed.<sup>45</sup>

The province in which constitutional precedent provides the most substantial constraint can be defined as the set of cases in which a court deems itself bound to accept a rule that it concludes or suspects is substantively erroneous. The subsequent court may surmise that the applicable precedent was unsound from the beginning,<sup>46</sup> or it may believe the rule has been undermined by the passage of time.<sup>47</sup> Either way, the subsequent court is put in the position of announcing a result that it currently believes to reflect a likely misapplication of the Constitution.

The self-binding function of precedent is complicated by the Supreme Court's characterization of *stare decisis* as a matter of discretion rather than compulsion.<sup>48</sup> A court's discretionary authority to overrule its own

42. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) ("If precedent matters, a prior decision now believed erroneous still affects the current decision simply because it is prior.").

43. *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

44. For a discussion of those challenges, see *infra* section III(A)(1) and subpart V(A).

45. As a corollary, the balance of the Article will deal with precedent in its horizontal dimension—which implicates the doctrine of *stare decisis* in the sense of a court's fidelity to its own past self—rather than its vertical dimension of imposing binding constraints on inferior courts.

46. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (describing *Bowers v. Hardwick* as "not correct when it was decided").

47. See, e.g., Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 71 (1988) ("[A] Justice may conclude that a prior decision was premised on a state of affairs that has changed so much over time that the Justices who reached the prior decision would themselves have reached a different result in light of the changed circumstances.").

48. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (contending that "none of" the Justices understand *stare decisis* in "absolute terms"); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command . . ."); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("*Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision . . .").

precedents is not a strict requirement of common law jurisprudence. The classic example of the contrary approach is the U.K. House of Lords, which formerly depicted itself as foreclosed from reconsidering its past decisions.<sup>49</sup> Notwithstanding debates over whether the House of Lords was always faithful to this mandate in practice,<sup>50</sup> it is certainly conceivable that a court could treat its own precedents as utterly binding. Yet the U.S. Supreme Court has chosen a different path. As a matter of horizontal constraint, the Court views its precedents as only presumptively self-binding, not absolutely so. To guide the inquiry into whether a dubious precedent should be retained, the Court has enumerated an array of factors, including reliance expectations, workability, evolving factual contexts, jurisprudential coherence, the nature of the decisional rule contained in the precedent, and the voting margin by which the precedent was issued.<sup>51</sup> All the while, the Justices have been unequivocal in preserving their prerogative to overrule precedents under appropriate circumstances.<sup>52</sup>

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The dynamics of horizontal self-binding lead to the “overwhelming question”<sup>53</sup> posed by any theory of constitutional precedent: When should a court willfully perpetuate a reading of the Constitution that it would reject but for the existence of precedent?

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49. The formal move away from this approach occurred in 1966:

Their Lordships . . . recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234.

50. See NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 127 (2008) (“Before 1966, the House of Lords had distinguished some of its own precedents to the point where they were effectively stripped of authority. What had the House been doing in those instances, if not ‘departing from’ its previous decisions?” (footnote omitted)); Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 143 (1946) (arguing that the House of Lords “carried the technique of distinguishing to a very high pitch of ingenuity”).

51. For a leading formulation of the components of the doctrine of stare decisis, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992). See also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 412 (2012) (enumerating several of the common factors); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416–49 (2010) (analyzing the doctrine’s components).

52. See, e.g., *Citizens United*, 558 U.S. at 319 (concluding that “stare decisis does not compel the continued acceptance” of the applicable precedent).

53. The words, though obviously not the context, are from T.S. Eliot, *The Love Song of J. Alfred Prufrock*, POETRY, June 1915, reprinted in CATHOLIC ANTHOLOGY 1914-1915, at 2, 2 (1915). See also Jackson, *supra* note 37 (“To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.”).

## II. Independent Effects of Constitutional Precedent

Certain implications of deferring to precedent are amenable to preliminary scrutiny without regard to interpretive method. Those elements, which I call the *independent* effects of precedent, are examined in the subparts that follow. Subpart A addresses the independent benefits of adhering to precedent for the sake of decisional continuity. Subpart B examines the independent costs of continuity, meaning the detriments that attend the preservation of a flawed decision. Part III then turns to the *dependent* effects of precedent, whose composition is derivative of methodological choices.

### A. *Independent Benefits of Continuity*

1. *Expectations and Disruption.*—The protection of settled expectations is among the most prevalent justifications for deferring to precedent.<sup>54</sup> When a court issues an opinion, stakeholders modify their behaviors in response.<sup>55</sup> Judicial delineation of the applicable rules affects commercial activities such as the formation of contracts, allocation of investments, and organization of business operations.<sup>56</sup> It influences governmental decisions such as the crafting of legislation designed to foster democratic objectives within lawful bounds.<sup>57</sup> It even affects societal understandings regarding the content of the legal backdrop against which citizens arrange their lives.<sup>58</sup>

54. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (“The doctrine [of stare decisis] exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules.”); cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 157 (Touchstone 1991) (1990) (“In constitutional law, as in all law, there is great virtue in stability. Governments need to know their powers, and citizens need to know their rights; expectations about either should not lightly be upset.”); Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 *YALE L.J.* 1999, 2024 (2011) (“When the Court considers the work of past Courts, the key concept is *stare decisis* while the key attitude recognizes the importance of *reliance*.”).

55. See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 239 (2012) (noting that there is an “equitable principle, prominent in judicial decisions stretching back hundreds of years, [that] directs judges to give due weight to the ways in which litigants who come before the Court may have reasonably relied upon prior case law”).

56. See, e.g., *Citizens United*, 558 U.S. at 365 (recognizing that “reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions”); *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992) (noting that the precedent in question “has engendered substantial reliance and has become part of the basic framework of a sizable industry”).

57. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion) (“*Buckley* [*v. Valeo*, 424 U.S. 1 (1976) (per curiam)] has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws.”).

58. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (describing the impact of *Miranda v. Arizona*, 384 U.S. 436 (1966), on “our national culture”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (discussing reliance by “people who have ordered their thinking and living around” the rule of *Roe v. Wade*, 410 U.S. 113 (1973)).

When the judiciary reverses course and announces a new rule, it introduces a potentially dramatic source of disruption. Commercial structures that seemed ingenious under the old regime become problematic or even prohibited. Hard-fought and extensively researched legislation is invalidated, with the lawmakers sent back to the drawing board for another sapping of public resources. And widespread understandings about the legal backdrop—as well as corresponding assumptions about the stability and reliability of the legal equilibrium—are challenged, sometimes marginally but sometimes substantially.<sup>59</sup>

By retaining a precedent despite its dubious merits, a court can prevent these disturbances from coming to pass.<sup>60</sup> That makes the avoidance of disruption a principal benefit of precedential continuity. Such avoidance is also an *independent* benefit. The unsettling effects of adjudicative change reflect the degree to which stakeholders would be required to adapt their behaviors and understandings to a revised legal order. There remain vast differences of opinion regarding the quantum of evidence required to prove those effects.<sup>61</sup> In addition, there are significant debates about the types of disruptions that should be relevant for purposes of stare decisis. For example, some scholars contend that the potential disruption of societal understandings caused by a judicial overruling—famously invoked in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>62</sup> with respect to abortion rights<sup>63</sup>—is too “inchoate” to serve as a valid component of stare decisis doctrine.<sup>64</sup> Others suggest that a full accounting should include intangible, systemic reactions to legal change.<sup>65</sup> Quite apart from these debates, interpretive method is unnecessary to determine the degree to which adjudicative change would upset expectations and require forward-looking

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59. See Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. (forthcoming 2013).

60. For an argument that the consequences of deviating from precedent are more aptly described in terms of avoiding forward-looking disruption as opposed to backward-looking reliance, see generally *id.* The distinction is immaterial for present purposes; both formulations are independent of interpretive method.

61. See *Casey*, 505 U.S. at 956 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (describing the majority’s assertions relating to precedential reliance as “undeveloped and totally conclusory”); *Quill Corp.*, 504 U.S. at 331–32 (White, J., concurring in part and dissenting in part) (describing the majority’s assertions of precedential reliance as unsupported by evidence).

62. 505 U.S. 833 (1992).

63. See *id.* at 856 (citing “two decades” of societal reliance upon “the availability of abortion in the event that contraception should fail”).

64. Barnett, *supra* note 9, at 266.

65. Cf. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 702 (1999) (“If private investment in contract and property interests is sufficient to demand adherence to arguably erroneous precedent, public investment in governmental structures should produce a similar effect.”); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 63 (2001) (“To the extent that a court’s general willingness to overrule precedents increases uncertainty about which rules the court will apply, it may also generate more systemic costs—costs that cannot be identified with any particular change, but that are no less real.”).

adjustments. Interpretive choices remain crucial to the level of significance that is ultimately ascribed to protecting settled expectations.<sup>66</sup> The extent of disruption, however, does not fluctuate depending on one's theory of constitutional interpretation.

2. *Rule of Law*.—Intertwined with the avoidance of disruption is the efficacy of stare decisis in promoting the rule of law. The rule of law requires, among other things, that “people in positions of authority” operate within a “constraining framework” of publicly available rules rather than indulging “their own preferences or ideology.”<sup>67</sup> It is sometimes described (usefully, I think) in contradistinction to its converse, the rule of individuals.<sup>68</sup> Commitment to the rule of law may be driven by the perceived consequentialist benefits of enhanced stability and order or by the belief that “reciprocity and procedural fairness” in the imposition and enforcement of legal requirements are “valuable for [their] own sake.”<sup>69</sup> The Supreme Court has gone so far as to pronounce the doctrine of stare decisis to be an essential feature of a democratic society governed by the rule of law.<sup>70</sup> Whether or not the rule of law really does require a certain degree of respect for precedent, much of the academic literature recognizes that, at very least, deference to precedent can promote the rule of law in important ways.<sup>71</sup>

One way in which adherence to precedent advances the rule of law is by fostering a sense of uniformity, consistency, and reliability. Part of the value is tangible, allowing for better forecasting and more efficient planning. The other part is intangible. In law as in life, the benefits of fidelity to precedent include psychological comfort; predictability simply makes us “feel better.”<sup>72</sup>

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66. Cf. *Quill Corp.*, 504 U.S. at 321 (Scalia, J., concurring in part and concurring in the judgment) (noting that reliance on precedent “may not always carry the day”).

67. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012).

68. See, e.g., Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 2–3 (1997) (making the contrast).

69. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 274 (2d ed. 2011).

70. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 478–79 (1987) (plurality opinion) (“The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is ‘a natural evolution from the very nature of our institutions.’” (quoting W.M. Lile, *Some Views on the Rule of Stare Decisis*, 4 VA. L. REV. 95, 97 (1916))); cf. Richard Primus, Response, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1227 (2010) (“One aspect of the rule of law is a set of legal norms that are stable enough to enable planning and justify reliance.”).

71. See, e.g., Waldron, *supra* note 67, at 31 (“I do not endorse the position . . . that ‘[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*.’ But it might be true the other way around: the justification of stare decisis might depend to a large extent on the rule of law.” (footnote omitted) (quoting *Welch*, 483 U.S. at 478–79)).

72. Schauer, *supra* note 42, at 598; see also *id.* (“Predictability thus often has value even when we cannot quantify it.”); cf. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (describing stare decisis as “rooted in the psychologic need to satisfy reasonable expectations”).



That feeling extends to attitudes about the constancy of the legal regime and the stability of the legal order.

The knowledge that a decision will serve as a precedent in future litigation can also promote the rule of law by encouraging judges to view individual cases as reflecting recurring problems that require generalizable, forward-looking solutions.<sup>73</sup> The resulting norm of “generality” reduces the hazards of case-specific or party-specific idiosyncrasy in the adjudication of disputes.<sup>74</sup> Similarly, the infusion of precedent with durability that outlasts the tenure of the issuing judges facilitates both the reality and appearance of decisionmaking that is driven by considerations beyond individual personalities.<sup>75</sup> This ideal of impersonal adjudication resounds in then-Judge Cardozo’s caution against allowing the decisions of courts to ebb and flow with the “weekly changes in [their] composition”<sup>76</sup> as well as Alexander Hamilton’s famous depiction of precedent as a safeguard against the exercise of “arbitrary discretion.”<sup>77</sup>

These rule of law benefits of following precedent arise independently of interpretive method. There are, of course, plausible reasons to be skeptical about the ability of precedent to enhance predictability, generate confidence in the legal regime, contribute to the norm of generality, or reduce the impact of individual idiosyncrasies. Among other things, a critic might contend that the discretionary nature of constitutional stare decisis, which feeds the perception of some commentators that the doctrine strikes “with the randomness of a lightning bolt,”<sup>78</sup> introduces its own layer of unpredictability

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73. See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 11–12 (1994) (“Because today’s decision will be taken into account in future cases, the Court must judge not only what is best for today, but also how the current decision will affect the decision of others cases in the future.”).

74. Waldron, *supra* note 67, at 19–20. *But cf.* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 416–17 (2001) (noting the argument that “interpreters will reason impartially if they anticipate that the decision may be invoked in future cases whose valence in terms of the decisionmakers’ future interests is unpredictable” but responding that “it is hardly clear that durability successfully dampens decisionmakers’ self-interest”).

75. See, e.g., Caminker, *supra* note 26, at 853 (“Frequent or immediate overrulings, especially when prompted by a change in personnel, cast into doubt courts’ commitment to making decisions free from politics and personal whim.”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 753 (1988) (“If courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened.”). For a comparable argument regarding reliance on precedent within the Office of Legal Counsel, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1497 (2010) (“Because OLC understands and advertises its job as providing legal advice consistent with its best view of the law, its credibility depends on its appearing to conduct itself in that manner. Adhering to precedent—and in particular, *advertising* that it adheres to precedent—can contribute to that appearance.”).

76. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150 (1921).

77. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citing Hamilton’s language in describing stare decisis as “a basic self-governing principle within the Judicial Branch”).

78. Monaghan, *supra* note 75, at 743.

and exacerbates the effects of judicial personality.<sup>79</sup> These are serious claims, but interpretive method makes no difference to their validity. The relevance of method only arises later, when a court weighs the rule of law implications of continuity against the value of rectifying a constitutional mistake or anachronism.

3. *Decisional Economy and Resource Conservation.*—The costliness of a decision making process depends in part on the number of issues that require determination. By limiting the matters that are open for debate in the course of litigation, the doctrine of stare decisis can enhance adjudicative economy.<sup>80</sup>

These efficiency-enhancing properties are most evident in the context of hierarchical precedent. Given their unconditional obligation to follow the decisions of superior tribunals, inferior federal courts are spared from expending the resources needed to reach their own conclusions. Of course, some of the resources that are saved must be redeployed to sorting through, analogizing from, and distinguishing the array of potentially relevant precedents. Moreover, in cases where the Supreme Court is considering whether to abide by its own precedent, the lingering possibility of overruling may prevent the Court from entirely disregarding the precedent's merits and effects. Nevertheless, efficiency benefits arise even in the horizontal context from the choices of litigants to feature certain arguments and ignore others on the (sensible) theory that many previously decided issues are unlikely to be revisited in the near term.<sup>81</sup>

Within a typology that classifies the benefits of precedential continuity based on their connection with interpretive method, efficiency represents another independent consideration. Judicial efficiency is an established concept relating to the amount of time and energy that is necessary to resolve a case. The doctrinal implications of efficiency considerations—that is, their power to affect the final stare decisis calculus—depend upon methodological choices. Their composition does not.

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79. See Waldron, *supra* note 67, at 13 (“[T]he principle of stare decisis seems to introduce its own distinctive uncertainty into the law, particularly insofar as it does not operate as an absolute.”). But see DUXBURY, *supra* note 50, at 167 (“The activity [of precedent following] can be commended . . . because it eradicates only some judicial discretion; for were it to eradicate all judicial discretion, the doctrine of *stare decisis* would be inappropriate to the common law.”).

80. See, e.g., CARDOZO, *supra* note 76, at 149 (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . .”); FALLON, *supra* note 7, at 573 (“The doctrine [of stare decisis] liberates the Justices from what otherwise would be a constitutional obligation to reconsider every potentially disputable issue as if it were being raised for the first time . . .”).

81. See Taylor v. Sturgell, 553 U.S. 880, 903–04 (2008) (asserting that “even where *stare decisis* is not dispositive, ‘the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others’” (quoting DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 97 (2001))).

### B. *Independent Costs of Continuity*

1. *Workability*.—Judicial decisions that have proved cumbersome in operation are commonly singled out as prime candidates for reconsideration.<sup>82</sup> The retention of such precedents imposes costs on the legal system. When a decision is difficult for subsequent courts to understand and apply, the efficiency of decisionmaking is hindered.<sup>83</sup> Unworkable precedents can also breed uncertainty by reducing the ability of litigants, attorneys, and other stakeholders to plan their behaviors and forecast litigation outcomes.<sup>84</sup>

A precedent's workability is an independent consideration that is determined based on its clarity of exposition and practical operation.<sup>85</sup> Different jurists will evince different tolerances for what degree of clumsiness renders a precedent so unworkable as to warrant revision.<sup>86</sup> They likewise will apply their respective tests differently to concrete sets of facts.<sup>87</sup> But the metrics by which workability is assessed need not be bound up with methodological choices. The question whether a precedent's retention is likely to breed uncertainty and hinder judicial administration can be answered *ex ante*, prior to any methodological election.

2. *Jurisprudential Coherence*.—The steady accumulation of legal doctrine makes it inevitable that discrete bodies of precedent occasionally

82. See, e.g., *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (“[T]he fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.” (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).

83. See Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 670 (2000) (“[U]nworkable decisions are by definition uncertain, so their retention should be expected to require ongoing and inefficient expenditures on measures aimed at divining their application and effect.”); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1552 (2000) (“The inquiry into ‘workability,’ as framed by the Court, is essentially a question of whether the Court believes itself able to continue working within a framework established by a prior decision. The unworkability of precedent provides additional incentive for the judiciary to overrule it.”).

84. See *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (“[Precedent] should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.”).

85. Compare, e.g., *Arizona v. Gant*, 556 U.S. 332, 360 (2009) (Alito, J., dissenting) (finding a precedent to be workable where it provided “a test that would be relatively easy for police officers and judges to apply”), with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996) (finding a precedent to be unworkable where it had “created confusion among the lower courts that [had] sought to understand and apply [it]”).

86. Compare *Altria Grp., Inc. v. Good*, 555 U.S. 70, 84 (2008) (reaffirming a precedent despite acknowledging its lack of “theoretical elegance” (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 n.27 (1992) (plurality opinion))), with *id.* at 97 (Thomas, J., dissenting) (concluding that the precedent should be overruled because, *inter alia*, it “has proved unworkable”).

87. Compare *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (defending *Miranda*'s workability), with *id.* at 463–64 (Scalia, J., dissenting) (assailing *Miranda*'s workability). See *Montejo*, 556 U.S. at 808 (Stevens, J., dissenting) (criticizing the majority's labeling of a precedent as unworkable).

will come into apparent conflict.<sup>88</sup> One line of cases protects corporations' constitutional right to participate in political referenda campaigns, while another denies them the right to speak in support of political candidates.<sup>89</sup> One line upholds the power of a state to criminalize sexual conduct between people of the same gender, while another suggests a relevant sphere of personal privacy in which governmental influence is severely constrained.<sup>90</sup> The examples are legion, and they will continue to proliferate as overlapping lines of constitutional precedent become more robust and nuanced. The doctrine of *stare decisis* has taken notice.<sup>91</sup>

If a reviewing court allows two or more competing lines of precedent to coexist, it risks exacting a toll on jurisprudential coherence. Lower courts and stakeholders may find it difficult to determine which doctrinal strand applies to a given course of conduct. The likely results include inefficiencies caused by the need for extensive analysis and uncertainty among stakeholding parties as to how to organize their affairs.<sup>92</sup> Jurisprudential incoherence also threatens systemic impacts by reducing the rationality, both actual and apparent, of the legal order.<sup>93</sup>

Notwithstanding the significance of these effects, interpretive method once again is inapposite to their composition. Competing precedents can be difficult for stakeholders to square regardless of the methodological approaches those precedents embody. As for the systemic costs of incoherence, they arise from dissonance between judicial decisions irrespective of underlying methodological preferences.

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88. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 232 (1995) (O'Connor, J.) ("We cannot adhere to our most recent decision without colliding with an accepted and established doctrine."); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.").

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

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

91. See, e.g., GERHARDT, *supra* note 25, at 31 (noting the Supreme Court's receptiveness to overruling precedent based on "irreconcilability with subsequent case law"). The appeal to jurisprudential coherence as a justification for departing from precedent is no recent innovation. See Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 223 (noting that the Supreme Court often "attempted to buttress its position by showing that the rejection of the overruled case was required, or at least suggested, by other, later decisions basically inconsistent with its earlier ruling").

92. See, e.g., McGinnis & Rappaport, *supra* note 12, at 847 ("Legal incoherence in jurisprudence has negative consequences because individuals have more trouble complying with a set of rules that are incoherent and hard to understand.").

93. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting) ("It damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions.").

3. *Rule of Law (Redux)*.—The previous section discussed the rule of law benefits that can arise from the preservation of settled precedent. There is also a second aspect to the relationship between precedent and the rule of law, one that cuts in the opposite direction.<sup>94</sup> Consciously entrenching erroneous decisions can impair the soundness of the legal regime.<sup>95</sup> Behaviors that should create one set of constitutional ramifications instead yield a very different set. Litigants who would have been victorious if certain precedents were not on the books are forced to endure losses for the sake of continuity.<sup>96</sup> In theory, perhaps those litigants should take solace in knowing that the legal system is stronger for their sacrifice and that a portion of the benefits of living in such a system eventually will trickle down to them, or at least to their descendants.<sup>97</sup> In reality, that prospect seems like cold comfort in the here and now. In any event, using the doctrine of stare decisis to entrench interpretations that depart from the best understanding (however defined) of the Constitution poses a challenge to the democratic nature of the constitutional order.<sup>98</sup> This, too, may represent a rule of law concern, at least if one believes the American rule of law to be bound up with popular sovereignty and democratic pedigree.

Excessive deference to flawed constitutional precedents can also threaten to create systemic concerns for the rule of law. In the worst-case scenario, society is forced to endure pervasive misapplications of its most important document. The ability to agitate for legal changes through reasoned argumentation becomes seriously impaired.<sup>99</sup> The prospects for “growth and reexamination” are gradually “choke[d] off” by reams of ossified precedents.<sup>100</sup> And the nation’s constitutional culture suffers as the

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94. See Fallon, *supra* note 68, at 5 (“[I]n contemporary constitutional discourse it is by no means anomalous to find competing Rule-of-Law claims arrayed against each other.”).

95. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (“[I]n the unusual circumstance when fidelity to any particular precedent does more to damage [the] constitutional ideal [of the rule of law] than to advance it, we must be more willing to depart from that precedent.”); cf. Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2034 (1996) (arguing that “stare decisis has the potential to import injustice irremediably into the law”).

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

97. Cf. 1 JOHN HICKS, *The Rehabilitation of Consumers’ Surplus*, in COLLECTED ESSAYS ON ECONOMIC THEORY: WEALTH AND WELFARE 100, 105 (1981) (suggesting that certain enhancements to productive efficiency that leave some parties worse off can nevertheless create a “strong probability that almost all [inhabitants of the community] would be better off after the lapse of a sufficient length of time”).

98. Cf. Nelson, *supra* note 65, at 62 (arguing that “the primary reason we want courts to avoid erroneous interpretations of the written law is that we value democracy”).

99. See Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 8 (2008) (“The procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power. It requires that public institutions sponsor and facilitate reasoned argument in human affairs.”).

100. Stone, *supra* note 47, at 69.

polity lapses into resignation due to its perception of constitutional law as defying realistic efforts at improvement.<sup>101</sup>

I am not suggesting that anything like this bleak picture actually obtains in contemporary American practice. My point is simply that it is too facile to describe precedent and the rule of law as engaged in a common and mutually reinforcing enterprise. It may be true that, on balance, the rule of law is better served by having a doctrine of constitutional *stare decisis* than it would be without one.<sup>102</sup> Yet it does not follow that the retention of erroneous precedents is entirely positive from the standpoint of the rule of law. Finally, and most importantly for present purposes, the rule of law implications of precedent are independent effects of continuity. They maintain the same shape regardless of the interpretive method that one prefers.

4. *Justice and Policy.*—Fidelity to precedent might entail the entrenchment of a rule that is unjust or undesirable from a policy perspective. Debates about such values can proceed independently of interpretive methodology. Whether an outcome is immoral or otherwise detrimental can be determined prior to any interpretive election; such values have inherent content apart from one's interpretive philosophy. The function of interpretive methodology is to shape the extent to which those, and other, values are appropriate matters for judicial consideration in construing the Constitution's meaning.

### III. Building the Bridge to Constitutional Method

The independent effects of precedential continuity are critical to assessing the ramifications of adjudicative change. They reflect the value of allowing the law to remain settled by focusing attention on considerations such as reliance and disruption. And some of them—including the benefit that overruling a flawed precedent can create for jurisprudential coherence and doctrinal workability—begin to capture the potential virtues of breaking with the past.

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101. See Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1061 (2010) (describing the argument that “[i]f constitutional meaning were irrevocably settled, some groups would be permanently cast as constitutional losers, eliminating or reducing their sense of participation in a shared community”); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1328 (2006) (“In a normatively divided polity, a system that permanently resolves the Constitution’s meaning risks permanently estranging groups in ways that a system enabling a perpetual quest to shape constitutional meaning does not.”); cf. Fallon, *supra* note 7, at 584 (noting that “[w]ithin our constitutional regime, it is healthy for there to be some degree of ferment and reconsideration” but cautioning that “it would overtax the Court and the country alike to insist . . . that everything always must be up for grabs at once”).

102. I tend to believe that this is indeed the case. For a very brief introduction to the issue, see Kozel, *supra* note 96, at 40–44.

But the value of interpretive accuracy also has another dimension: the benefits that would arise directly from the replacement of the flawed rule with the proper one. This dimension of accuracy reflects the proximate consequences of implementing the optimal constitutional interpretation rather than deferring to an erroneous precedent.

A. *Interpretive Method and the Dependent Value of Accuracy*

The most direct impacts of improving upon a flawed constitutional rule are twofold: the elimination of harms that would otherwise result from the flawed precedent's continued operation, and the generation of affirmative benefits that arise from implementing the superior rule. Neither component can be analyzed in the abstract. The following sections explain that the value of correcting an erroneous decision is a fundamentally *dependent* aspect of abandoning precedent. It requires the integration of interpretive method and underlying normative premises.<sup>103</sup>

It warrants emphasizing that my aim is not to align myself with any particular movement in constitutional theory. Nor is it to propose my own, alternative constitutional methodology. I seek to demonstrate that whatever one's interpretive theory of choice, it will be inextricably linked to the proper treatment of constitutional precedents and questions of stare decisis.

1. *The Originalist Perspective.*—Begin by considering one of the most impactful methodologies in modern constitutional discourse: originalism. The originalist school posits that the meaning of constitutional terms was “determined at the time the text was written and adopted.”<sup>104</sup> Over the past three decades, debate has swirled around the question of which determinants of original meaning should predominate. An early version of originalism emphasized the primacy of the subjective intentions of the Constitution's Framers.<sup>105</sup> The intentionalist position drew criticism based on the claimed artificiality of constructing an aggregated version of the Framers' intentions.<sup>106</sup> There was also the problem of defining who the relevant

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103. I use the concept of “interpretive” method to indicate both the discernment of the Constitution's semantic meaning and the conversion of that meaning into legal doctrine. Some commentators emphasize the distinction between these two tasks, dubbing the former “interpretation” and the latter “construction.” *E.g.*, Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 100–03 (2010). The analysis presented in this Article is not affected by one's view of the distinction, so for simplicity I include both concepts under the label of “interpretation.” *Cf.* JACK M. BALKIN, LIVING ORIGINALISM 4–5 (2011) (noting the prevalence of this practice as a usage convention).

104. Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEXAS L. REV. 147, 154 (2012); *see also id.* at 154–55 (describing this proposition as the “fixation thesis,” and distinguishing it from the “constraint principle,” which provides that “original meaning should have binding or constraining force”).

105. Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–35 (2003).

106. *Id.* at 1135.

“Framers” were: the Philadelphia Convention, state ratifying conventions, or some other segment of the population.<sup>107</sup>

The dominant strand of originalism transformed, eventually moving the analytical focus from the Framers’ intentions to the objective public meaning of the Constitution’s text.<sup>108</sup> For proponents of this “New Originalism,” the interpretive touchstone is the Constitution’s language as it would have been understood at the time of ratification.<sup>109</sup> Debates over the intricacies of originalist method continue apace, but the recasting in terms of objective meaning as opposed to subjective intention has emerged as the prevalent (though not exclusive) formulation.<sup>110</sup>

The debates within the originalist school extend beyond identifying the proper referents of original meaning. The deep theoretical justifications for originalism also vary significantly as between the philosophy’s adherents. One version of originalism is especially useful in illustrating the relationship between interpretive method and constitutional precedent. That version, which we might call *structural* originalism in light of its connection with the Constitution’s nature, text, and design,<sup>111</sup> is often associated with commentators such as Gary Lawson.<sup>112</sup> Professor Lawson justifies his support for originalism by reference to the implicit lesson of *Marbury v. Madison*<sup>113</sup> that judicial review of enacted legislation is authorized only because the Constitution itself is “hierarchically superior to all other claimed sources of law.”<sup>114</sup> The same principle, Professor Lawson argues, forecloses deference to judicial precedents that misconstrue the Constitution; a judge who believes that the Constitution’s original meaning dictates a certain result may never

107. *Id.* at 1135–36. What is perhaps the most famous criticism of intentions-based originalism is Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

108. Solum, *supra* note 104, at 153–54.

109. *See id.* (defining New Originalism as based on the theory that “the original meaning of the Constitution is the original *public* meaning of the constitutional text”); *see also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) (“[O]riginalism has itself changed—from original *intention* to original *meaning*.”).

110. *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (“Ever since 1986, when then-Judge Antonin Scalia articulated the distinction between original intent . . . and original meaning . . . modern originalists have moved steadily towards the latter.”). *But see, e.g.*, Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 714 (2009) (defending a paramount focus on original intentions).

111. For a concise summary of the relevance of these factors to the structuralist position, *see* Gary Lawson, *Rebel Without a Clause: The Irrelevance of Article VI to Constitutional Supremacy*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 36–37 (2011).

112. *See generally* Lawson, *supra* note 32; *cf.* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 4 (2007) (accepting the use of constitutional precedent “if, but only if, the precedent is the best available evidence of the right answer to constitutional questions”).

113. 5 U.S. (1 Cranch) 137 (1803).

114. Lawson, *supra* note 32, at 26; *see also id.* at 28 (“[T]he case for judicial review of legislative or executive action is precisely coterminous with the case for judicial review of prior judicial action.”).



depart from that result for reasons of stare decisis.<sup>115</sup> Along with Professor Lawson, Michael Paulsen has advocated a vision of structural originalism at odds with constitutional stare decisis.<sup>116</sup> In Professor Paulsen's words, deference to erroneous precedents "undermines—even refutes—the premises that are supposed to justify originalism."<sup>117</sup>

For a jurist who follows commentators like Professors Lawson and Paulsen in emphasizing the Constitution's structural superiority to its judicial gloss, flawed precedents must be overruled regardless of the degree of resulting disruption.<sup>118</sup> Once one adopts a method that treats a certain category of precedents as ultra vires and illegitimate, no weighing of countervailing considerations is necessary. The flawed precedents are too harmful to tolerate, and they accordingly must be abandoned. On the rationale of the structural originalists, then, all erroneous precedents are situated identically.

This is true even of highly controversial cases like *Roe v. Wade*,<sup>119</sup> assuming arguendo that, as some Justices and commentators maintain, *Roe* reflects a misapplication of the Constitution. Notwithstanding the leading role played by *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*—which reaffirmed *Roe*'s "essential holding" regarding the constitutional protection of abortion<sup>120</sup>—in stirring certain originalist challenges to stare decisis,<sup>121</sup> for the structural originalist *Roe* is no more problematic than any other constitutional mistake. Every departure from original meaning is equally in need of correction. The fact that *Roe* dealt with issues of abortion and substantive due process is doctrinally inapposite.

2. *The Living Constitutionalist Perspective.*—Compare the structural originalist position with an interpretive method that supplants original

115. See *id.* at 27–28 ("If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution."); cf. THE FEDERALIST NO. 78, *supra* note 77, at 465–66 ("There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.").

116. See, e.g., Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

117. *Id.* at 289.

118. Randy Barnett has sketched an approach to stare decisis similar to that of Professors Lawson and Paulsen. See Barnett, *supra* note 9, at 259 ("Accepting that judicial precedent can trump original meaning puts judges above the Constitution they are supposed to be following, not making."). Professor Barnett's underlying normative premises, however, are distinctive. He emphasizes fidelity to the written Constitution as a means of legitimating its application to those who never expressly consented to it. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 117 (2004) ("Only if lawmakers cannot change the scope of their own powers can the rights of the people be in any way assured. In this way, constitutional legitimacy based on natural rights, rather than popular sovereignty or consent, can ground a commitment to originalism.").

119. 410 U.S. 113 (1973).

120. 505 U.S. 833, 846 (1992).

121. See, e.g., Paulsen, *supra* note 83, at 1539 ("My motivation for writing, revealed in the style of my presentation, is one that openly reflects a desire that *Roe* be overturned.").

meaning with factors such as contemporary understandings, mores, and policy judgments. In modern parlance such approaches are often grouped under the heading of living constitutionalism.<sup>122</sup>

Among the most influential advocates of living constitutionalism is David Strauss, who has articulated a common law approach to constitutional interpretation. The common law constitutionalist's point of departure is "rational traditionalism," which regards past practice as significant for reasons of humility and restraint.<sup>123</sup> This rational traditionalism is paired with a principle of "conventionalism" that promotes "allegiance to the text of the Constitution" not out of any particular fidelity to the text itself,<sup>124</sup> but rather "as a way of avoiding costly and risky disputes and of expressing respect for fellow citizens."<sup>125</sup> Precedent, however, is neither infallible nor obligatory. While there is significant value in tradition and convention, the need remains for evolution toward a constitutional order that is morally sound. The virtues of adhering to the past can thus be overcome by a subsequent court's moral or policy judgments.<sup>126</sup> Whether a flawed precedent should be overruled depends in large part on its substance: The judge must ask how confident she is that a "given practice is wrong" and how severe the practical consequences of that wrongness are likely to be.<sup>127</sup>

For a living constitutionalist like Professor Strauss, a precedent's consistency with the Constitution's original meaning cannot resolve whether the precedent was decided correctly or incorrectly. Moreover, even if one concludes based on a combination of text, tradition, and policy that a given precedent represents a misapplication of the Constitution, it does not necessarily follow that the precedent is so harmful as to warrant overruling.

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122. Cf. STRAUSS, *supra* note 1, at 1 ("A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.").

123. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) ("[T]he traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.").

124. *Id.* at 911; see David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEXAS L. REV. 1969, 1969 (2013) (arguing that in difficult constitutional disputes, the text of the Constitution "plays a limited role").

125. Strauss, *supra* note 123, at 911.

126. *Id.* at 894; see also *id.* at 902 ("The reason for adhering to judgments made in the past is the counsel of humility and the value of experience. Moral or policy arguments can be sufficiently strong to outweigh those traditionalist concerns to some degree, and to the extent they do, traditionalism must give way."); cf. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949) ("Precedents are made or unmade not on logic and history alone. The choices left by the generality of a constitution relate to policy.").

127. See Strauss, *supra* note 123, at 895 ("If one is quite confident that a practice is wrong—or if one believes, even with less certainty, that it is terribly wrong—this conception of traditionalism permits the practice to be eroded or even discarded."); cf. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 7 (1998) ("The role of the constitutional interpreter is to reconcile our deepest constitutional commitments, revealed by all of our constitutional history, with today's preferences."); *id.* at 63–64 ("When mining our history, we need to look to the actions and positions of constitutional actors ranging well beyond the courts.").

The perseverance of the precedent might be taken as evincing an “accumulated practical wisdom” that strengthens its claim to continued retention.<sup>128</sup> At the same time, even longstanding precedents may become vulnerable based on their troublesome consequences.<sup>129</sup>

The contrast with structural originalism is stark. Because structural originalism treats all decisions that deviate from the Constitution’s original meaning as irreparably and dispositively flawed, there is no need for distinguishing among erroneous precedents to decide which should be retained and which should be overruled. From the perspective of living constitutionalism, by comparison, drawing such distinctions is vital. Some erroneous precedents are indeed too harmful to tolerate, but others should endure. The value of constitutional accuracy can vary depending on the nature of a given constitutional mistake. The question becomes whether the substantive “stakes” of perpetuating the error are “high enough” to justify a reversal of course.<sup>130</sup>

To return to the previous section’s example, in deciding whether a case like *Roe* should be overruled, the living constitutionalist first needs to assess that case’s societal effects. If *Roe*’s effects are deemed to be only mildly or moderately negative, there will be a strong argument for reaffirmance in light of the countervailing costs of change. If, however, *Roe*’s protection of abortion is viewed as severely harmful in substantive terms, the appropriate response might well be an overruling based on considerations of justice or social policy. As an alternative, one might conclude that assessing the aggregate harmfulness of a constitutional right to abortion is a matter that exceeds the bounds of judicial competence. In that event, the need would arise for a supplemental theory, with an independent normative basis, for determining whether the appropriate course is to reaffirm *Roe* or rather to deconstitutionalize abortion rights and leave them to the Legislative and Executive Branches.<sup>131</sup> The resolution of these issues is unavoidable under a living constitutionalist approach that defines the value of constitutional accuracy in terms of sound policy and contemporary mores. The appropriate precedential effect of cases like *Roe* must remain undefined unless and until those issues are addressed.

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128. STRAUSS, *supra* note 1, at 96.

129. See Strauss, *supra* note 123, at 895 (“Nearly everyone . . . recognizes that sometimes we must depart from the teachings of the past because we think they are not just or do not serve human needs.”); cf. Fallon, *supra* note 7, at 584 (“An entrenched precedent that is normatively reprehensible should be viewed as vulnerable in a way that a more attractive practice is not.”).

130. Strauss, *supra* note 123, at 897.

131. See, e.g., David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 4 (arguing that “[i]n cases of true moral uncertainty, an issue should be resolved at the level that minimizes the risk that some group of people will be unacceptably subordinated by the decision makers”).

3. *Synthesis*.—Comparing the originalist and living constitutionalist methodologies begins to uncover the problem with posing the abstract query of whether *stare decisis* supports the retention of a dubious decision. The question is unanswerable until one's theory of precedent is situated within a broader vision of constitutional interpretation. For adherents of structural originalism, the calculus is simple. If a given constitutional precedent is incorrect, it must be overruled—just like every other precedent that deviates from the original meaning of the Constitution's text. The fate of a flawed precedent is less certain on the living constitutionalist account. There must first be an evaluation of the harmfulness likely to attend the precedent's retention, which depends in part on the severity of the individual and social costs it imposes.

While I have made reference to *Roe* as a useful illustration, the same analysis applies across the universe of constitutional precedents. From the standpoint of *stare decisis*, the structural originalist should discern no difference among erroneous precedents that allow the restriction of corporate political speech,<sup>132</sup> prohibit the criminalization of same-sex intimate conduct,<sup>133</sup> require the evidentiary exclusion of certain statements by criminal suspects,<sup>134</sup> or forbid the use of racial preferences in admission to public universities.<sup>135</sup> Assuming (again, *arguendo*) that these decisions represent departures from the Constitution's original meaning, considerations of *stare decisis* are categorically unavailing. The cases must be overruled.

For the living constitutionalist, not all interpretive mistakes are created equal. The decision whether to retain a dubious precedent will be informed by the consequences that arise from the continued operation of the flawed rule. How severe is the social harm posed by withholding protection from corporate speech rights or the right to engage in same-sex intimate conduct? What about the harm posed by requiring the exclusion of criminal defendants' voluntary statements because they were not precipitated by the *Miranda* warnings? Or the harm caused by using racial characteristics in university admissions? The living constitutionalist must engage these issues in order to determine the value of getting the law right.

The fact that living constitutionalism entails a more complex approach to precedent is not necessarily a weakness. Demanding the rectification of every mistaken precedent, as the structural originalist position requires, arguably reflects insufficient regard for the importance of legal stability.<sup>136</sup> It

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132. *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

133. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

134. *Dickerson v. United States*, 530 U.S. 428, 444; (2000) (reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966)).

135. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

136. *Cf.* Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2244 (1997) (arguing with respect to the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), that “[t]he

might follow that the living constitutionalist approach to precedent is superior despite its thorniness in application. Alternatively, one may be persuaded by the structural originalist argument that, practical consequences aside, the Constitution does not permit the privileging of case law over original meaning.<sup>137</sup> In that event, the structural originalist view is justified in treating interpretive accuracy as paramount. The more general point is that whatever the precedent under review, the perceived value of accuracy will vary, often substantially, from one interpretive method to another. Constitutional methodologies and theories of precedent go hand in hand.

*B. From Interpretive Method to Normative Premises*

No one is born an originalist. Nor is anyone born a living constitutionalist. We arrive at our methodological philosophies through normative choices, explicit or implicit, about the manner in which the Constitution ought to be interpreted.<sup>138</sup> This phenomenon is characteristic across academic disciplines.<sup>139</sup> Constitutional theory is no exception.

The role of normative premises adds another layer to the relationship between precedent and constitutional method. I claimed in the previous subpart that it is impossible to determine the value of rectifying an erroneous constitutional rule without drawing on a specified interpretive method. This subpart contends that while the integration of method is necessary, it is not sufficient. A single philosophy may spring from any number of distinct ideological commitments. Even within a particular school, such as originalism or living constitutionalism, there are vast differences in normative underpinnings that can dramatically alter the perceived gravity of constitutional mistakes.

*1. Divergent Strands of Originalism.*—As we have seen, some originalists base their interpretive philosophy on considerations of constitutional structure. In their view, the Constitution's status as the "supreme Law of the Land,"<sup>140</sup> which is the lynchpin of judicial review as pioneered in *Marbury*, forecloses deference to flawed constitutional

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Court would be behaving in an extraordinarily irresponsible manner if it overruled a precedent in circumstances in which its decision destroyed trillions of dollars of investments made in reliance on that precedent").

137. See *supra* notes 111–14 and accompanying text.

138. See Lash, *supra* note 12, at 1439 (noting the role of "normative theory" in informing one's interpretive philosophy and approach to precedent).

139. See Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259, 265–66, 286 (2013) (discussing THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) and arguing that "just as with scientific choices, no apparent transcendent kind of rule can compel, rather than influence, our choice between [interpretive modalities]").

140. U.S. CONST. art. VI, cl. 2.

precedents.<sup>141</sup> Judges take an oath to support the Constitution and are “bound by the text as law.”<sup>142</sup> Erroneous precedents are beyond toleration; they must yield to the Constitution itself.<sup>143</sup>

Structuralist arguments are but one path to originalism.<sup>144</sup> Other commentators champion the originalist approach for reasons that are overtly consequentialist. Prominent among them are John McGinnis and Michael Rappaport, who emphasize the presumptive societal benefits of implementing the Constitution’s supermajoritarian dictates.<sup>145</sup> The essence of their position is that fidelity to original meaning is desirable because the Constitution was “enacted in accordance with a supermajoritarian process that generally produces beneficial provisions.”<sup>146</sup> Professors McGinnis and Rappaport also cite other consequentialist advantages of originalism in the form of legal clarity, judicial restraint, and the channeling of efforts at revision through the formal amendment process.<sup>147</sup>

The consequentialist strand of originalism makes it necessary to distinguish among erroneous precedents in a way that structural originalism does not contemplate. Implicit in the consequentialist approach is the suggestion that the most harmful constitutional mistakes are those that remain politically divisive and defy supermajoritarian consensus.<sup>148</sup> The

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141. See *supra* section III(A)(1); see also, e.g., Kesavan & Paulsen, *supra* note 105, at 1127 (“This clause, conventionally called the Supremacy Clause, but probably as aptly termed the ‘Supreme Law Clause,’ establishes the text of the document . . . as that which purports to be authoritative.”); Paulsen, *supra* note 116, at 291 (contending that “the argument for judicial review in *Marbury*” is grounded “in the supremacy of the Constitution”).

142. Kesavan & Paulsen, *supra* note 105, at 1127–28; see also U.S. CONST. art. VI, cl. 3 (stating that “judicial Officers . . . shall be bound by Oath or Affirmation . . . to support this Constitution”).

143. See, e.g., Paulsen, *supra* note 116, at 291 (“[C]ourts must apply the correct interpretation of the Constitution, *never* a precedent inconsistent with the correct interpretation. It follows, then, that if *Marbury* is right (and it is), *stare decisis* is unconstitutional.”).

144. See Lash, *supra* note 12, at 1440 (“Because originalism is an interpretive method and not a normative constitutional theory, different originalists advance different normative grounds for their interpretive approach.”); Solum, *supra* note 104, at 1 (“Even today, originalists disagree among themselves about a variety of important questions, including the normative justification for a constitutional practice that adheres to original meaning.”); cf. Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5, 9–10 (2008) (recognizing normative differences among strands of originalism and discussing their implications for matters of foreign affairs).

145. See, e.g., John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010) (“A constitution that is enacted under a strict supermajority process is likely to be desirable because such a process has features appropriate for determining the content of entrenched laws . . .”).

146. McGinnis & Rappaport, *supra* note 12, at 804–05; see also *id.* at 830 (“Strict supermajority rules help to assure that constitutional provisions are supported by a consensus. They also impede the passage of partisan measures because support from both parties is needed for enactment.”).

147. See *id.* at 831–34 (discussing the relative benefits of following original meaning and precedent, respectively).

148. Cf. *id.* at 837 (advocating favorable treatment of “entrenched precedents” that “are so strongly supported that they would be enacted by constitutional amendment if they were overturned by the courts”).

converse is also true. Thus, irrespective of whether a case like *Brown v. Board of Education*<sup>149</sup> was decided correctly from the perspective of original meaning,<sup>150</sup> its continued retention is unproblematic because its principles enjoy such widespread public support.<sup>151</sup> This rationale illuminates a central difference between consequentialist originalism and its structuralist cousin, the latter of which recognizes no possibility that an erroneous precedent could legitimately be reaffirmed due to its popular acceptance.<sup>152</sup> The juxtaposition of consequentialist and structuralist originalism also illustrates that just as there is no “universal” theory of constitutional precedent, there likewise is no “originalist” theory of constitutional precedent. Before the principles of stare decisis can be applied, there must be a deeper inquiry into the normative premises that support the various formulations of originalism. Some originalists will defer to a particular type of precedent, while others will not.

The crucial role of normative premises can be underscored by introducing a third version of originalism, this one driven by notions of popular sovereignty. Among the ablest proponents of popular-sovereignty originalism is Kurt Lash. Professor Lash defends the centrality of “the right of a political majority to determine policy in a democratic government” and the unique ability of constitutional rules to embody “the will of the people.”<sup>153</sup> On the popular-sovereignist account, the value of rectifying a mistaken precedent depends in large part on the extent of its intrusion into the democratic process.<sup>154</sup> The most troubling situations are those in which the Supreme Court has unjustifiably protected an asserted right, thereby preventing political correction through anything short of constitutional amendment.<sup>155</sup> Other constitutional mistakes are less severe in their intensity because, for example, their flaw is the failure to protect a constitutional right

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149. 347 U.S. 483 (1954).

150. Michael McConnell has taken the contrary position, arguing that *Brown* is consistent with principles of originalist interpretation. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995) (“[S]chool segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment.”).

151. See McGinnis & Rappaport, *supra* note 12, at 837–38 (noting with respect to such cases that “[t]he benefits of following the original meaning are small because there is strong support for the new constitutional rule announced in the precedent”).

152. See *supra* notes 111–17 and accompanying text.

153. Lash, *supra* note 12, at 1444–45; see also *id.* at 1445 (“In a constitutional democracy, the laws of the Constitution trump the laws of the mere majority, not because majoritarian laws are illegitimate, but because a variety of factors tend to undermine the link between the will of political actors and the actual majoritarian will of the people.” (footnotes omitted)).

154. *Id.* at 1442.

155. *Id.* at 1443. For an alternative view of constitutional precedent that shares a focus on popular sovereignty, see AMAR, *supra* note 55, at 238 (contending that if an unenumerated right is erroneously recognized but later “catches fire and captures the imagination of a wide swathe of citizens, it thereby becomes a proper Ninth Amendment entitlement even though the Court . . . jumped the gun”).

rather than the entrenchment of a right that should not exist.<sup>156</sup> In those cases, there is the prospect of majoritarian correction through the ordinary legislative process.<sup>157</sup> The availability of a majoritarian solution weakens the need for judicial overruling as a safeguard of popular sovereignty.<sup>158</sup>

While popular-sovereignty originalism resembles consequentialist originalism at the most basic level by recognizing a legitimate province for the reaffirmance of erroneous precedents, the types of precedents that may be retained will vary between the two approaches in accordance with their respective normative baselines.<sup>159</sup> The broader takeaway is that the normative underpinnings that drive one's acceptance of originalism have a significant effect on one's treatment of constitutional precedent.<sup>160</sup> While there may be common threads among different strands of originalism, their respective approaches to precedent can diverge in meaningful ways.

2. *Divergent Strands of Living Constitutionalism.*—The necessity of grounding a theory of precedent in an underlying set of normative premises extends beyond originalism. Living constitutionalism faces the same obligation, and for precisely the same reason.

Like originalists, living constitutionalists subscribe to varying belief sets. The strand of living constitutionalism articulated by David Strauss acknowledges that deviations from settled law can be justified for compelling reasons of “fairness and social policy,” but it nevertheless places a premium on maintaining continuity over time through the adoption of a common law approach.<sup>161</sup> Other living constitutionalists are less tethered to gradual progression and more receptive to judicial innovations that advance the “constitutional frontier.”<sup>162</sup> Common law constitutionalism emphasizes the

156. Lash, *supra* note 12, at 1443.

157. *Id.*

158. *See id.* at 1442 (“[W]here erroneous precedents do not threaten or frustrate majoritarian government, the pragmatic considerations of stare decisis are more applicable.”).

159. Professor Lash does leave open the possibility that an exceptional case like *Brown*, “even if originally in error,” might warrant retention based on its “de facto supermajoritarian political ratification.” *Id.* at 1471.

160. The three strands of originalism I have discussed are, I think, sufficient to prove this point. But they are only the tip of the iceberg in terms of the competing versions of originalism. For one additional example that remains mindful of the interplay between precedent and normative premises, see Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 436 (2006) (contending that “judges should overrule nonoriginalist constitutional precedent unless doing so would gravely harm society’s pursuit of the common good”).

161. STRAUSS, *supra* note 1, at 38, 45; Strauss, *supra* note 123, at 895–97; cf. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2012 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011) & DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)) (describing Professor Strauss’s position that “the common law method itself confers legitimacy on the Court’s decisions”).

162. *See* Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2012) (arguing that “[s]ome of our most cherished constitutional decisions



virtues of incremental change.<sup>163</sup> The “frontier”-minded approach reflects a different judgment about the utility and propriety of judicial leadership in pursuit of social progress.<sup>164</sup> These distinct normative priorities lead to distinct theories of precedent: A constitutional lawyer who sympathizes with the frontier-minded approach will be more inclined than a common law constitutionalist to perceive bold judicial innovations as justifiable even when they disrupt settled expectations and destabilize the political order.

Just as different strands of originalism can yield differing appraisals of the importance of implementing the Constitution correctly, so, too, can the various versions of living constitutionalism, or of any other interpretive method. To be complete, a theory of constitutional precedent accordingly must account for both interpretive method and the underlying premises that inform it.

3. *Alternative Approaches to Precedent.*—In examining the interplay between precedent, interpretive method, and normative commitments, I have drawn on the schools of originalism and living constitutionalism. The reason for that focus is the prominence of both philosophies in modern constitutional discourse. Notwithstanding the selection of those two examples, the necessity of examining precedent in methodological and normative context reaches all approaches to constitutional interpretation. To illustrate, consider one final example that does not fit neatly into the camps I have discussed.

Lawrence Solum has sketched a “neoformalist” model in which precedents exert binding force if they embody a formalistic process of reasoning.<sup>165</sup> From the neoformalist perspective, the most durable constitutional mistakes—that is, those most worthy of being preserved on grounds of *stare decisis*—are ones that result from a deliberative process marked by attention to legal rules as sources of determinate meaning and genuine constraint.<sup>166</sup> The neoformalist approach flows from a basic dedication to the function of law in providing a “public standard for the resolution of disputes.”<sup>167</sup> In addition to yielding consequentialist benefits related to stability and the rule of law, the public-standard function is deemed

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have come about precisely because judges decide—consciously—to cast aside their predecessors’ outmoded thinking, and place themselves on the constitutional frontier”).

163. See STRAUSS, *supra* note 1, at 85 (characterizing the Supreme Court’s decision in *Brown* as an example of the “evolutionary, common law process” as opposed to “an isolated, pathbreaking act”). *But cf.* Driver, *supra* note 162 (“Living constitutionalism, properly conceived, must create significant leeway for judicial interpretations that deviate from even well-settled precedents.”).

164. See Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755, 794 (2011).

165. Solum, *supra* note 4, at 186, 194.

166. See *id.* at 192–95.

167. *Id.* at 181; see also *id.* at 182 (noting that formalists “are keen on the plain meaning of legal texts precisely because this methodology provides the best mechanism for making the law accessible”).

integral to protecting the rights of individuals to “have their dispute decided in accordance with the existing law.”<sup>168</sup>

Embracing the neoformalist model of precedent is conditional upon acceptance of these normative premises. For those who are inclined to elevate other interests above judicial fidelity to public legal standards, the neoformalist theory of precedent will be unpersuasive. It will fail to permit overruling in cases where the value of rectifying a constitutional mistake is at its apex—because, for example, the precedent departs from the Constitution’s original meaning in a way that undermines popular sovereignty,<sup>169</sup> or because it violates widely-held beliefs regarding fundamental rights and just treatment.<sup>170</sup> The neoformalist position provides yet another example of how working out a theory of constitutional precedent requires a defined methodological apparatus for assigning value to the consequences of constitutional mistakes.

#### IV. Constitutional Practice and the Problem of Pluralism

The previous Part contended that the modern doctrine of stare decisis is fundamentally derivative. I claimed that for the doctrine to function, the value of rectifying a mistaken precedent must be situated within an interpretive and normative framework. This Part examines the implications of those preconditions for constitutional practice at the U.S. Supreme Court. I will suggest that the relationship between precedent and interpretive method poses a serious problem for pluralistic approaches to adjudication that resist adherence to any consistent theory of interpretation.

##### A. *The Primacy of Independent Effects*

In applying the doctrine of stare decisis, the Supreme Court regularly focuses on certain independent effects of precedential continuity, including the disruption that is likely to result from an overruling and the degree to which a precedent appears inconsistent with other lines of cases.<sup>171</sup> Where the independent costs of overruling are great, the dubious precedent is likely to be retained.<sup>172</sup> Where the independent effects are more equivocal,

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168. *Id.* at 184.

169. *See supra* notes 153–60 and accompanying text.

170. *See supra* section III(B)(2).

171. For a discussion of the independent effects of precedential continuity, see *supra* Part II.

172. *See, e.g.,* *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000) (reaffirming *Miranda* on grounds including the fact that the warnings it requires had “become part of our national culture”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (reaffirming *Roe* in part because “[a]n entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions”); *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992) (reaffirming *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967), on grounds including the fact that its rule had “engendered substantial reliance and ha[d] become part of the basic framework of a sizeable industry”).

overruling becomes palatable.<sup>173</sup> Under either scenario, the dependent value of implementing a particular constitutional interpretation—and, at the same time, replacing an inferior one—plays a limited role.

At first glance, this practice seems puzzling. The conception of *stare decisis* as incorporating both the value of settlement and the value of accuracy—recall Justice Brandeis’s classic dichotomy<sup>174</sup>—renders it inadequate to fixate on the independent effects of precedential continuity without also considering the direct, substantive consequences of perpetuating a constitutional mistake. Surely it would matter to some Justices whether the effect of a flawed precedent was, say, to validate the lawfulness of racial segregation in public accommodations as opposed to limiting the authority of states to impose tax-collection obligations on out-of-state retailers.<sup>175</sup> The importance of getting the law right can look very different from case to case and judge to judge.

Yet there remains within the jurisprudence a notable lack of attention to the substantive ramifications of interpretive accuracy. This phenomenon extends to even the most high-profile applications of *stare decisis*. In *Casey*, for example, the Court emphasized considerations of reliance and institutional legitimacy as warranting the reaffirmance of *Roe*.<sup>176</sup> Pursuant to the Court’s own descriptions of the doctrine of *stare decisis*, its inquiry also should have included a weighing of those considerations against the substantive value of interpreting the Constitution correctly. On that latter score, the Court said precious little.<sup>177</sup> It made brief reference to the “consequences” of abortion and the possibility that, “depending on one’s beliefs,” the resulting harms may include the unjust termination of human life.<sup>178</sup> But it went no further, implying that because the costs of renouncing *Roe* were significant, there was no need to dwell on the substantive impacts of retaining the case.

It would be an overstatement to claim that the Court *never* mentions the substantive effects of reaffirming erroneous precedents. To take a recent

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173. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (“No serious reliance interests are at stake.”); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“[T]here has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.”); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules.” (citations omitted)).

174. See *supra* text accompanying note 8.

175. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Quill Corp.*, 504 U.S. 298.

176. *Casey*, 505 U.S. at 855–56, 861–69.

177. See Strauss, *supra* note 131, at 5 (“[T]he Court did not explain why mere [societal] disagreement, even persistent disagreement, is enough to justify rejecting the position about fetal life endorsed by a democratic majority.”).

178. *Casey*, 505 U.S. at 852.

example, in *Citizens United v. FEC*<sup>179</sup> the Court noted that a ban on independent expenditures by corporations in support of political candidates would impoverish the marketplace of ideas<sup>180</sup> and validate the exercise of governmental “censorship to control thought.”<sup>181</sup> Other opinions likewise reveal the Justices’ view that there is significant value in affording expressive liberties the full protection they are due under the Constitution.<sup>182</sup> These sentiments can be glimpsed in areas such as the Fourth Amendment’s prohibition against unlawful searches.<sup>183</sup> The Court has also noted the potential consequences of overprotecting certain rights, as in its recognition that application of the *Miranda* rules could result in the exclusion of voluntary statements and allow “a guilty defendant [to] go free.”<sup>184</sup> And in the statutory context, the Court has acknowledged—without passing judgment on—the argument that erroneous precedents are most in need of overruling when they have proven “inconsistent with the sense of justice or with the social welfare.”<sup>185</sup>

These statements suggest a role for the substantive value of accuracy within the stare decisis calculus. Still, the Court’s treatment of that value tends to be cursory and undeveloped. A tossed-off, abstract reference to the ramifications of a given constitutional mistake—along the lines of “failing to safeguard free speech is bad” or “protecting against unlawful searches is good”—is no substitute for careful scrutiny of its severity. More is needed in order to discharge the Court’s self-imposed obligation to consider both the costs of upsetting the law and the importance of interpretive accuracy.

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179. 558 U.S. 310 (2010).

180. *Id.* at 364.

181. *Id.* at 356.

182. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment) (“This Court has not hesitated to overrule decisions offensive to the First Amendment . . .”).

183. *See Arizona v. Gant*, 556 U.S. 332, 349 (2009) (“If it is clear that a practice is unlawful, individuals’ interest in its discontinuance clearly outweighs any law enforcement ‘entitlement’ to its persistence.”).

184. *Dickerson v. United States*, 530 U.S. 428, 444 (2000); *see also, e.g.*, *Gant*, 556 U.S. at 349 (arguing that “[c]ountless individuals . . . have had their constitutional right to the security of their private effects violated as a result” of a mistaken interpretation of the Fourth Amendment).

185. *Patterson v. McClean Credit Union*, 491 U.S. 164, 174 (1989) (quoting *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting *CARDOZO*, *supra* note 76, at 150) (internal quotation marks omitted)). David Shapiro recently offered a theory of constitutional precedent that draws heavily on the *Patterson* language. *See* David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 *TEXAS L. REV.* 929, 944 (2008) (“I would ask for a showing sufficient to persuade me that the precedent(s) constitute a significant obstacle to the pursuit of other important, recognized objectives or the vindication of basic rights.”).

### B. *Institutional Pluralism*

Ours is not an originalist Supreme Court.<sup>186</sup> To be sure, the Court often refers to the Constitution's original meaning in explaining its decisions, and originalism occasionally takes center stage. A recent example comes from *District of Columbia v. Heller*,<sup>187</sup> in which the Court adopted a predominantly originalist focus in determining whether the Second Amendment recognizes an individual right to possess firearms.<sup>188</sup> But at other times, the Court resolves constitutional questions with little or no attention to original meaning.<sup>189</sup> Depending on the case, factors such as text, history, precedent, justice, political philosophy, and government policy might drive the analysis.<sup>190</sup> The Court has not articulated an overarching theory to explain the fluctuating relevance of the various considerations. Though there is a predictable array of modalities of constitutional reasoning, their impact on judicial opinions defies explanation by any single organizing principle.

This state of affairs might be taken to suggest that the Court's constitutional jurisprudence embraces the precepts of *pragmatism*. Some leading advocates of pragmatism describe it as akin to an antitheory, encompassing all potential sources of constitutional meaning without being beholden to rigid rules of decision.<sup>191</sup> The pragmatists' benchmark is the achievement of constitutional outcomes that yield the best "results for society."<sup>192</sup> But as examples like *Heller* indicate, the Court sometimes depicts social policy as subordinate or inapposite in resolving thorny constitutional questions. That practice separates the Court's approach from genuine pragmatism, which acknowledges the potential importance of factors

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186. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) ("[O]riginalism is not, and had perhaps never been, the sole method of constitutional exegesis.").

187. 554 U.S. 570 (2008).

188. See *id.* at 576 ("We turn first to the meaning of the Second Amendment."); *id.* at 605 (describing the determination of "the public understanding of a legal text" as "a critical tool of constitutional interpretation" (emphasis omitted)). But cf. *id.* at 625 (raising the possibility that principles of stare decisis may "foreclose[]" the Court's "adoption of the original understanding of the Second Amendment").

189. See, e.g., STRAUSS, *supra* note 1, at 33 (arguing that "original understandings play a role only occasionally, and usually they are makeweights, or the Court admits that they are inconclusive"); cf. Solum, *supra* note 4, at 170 (describing the Court's attitude toward constitutional text as "ambivalent").

190. For influential treatments of the modalities of constitutional argumentation, see, for example, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) and PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

191. See, e.g., Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) (describing pragmatism as a means of "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy"); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 9 (1998) ("[W]hile in one sense pragmatism is indeed a theory . . . , in an equally valid and more illuminating sense it is an avowal of skepticism about various kinds of theorizing . . .").

192. Farber, *supra* note 191, at 1353.

like “original intent” but does not allow them to become “decisive.”<sup>193</sup> At most, the Court’s constitutionalism is intermittently pragmatic, just as it is intermittently originalist and intermittently living constitutionalist.

The best description of the Court’s interpretive approach is not pragmatic but *pluralistic*.<sup>194</sup> It is defined by the absence of any consistent methodological commitment, including even a commitment to pragmatic resolution of disputes.<sup>195</sup> The Court emphasizes various interpretive modalities from case to case—and often within the same case—without ever suggesting “that the different methods are reducible to one master method,” much less furnishing a passkey for undertaking such a decryption.<sup>196</sup> That is the essence of interpretive pluralism as I use the term here. Recognizing multiple modalities of argument as relevant does not a pluralist make.<sup>197</sup> Rather, pluralism arises from invoking those modalities without reference to an overarching theory of interpretation designed to promote a specified set of normative values.

The prevalence of pluralism owes in part to the Court’s composition of different individuals appointed by different presidents and espousing different judicial philosophies.<sup>198</sup> The institutional dynamics of the Court as a multimember body reduce the probability of methodological consensus. To take just one example, Justice Thomas is especially attentive to the Constitution’s original public meaning.<sup>199</sup> His colleagues are, to varying degrees, more inclined to reject originalist arguments in light of factors including precedent and social policy. That sort of methodological diversity

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193. *Id.*; cf. Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 8 (2011) (“[M]any pragmatists acknowledge constitutional language only because it serves as a focal point, a convenient device that enables a diverse society to agree on what constitutes fundamental law.”).

194. *See, e.g.*, Coan, *supra* note 101, at 1063 (arguing that it is “virtually incontrovertible that contemporary American constitutional practice has a substantially pluralist cast”).

195. *See* Sunstein, *supra* note 18, at 14 (“Not only has the Court as a whole refused to choose among [interpretive theories] . . . , but many of the current justices have refused to do so in their individual capacities.”); *id.* at 13 (“Even individual Supreme Court Justices can be hard to classify.”); Coan, *supra* note 101, at 1063 (contending that the “defining characteristic [of interpretive pluralism] is the recognition of multiple authoritative sources of constitutional meaning”).

196. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEXAS L. REV. 1753, 1757 (1994).

197. *See, for example*, Richard Primus’s impressive effort at articulating a theory to explain when original meanings should matter and when they should not: *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008).

198. *Cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 827 (1982) (“[T]he Justices are not promoted from lower courts by a method that rewards conformity with prevailing norms; to the contrary, Presidents often appoint particular Justices because they value the new Justices’ different perspective on legal affairs.”).

199. *See, e.g.*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) (“The Court’s decision today does not comport with the original public understanding of the First Amendment.”); *infra* note 222.

makes it less likely that five or more Justices will endorse originalism—or, for that matter, any other unified theory of constitutional interpretation.<sup>200</sup>

### C. *Individual Pluralism*

As a practical matter, judicial decisions are not made by the Supreme Court. They are made by the people who comprise it. A second layer of interpretive pluralism emerges from the views of the Court's individual members. The validity of adjudicating constitutional disputes through application of a "grand theory"<sup>201</sup> continues to be a matter of extensive debate. Judge J. Harvie Wilkinson recently authored a notable book that criticizes leading constitutional theories as "competing schools of liberal and conservative judicial activism,"<sup>202</sup> while Judge Richard Posner likewise has expressed dissatisfaction with constitutional theory.<sup>203</sup> And commentators like Cass Sunstein advocate the resolution of constitutional disputes through "incompletely theorized agreements" precisely to avoid disagreements over "first principles."<sup>204</sup>

Sympathy for these arguments reaches all the way to the Supreme Court. The experience of John Roberts is a case in point. During his confirmation hearings in 2005, soon-to-be-Chief Justice Roberts disavowed allegiance to any single theory of constitutional law.<sup>205</sup> He explained that rather than drawing on abstract theory, he favors "bottom up" judging.<sup>206</sup> As he elaborated in a response to Senator Orrin Hatch:

If the phrase in the Constitution says two-thirds of the Senate, everybody's a literalist when they interpret that. Other phrases in the Constitution are broader, [such as] "unreasonable searches and

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200. See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 87 n.47 (2003) ("[T]he principle of 'every person for herself' with respect to choosing interpretive practices is now well entrenched.").

201. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 1–4 (1988) (critiquing grand theory).

202. J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 4 (2012). For Judge Wilkinson, the "highest virtues of judging" are found in overcoming theory and being guided instead by "self-denial and restraint." *Id.* at 116.

203. See generally Posner, *supra* note 191.

204. Sunstein, *supra* note 18, at 20–21; see also *id.* at 8 ("Courts should try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so.").

205. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) [hereinafter *Roberts Confirmation Hearing*] ("I have said I do not have an overarching judicial philosophy that I bring to every case, and I think that's true."); GERHARDT, *supra* note 25, at 193 ("John Roberts avoided controversy by rejecting fidelity to any particular theory of constitutional interpretation.").

206. *Roberts Confirmation Hearing*, *supra* note 205, at 159; cf. GERHARDT, *supra* note 25, at 195 (describing Chief Justice Roberts as "signaling a preference to decide cases incrementally and to infer principles from the records of the cases below").

seizures.” You can look at that wording all day and it’s not going to give you much progress in deciding whether a particular search is reasonable or not. You have to begin looking at the cases and the precedents, what the Framers had in mind when they drafted that provision.

So, yes, it does depend on the nature of the case before you[,] I think.<sup>207</sup>

It is worth pausing to note that despite Chief Justice Roberts’s protestations, his vision bears some hallmarks of a bona fide theory of constitutional interpretation. The Constitution’s specific textual commands must be interpreted literally. But when the Constitution sets forth broad standards, respect for the document requires resort to other interpretive techniques. On these points, the Chief Justice is in accord with theories such as Jack Balkin’s “living originalism,” which embraces a similar distinction between “determinate rule[s]” and broad standards.<sup>208</sup>

Despite these tendencies in the direction of grand theory, Chief Justice Roberts established himself as a theory skeptic through his attitude toward methodological consistency.<sup>209</sup> The Chief Justice made no pretense of consulting a unified principle to guide the weighing of relevant factors across different types of cases. Constitutional text will control in some cases, history in others, and precedent in still others.<sup>210</sup> Determining which modality should govern is done on a case-by-case basis. Therein lies the true significance of the “bottom up” descriptor: It reflects the Chief Justice’s dedication to interpretive pluralism.

The experience of Chief Justice Roberts demonstrates that the Court’s pluralism is not solely the product of its multimember composition. It is also the result of individual choice. Nor is the Chief Justice alone in his pluralism. Five years after the Chief’s confirmation, Justice Kagan offered her own endorsement of a “case-by-case” approach to interpretive method.<sup>211</sup>

207. *Roberts Confirmation Hearing*, *supra* note 205, at 158–59.

208. BALKIN, *supra* note 103, at 6 (“If the text states a determinate rule, we must apply the rule because that is what the text offers us. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.”). The affinity is highlighted by a separate statement from the Chief Justice noting that although “the Framers’ intent is the guiding principle that should apply,” judges must pay attention to whether the Framers “chose to use broader terms.” *Roberts Confirmation Hearing*, *supra* note 205, at 182; *see also id.* (“That is an originalist view because you’re looking at the original intent as expressed in the words that they chose, and their intent was to use broad language, not to use narrow language.”).

209. To be clear, I am not suggesting that the Chief Justice merely played the part of a theory skeptic for purposes of securing confirmation. To the contrary, I assume (and believe) that he candidly described his approach.

210. *Roberts Confirmation Hearing*, *supra* note 205, at 159; *see id.* at 182 (“So the approaches do vary, and I don’t have an overarching view.”).

211. *See The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 81 (2010) (“I think in general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing.”).



For case-by-case Justices, methodological diversity is an individual phenomenon as much as an institutional one.<sup>212</sup> Even if the Court were made up of nine John Robertses or nine Elena Kagans, its interpretive method would remain variable, sometimes proceeding in accordance with philosophies such as originalism or living constitutionalism and sometimes heading off in other directions.

*D. Theories of Precedent in Pluralism's Wake*

The preceding subparts have sought to establish a pair of related propositions. First, in conducting its analyses of precedent, the Supreme Court commonly fails to engage with the direct, substantive impact of implementing the correct constitutional rule.<sup>213</sup> Second, the interpretive approach of both the Court as an institution and some of its individual members is deeply pluralistic, eschewing any commitment to a consistent constitutional method.<sup>214</sup>

Placing these propositions side by side suggests a solution to the puzzle of why the independent effects of precedent dominate the Court's stare decisis jurisprudence. I have contended that integration of a definitive interpretive method, as informed by an underlying set of normative premises, is necessary to assess the value of rectifying a flawed precedent. If that claim is correct, forsaking interpretive theory in favor of pluralism should foreclose any inquiry into the importance of getting the law right. The interpretive pluralist's natural response would be to focus on independent effects such as reliance expectations and workability, whose content does not depend on the integration of interpretive method. And that is just what the Court tends to do.<sup>215</sup> While this reaction is understandable, it is unsatisfactory. By giving short shrift to the substantive dimensions of constitutional accuracy, the Court subverts its articulated doctrine of stare decisis.

So how is a Supreme Court Justice to proceed when she is confronted by a constitutional precedent that she views as on point but problematic? The most straightforward situation is that involving a Justice who is committed to a defined interpretive philosophy. Such a philosophy furnishes a metric for the Justice to utilize in appraising the severity of constitutional errors. For example, Justice Breyer has advocated a paramount focus on ensuring that fundamental constitutional values are borne out in practice.<sup>216</sup> To him, the severity of a constitutional mistake depends on its pragmatic

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212. See Sunstein, *supra* note 18, at 13–14 (noting that many Supreme Court Justices have not, in their individual capacities, adhered to a single theory of constitutional interpretation).

213. See *supra* subpart IV(A).

214. See *supra* subparts IV(B)–(C).

215. See *supra* subpart IV(A).

216. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 75 (2010) (“[T]he Court should regard the Constitution as containing unwavering values that must be applied flexibly to ever-changing circumstances.”).

effects. Thus, the primary reason for overruling a case like *Plessy v. Ferguson*<sup>217</sup> was that it “worked incalculable harm” and fell short of promoting equal accommodations, let alone “equal[] respect[],” for people of all races.<sup>218</sup> Justice Breyer also emphasizes the need for a “thumb on the scale in the direction of stability,”<sup>219</sup> suggesting that constitutional mistakes with less dire consequences than *Plessy* often will be innocuous enough to tolerate. Justice Thomas, by comparison, commonly takes the position that erroneous precedents should be reconsidered.<sup>220</sup> His opinions provide some reason to suspect that he views many or most deviations from the Constitution’s original public meaning as, at most, only weakly constraining.<sup>221</sup>

A trickier situation is the one exemplified by Justice Scalia’s jurisprudence. Justice Scalia is not properly described as a bottom-up judge in the style of Chief Justice Roberts or Justice Kagan. To the contrary, he has taken great care in setting forth an overarching interpretive philosophy of originalism that guides his constitutional decisions.<sup>222</sup> At the same time, Justice Scalia has conceded that he occasionally will depart from original public meaning based on the presumptive benefits of preserving settled law.<sup>223</sup> The result is what he calls a “faint-hearted” version of originalism.<sup>224</sup>

217. 163 U.S. 537 (1896).

218. BREYER, *supra* note 216, at 150; *see also id.* (“[M]uch of American society had begun to see the *Plessy* decision as legally wrong and the segregated society it helped build as morally wrong.”); *id.* at 150–51 (“[I]n *Brown* a unanimous Court overturned an earlier decision that the justices considered legally wrong, out of step with society and the law, and unusually harmful.”).

219. *Id.* at 153.

220. *See, e.g.,* McDonald v. City of Chi., 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring in part and concurring in the judgment) (“[S]tare decisis is only an ‘adjunct’ of our duty as judges to decide by our best lights what the Constitution means.”); Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring) (“I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), is without basis in the Constitution.”); Van Orden v. Perry, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring) (“This case would be easy if the Court were willing to . . . return to the original meaning of the [Establishment] Clause.”).

221. *Cf.* Vikram David Amar, Morse, *School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637, 647 (2009) (arguing that “Justice Thomas’s is an originalism that consumes everything else, including *stare decisis*”); Tom Goldstein & Amy Howe, *But How Will the People Know? Public Opinion As a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 MICH. L. REV. 963, 973–74 (2011) (“[Justice Thomas] now regularly dissents, urging the Court to overrule prior lines of settled precedent. But those dissents are generally solo opinions, with no other member of the Court willing to chart such significant new directions in the law.” (footnote omitted)).

222. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–41 (1997); *see id.* at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

223. *See id.* at 140 (“[S]tare decisis is not *part of* my originalist philosophy; it is a pragmatic *exception to it*.”).

224. Scalia, *supra* note 186, at 864; *see also* SCALIA, *supra* note 222, at 138–39 (“Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.”); *cf.* BORK, *supra* note 54, at 158 (“[I]t is too late to overrule not only the decision legalizing paper money but also

The faint-hearted approach has drawn criticism from some commentators for lacking a coherent theoretical foundation: Jack Balkin contends that Justice Scalia's approach "undercuts the claim that legitimacy comes from adhering to the original meaning of the text adopted by the [F]ramers,"<sup>225</sup> and Randy Barnett has gone so far as to argue that Justice Scalia is not properly described as an originalist.<sup>226</sup>

As I have suggested with respect to popular-sovereignist originalism and consequentialist originalism, it is entirely possible for originalist theories to permit the retention of flawed precedents in certain circumstances.<sup>227</sup> The *sine qua non* is the consultation of normative premises that provide a principled basis for assessing the degree of harm threatened by the perpetuation of a given constitutional mistake. The crucial question in evaluating Justice Scalia's treatment of precedent is whether he possesses a defined normative baseline that can explain both (a) his general preference for original meaning and (b) his view that the importance of correcting constitutional mistakes must sometimes yield. If he does act with reference to such a baseline, there is no inherent reason why his precedent-tolerating approach to originalism is untenable.

Finally, we come to those who resist constitutional theory in favor of interpretive pluralism.<sup>228</sup> By disavowing any consistent interpretive method, the pluralists find themselves at odds with the modern doctrine of *stare decisis*. Without a theory for assessing the substantive dimensions of constitutional errors, they lack the tools to appraise the value of constitutional accuracy in any given case. The problem cannot be cured through bottom-up judging that treats precedent as among an array of relevant factors. Even on an eclectic approach to constitutional adjudication in which multiple considerations are relevant to the treatment of precedent, there must be some theory for determining how the considerations work together and what happens when they diverge.<sup>229</sup>

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those decisions validating certain New Deal and Great Society programs pursuant to the congressional powers over commerce, taxation, and spending."); Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors*, 19 GEO. MASON L. REV. 1029, 1041 (2012) (arguing that "[a]lmost all originalists have decided, on pragmatic grounds, that the Supreme Court's constitutional infidelities must sometimes be allowed to mature into de facto constitutional amendments").

225. BALKIN, *supra* note 103, at 8–9.

226. See Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 24 (2006) (arguing that "Justice Scalia's faint-hearted commitment to originalism is not really originalism at all").

227. See *supra* section III(B)(1).

228. See *supra* subpart IV(C).

229. See Paulsen, *supra* note 116, at 295 ("For any constitutional theory that acknowledges the legitimacy of consideration of multiple and potentially inconsistent sources of constitutional meaning there is an urgent corollary need for coherent and principled rules about what takes priority and when one can repair to less-favored modalities to resolve unclarity."); Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 317 (2010) ("The constitutional pragmatist must choose goals before she can 'do what works' to achieve them, and a

There is admittedly an element of, if not paradox, at least irony in the conclusion that interpretive pluralism is an ill fit with the doctrine of constitutional stare decisis. Strong deference to precedent might be seen as a response to the very existence of methodological diversity, which increases the probability that a given Justice will perceive certain precedents as mistaken simply because she adheres to an interpretive method that differs from that of her predecessors.<sup>230</sup> The doctrine of stare decisis responds by establishing a presumption of deference notwithstanding the proliferation of varying interpretive methods.<sup>231</sup> It thereby reduces the destabilizing effects of methodological diversity among successive waves of Justices.<sup>232</sup> Yet the conflict between interpretive pluralism and constitutional precedent persists. It may be true that deference to precedent is effective at preserving a stable core within judicial systems characterized by methodological diversity. Nevertheless, the fact remains that without reference to interpretive method, a pluralist has no adequate basis for evaluating the costs of constitutional mistakes.

The tension between the doctrine of stare decisis and pluralistic approaches to interpretation does not extend to every manner in which precedent is invoked. Precedent plays a variety of roles beyond institutional self-binding that are left untouched by the failure to integrate constitutional method. For example, the function of precedent as a means of hierarchical control is not affected, nor is the use of precedent for purposes of persuasion.<sup>233</sup> Only when a Justice describes a precedent as genuinely constraining—that is, as affecting the rule of decision in a subsequent case—does the tension arise.

### *E. Surveying the Potential Solutions*

For the interpretive pluralist who wishes to pursue a workable theory of constitutional precedent, at least three potential options are available: uniform integration of interpretive method across cases; integration of interpretive method on a context-dependent basis; and adoption of an absolutist approach to precedent. A fourth option would require the intervention of the Supreme Court as an institution: the Court could respond

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common law constitutionalist must choose normative commitments if she will test tradition against contemporary reason.”).

230. *Cf.* Fisch, *supra* note 36, at 100–01 (asserting that “[a] subsequent court’s disagreement with a prior precedent is more likely to reflect a disagreement about the prior court’s selection of decisional principles than the application of those principles”).

231. For exploration of this point, see Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711 (2013).

232. For a comparable suggestion in the context of statutory stare decisis, see *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (“Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.”).

233. *See supra* Part I.

to the challenges created by interpretive pluralism by redesigning the doctrine of stare decisis to exclude the dependent, substantive dimensions of constitutional accuracy. Finally, there is the possibility that any dissonance could be overcome through judicial courtesy and compromise. I discuss each of these options in turn, though my analysis is admittedly tentative and preliminary; a full vetting of these options (and, perhaps, others) must be left for future work.

1. *Uniform Integration.*—The clearest solution for the pluralist Justice who is grappling with constitutional precedent is to undertake the project of constructing a consistent, overarching theory of constitutional interpretation. With such a theory in place, there would be a ready mechanism for assessing the costs of constitutional mistakes. A Justice who devoted herself to a particular interpretive strategy, guided by defined normative premises, would be well-positioned to fashion an accompanying theory of precedent. Of course, she would also cease to be an interpretive pluralist.

2. *Context-Dependent Integration.*—Rather than restyling herself as an adherent of one interpretive school or another, our pluralist Justice could articulate a context-dependent set of interpretive methodologies. For instance, originalism might provide the appropriate lens in interpreting the Second Amendment's right to bear arms.<sup>234</sup> In other areas, perhaps including application of the Free Speech Clause, originalism might give way to methodologies such as living constitutionalism or pragmatism.<sup>235</sup> Within each context, the Justice would also articulate a normative justification for her approach, from structuralism or consequentialism in the originalist domains to common law adjudication or judicial innovation in the domains of living constitutionalism.<sup>236</sup>

The context-dependent approach would not result in any uniform methodological election. Within the contours of a given dispute, however, it would yield an effective apparatus for assigning value to the correction of constitutional mistakes. In a category of cases where structural originalism provided the rule of decision, all constitutional errors would be deemed intolerable; the value of accuracy would trump.<sup>237</sup> By comparison, in categories where common law constitutionalism reigned supreme, the relevant costs of retaining a flawed precedent would include considerations of justice and social policy.<sup>238</sup>

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234. Cf. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (emphasizing the “original understanding of the Second Amendment”).

235. See STRAUSS, *supra* note 1, at 52–53 (describing the nonoriginalist complexion of the Court's free speech jurisprudence).

236. See *supra* subpart III(B).

237. See *supra* notes 115–21 and accompanying text.

238. See *supra* notes 129–34 and accompanying text.

The central distinction between the context-dependent approach and pure pluralism is the former's commitment to the consistent utilization of predefined methodologies within particular substantive contexts. By furnishing a set of metrics for gauging the intensity of constitutional mistakes, the context-dependent approach addresses the tension between pluralism and the doctrine of *stare decisis*. But its success comes at a price—and one that brings the broader vulnerabilities of interpretive pluralism into relief. The context-dependent model contemplates that in some situations, factors such as policy outcomes will be integral to the severity of a constitutional error. In other situations, policy outcomes will be secondary or inapposite. Likewise, a precedent's harmfulness might occasionally be determined by its compatibility with principles of popular sovereignty or supermajoritarian consensus, while in other cases those considerations would have no role to play.

The implications are not different in kind from the implications of interpretive pluralism more generally. After all, pluralism contemplates judicial responsiveness to different indicia of constitutional meaning from case to case and context to context.<sup>239</sup> Yet viewing these consequences through the prism of precedent makes the ramifications of pluralism more vivid. The doctrine of *stare decisis* seeks to promote and accommodate systemic interests in (among other values) stability, rationality, and the rule of law.<sup>240</sup> Uncertainty about the criteria for evaluating the respective harmfulness of various constitutional mistakes is at odds with those norms. By this I do not mean to suggest that interpretive pluralism is unprincipled. A pluralist judge could be perfectly consistent in her *process* of adjudication, always making sure to consult a defined set of relevant sources before reaching her decision. That approach, it seems to me, might well satisfy the demand for consistency that we properly make upon our judges.<sup>241</sup> Nevertheless, consistent processes are insufficient to give content to the value of getting the law right in a way that is amenable to the application of *stare decisis* across cases. The doctrine of *stare decisis* requires something more.

3. *Absolutism*.—If our hypothetical Supreme Court Justice is not prepared to rethink pluralism as her preferred approach to constitutional

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239. See *supra* subparts IV(B)–(C).

240. See *supra* Part II.

241. Cf. Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 573 (1999) (declaring that “[f]or a judge or Justice to appeal to inconsistent assumptions [about preferred methods of reasoning] from one case to the next would breed cynicism” because “[t]he ideal of judicial reason, as distinct from power or will, implies an obligation of methodological integrity”); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1767–68 (2010) (contending in the context of statutory interpretation that “[l]itigants bringing like claims expect to have their cases decided under the same legal standards, and methodological flip-flopping undermines the public perception of the Court as a neutral body”).

interpretation, she might consider tailoring her view of precedent. The objective would be to avoid any need for assessing the substantive value of replacing incorrect constitutional rules. There are two ways in which that objective might be pursued.

Our Justice might resolve, following the example of the pre-1966 House of Lords,<sup>242</sup> that from this day forward she will cease to vote for the overruling of any constitutional precedent. Instead, she will leave the correction of constitutional errors entirely to the Article V amendment process.<sup>243</sup> The Justice would still need to grapple with issues of precedential scope in determining whether a prior decision was, in fact, controlling. But she would be spared the task of making case-by-case determinations about the comparative value of leaving the law settled versus getting the law right.

Relinquishing the judicial power to overrule is strong medicine. So, too, is the pluralistic Justice's second potential option, which is the converse of the first: The Justice could disavow any discretion to reaffirm a constitutional precedent that she views as incorrect. In effect, constitutional stare decisis would be excised from her jurisprudence. All constitutional questions would be resolved without any effort to maintain continuity with Justices of the past through the preservation of precedent.

*4. Doctrinal Redesign.*—Both absolute deference and zero deference would represent rather severe responses to the tension between pluralism and the doctrine of stare decisis. That severity is not disqualifying, but it does reduce the appeal and practicality of those options. It is thus worth considering whether the Supreme Court could find a more palatable solution through some other means. Is there an alternative formulation of stare decisis that is, if not perfect, at least a better fit with the second-best world of interpretive pluralism?

The Court might, for example, recast the doctrine of stare decisis as entirely dependent on the disruptive impact of adjudicative change, such that an erroneous precedent would be retained if and only if the disruption likely to accompany its overruling exceeds some predefined threshold. This version of stare decisis could be applied without any integration of interpretive method. Upon concluding that a precedent was mistaken, the Justices would have no need for aligning themselves with interpretive schools like originalism or living constitutionalism. They would simply consider the disruptiveness of reversing course.

In lieu of this disruption-based approach, the Court could address the tension between pluralism and precedent by redesigning the doctrine of stare decisis to focus on other independent effects of precedential continuity, such

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242. See *supra* notes 49–50 and accompanying text.

243. U.S. CONST. art. V.

as jurisprudential coherence or workability.<sup>244</sup> The common denominator is disregard for the substantive value of correct interpretation. The direct benefits of replacing a mistaken rule would play no role in the stare decisis analysis. The moment those benefits reentered the fold, the tension between stare decisis and pluralism would return along with them.

The central problem with proposals like these is that the redesigned doctrine of stare decisis would itself be inconsistent with certain interpretive methodologies. For example, a doctrine based exclusively on disruptiveness would imply both that disruptiveness is a legitimate reason for retaining a precedent and that all other considerations are inapposite.<sup>245</sup> Much the same would be true if other independent factors were added to or substituted for disruptiveness. The question is whether a doctrine of stare decisis reconstituted along these lines would fare any better than existing law in dealing with interpretive pluralism. If the answer is yes, the explanation would seem to be that it is more justifiable to ask judges to stipulate to the relevance of independent considerations like disruptiveness—even at the expense of applying their preferred interpretive theories—than to seek agreement about the direct, substantive ramifications of a particular constitutional ruling. Evaluating the soundness of such an explanation is a matter that requires further analysis.

5. *Judicial Compromise*.—Finally, it is worth considering whether the dissonance between pluralism and stare decisis might be worked out through the mechanism of judicial compromise, without the need for any doctrinal revision. Different Supreme Court Justices may harbor different views as to what makes an erroneous precedent so harmful as to warrant overruling. But they could seek to come together around their common ground—for example, by agreeing that a precedent should be retained, even if they disagree about the reason why. Those Justices could compromise to produce an opinion that is “shallow” enough to be agreeable to all of them.<sup>246</sup> Alternatively, they might agree to join an opinion that reaches the correct result even if they have quibbles over the way in which the issue of stare decisis is handled.

I see the virtues of both approaches, and I suspect that they occur with some regularity in practice. Yet they provide an incomplete solution to the problem of pluralism. Crafting shallow opinions will tend to reduce the institutional pluralism that arises from different Justices’ adherence to different methodologies.<sup>247</sup> But it does so at the expense of analytical

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244. See *supra* Part II.

245. See *supra* section II(A)(1).

246. See Sunstein, *supra* note 18, at 21 (defending the use of shallow decisions that “make it possible for people to agree when agreement is necessary” while “mak[ing] it unnecessary for people to agree when agreement is impossible”).

247. See *supra* subpart IV(B).



exposition, which is a trade-off that should give us some pause. Moreover, shallow opinion writing does not solve the problem of individual pluralism. Before she engages the question of whether to compromise, a jurist must determine, in her own mind, what the proper metric is for assessing the value of getting the law right.<sup>248</sup> Until she undertakes that analysis, shallow opinions will merely paper over a missing analytical step.

*F. A Dose of Realism?*

Might it be that the integration of interpretive method with constitutional precedent is already occurring, *sub rosa*, or perhaps even subconsciously, in the Supreme Court's decisions?

The Justices conceivably may be conducting in-depth examinations of the value of interpretive accuracy based on their respective philosophical predispositions and normative premises, but then refraining from weaving those examinations into their written opinions. This prospect seems unlikely, as there is no apparent explanation for why the Justices would be inclined to obscure that type of analysis from public view while providing elaborate explanations of their other interpretive moves.

An alternative theory is more plausible. It posits that when the Justices confront dubious precedents, they draw on basic, vaguely formed intuitions regarding the relative severity of constitutional mistakes. When a Justice declares that she is willing to stand by a precedent for the sake of *stare decisis*, she is implying that the costs of perpetuating the constitutional mistake are below some internal threshold, even if she does not have a developed theory of interpretation in mind.

It is impossible to know how often this latter scenario reflects the Court's actual practice, and we can stipulate to its potential occurrence without meaningfully affecting the analysis presented in this Article. For a Justice whose instincts suggest that a given type of constitutional error is especially harmful, a principled theory of precedent requires unpacking that intuition to test its consistency with the Justice's broader interpretive approach. As we have seen, some approaches to assessing constitutional mistakes are, while superficially plausible, irreconcilable with certain interpretive methods.<sup>249</sup>

The Justice who views one constitutional mistake as more harmful than another must explain which normative premises justify her view and whether those premises are consistent with her interpretive method. In the event of an inconsistency, it is incumbent upon the Justice either to overcome her initial intuitions of harmfulness or to adjust her broader theory of constitutional

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248. See *supra* subpart IV(D).

249. See *supra* Part III.

interpretation to take them into account.<sup>250</sup> In light of the Court's laudable commitment to reason giving,<sup>251</sup> the appropriate forum for that deliberative process is a written opinion, not the Justice's own mind.<sup>252</sup>

This Article's prescriptions accordingly remain applicable even if one believes that the Justices already engage in rudimentary and implicit analyses of the severity of constitutional mistakes. Neither *rudimentary* nor *implicit* is sufficient.

## V. Objections and Analogies

So far I have contended that theories of precedent require the integration of particular interpretive methodologies as informed by underlying normative premises. The following subparts consider two potential reactions to my argument, one in the spirit of objection and one in the spirit of analogy. The objection is that the benefits of integrating precedent and interpretive method are rendered illusory by the tendency of *stare decisis* to corrupt any interpretive strategy to which it is joined. The analogy suggests that the relationship between precedent and interpretive method extends beyond the realm of constitutional law.

### A. *Intrinsic Corruption*

Aspiration toward interpretive accuracy arguably sits in tension with the doctrine of *stare decisis*, which can lead to the perpetuation of constitutional rulings that would be rejected in the absence of applicable precedent. Some commentators have seized upon this tension to argue that deference to precedent undermines the purity of any constitutional theory. The most well-known critique is that of Justice Scalia, who has called *stare decisis* a "compromise of all philosophies of interpretation."<sup>253</sup> Michael Paulsen echoes that conclusion in contending that deference to erroneous decisions is "intrinsically corrupting" of constitutional theory because it "accords

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250. Cf. Strang, *supra* note 160, at 1730 ("[P]recedent plays such a central role in our legal practice that all plausible interpretative methodologies must account for the role of precedent in their theories.").

251. See, e.g., Breyer, *supra* note 54, at 2016 ("[A] good opinion contains the true reasons that led to the judge's decision. The decision must be reasoned. It must be principled. It must be transparent.").

252. Cf. Gerhardt, *supra* note 1, at 143 ("There can be no meaningful exchange of ideas among the Justices on the question of continued adherence to precedent unless they each disclose their reasons for the positions they have taken and the values they believe should continue to guide the Court's decisionmaking on the particular issue under reconsideration.").

253. SCALIA, *supra* note 222, at 139; see also *id.* ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."). For a recent reaffirmation, see SCALIA & GARNER, *supra* note 51, at 414 ("[Stare decisis] is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity.").

decision-altering force to precedents that would otherwise be thought wrong.”<sup>254</sup>

Despite its capacious formulation, the intrinsic-corruption thesis is ultimately an adjunct of structural originalism<sup>255</sup> that does not necessarily apply to other methodologies. Even when legal change is desirable, it is by nature disruptive. The world in which a given precedent exists is different from the world in the absence of any such precedent. The issuance of a judicial opinion carries meaningful consequences for the way in which individuals organize their affairs, legislators craft laws, and society at large understands the content and nature of the legal backdrop.<sup>256</sup> It is possible to conclude, following the structural originalists, that those consequences should be irrelevant to the task of constitutional interpretation.<sup>257</sup> It is also plausible to argue that the ramifications of a precedent’s issuance are germane to the propriety of its retention. Interpretive philosophies that permit deference to precedent in order to mediate the costs of legal change are subject to reasonable dispute regarding their functionality and their fidelity to the Constitution, but they are not corrupted by their acceptance of *stare decisis*.<sup>258</sup>

In staking out the contrary view, Professor Paulsen acknowledges the argument that precedent might legitimately be deployed as one component of an overarching constitutional theory.<sup>259</sup> He remains unconvinced, criticizing such theories as implying that judicial pronouncements can alter the Constitution’s meaning.<sup>260</sup> Professor Paulsen’s criticism is elegant and thought-provoking, but I submit that it is ultimately unpersuasive in two respects. First, as suggested in the previous paragraph, there is no innate reason why a theory of constitutional interpretation must disregard the effects of deviating from precedents that are already on the books. A constitutional theory that is driven by factors such as policy considerations or welfare maximization can easily accommodate the view that, for example, the original public meaning of the Constitution’s text should govern *unless* the negative effects of breaking continuity exceed some threshold. Those types of approaches provide ample room for principles of *stare decisis* to operate.

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254. Paulsen, *supra* note 116, at 290–91; *see also* Lawson, *supra* note 32, at 32 (describing deference to erroneous constitutional precedents as inconsistent with “any theory of interpretation that prescribes objective right answers to constitutional questions” (footnote omitted)).

255. *See supra* section III(A)(1).

256. *See* Kozel, *supra* note 59.

257. *See supra* section III(A)(1).

258. *Cf.* Caminker, *supra* note 26, at 859 (“[A] court may appropriately interpret a particular constitutional provision to take into account the institutional values that commend embracing the same interpretation offered previously by (the same or) a superior court.”).

259. Paulsen, *supra* note 116, at 292.

260. *See id.* at 294–95 (challenging the argument that “judges have the power to invest the Constitution with meaning simply by virtue of their decisions and opinions”).

Second, even someone who views original meaning as the paramount source of constitutional law might accept deference to precedent as a legitimate part of the judicial process through which that meaning is brought to bear. When the Supreme Court confronts a precedent it currently views as erroneous, it is dragged into conflict with its past self. The institutional question is which instantiation of the Court—the prior one or the current one—should win out in issuing the decree of the “judicial department” created under Article III.<sup>261</sup> A Justice or constitutional lawyer might plausibly conclude that fidelity to the Constitution is not impaired by resolving such disputes with a presumption in favor of the predecessor Court, any more than fidelity to the Constitution requires lower courts to ignore Supreme Court decisions they view as erroneous. The debate is not about the proper source of constitutional meaning but “the institutional mechanism” through which disputes over that meaning “are to be settled.”<sup>262</sup> A presumption in favor of the current Court’s interpretation represents an internally coherent approach to constitutional adjudication. So, too, does the opposite presumption in favor of precedent.

The force of the intrinsic-corruption thesis turns out to be coextensive with structural originalism, which draws on the Constitution’s status as supreme law in renouncing departures from original meaning.<sup>263</sup> Given the theory’s premises, it would be discordant for a structural originalist to contemplate the privileging of judicial precedent over original meaning. For those who claim no allegiance to structural originalism—including originalists who base their interpretive approach on other normative premises<sup>264</sup>—precedent remains a potentially legitimate component of constitutional method. Correct or incorrect, their theories are not necessarily corrupt.

### B. *Statutory and Common Law Precedents*

Stare decisis applies to more than constitutional cases. The Supreme Court has stamped its statutory decisions with a degree of durability beyond that which is accorded to constitutional rulings.<sup>265</sup> The divergence is

261. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (noting that Article III creates “not a batch of unconnected courts, but a judicial *department* composed of ‘inferior Courts’ and ‘one supreme Court’”).

262. See Solum, *supra* note 4, at 196 (“Once we are operating within the realm of formalist precedents, the question is not ‘Are we respecting the authority of the Constitution?’ but is instead, ‘What is the institutional mechanism by which disputes about the meaning of the Constitution are to be settled?’”); see also Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 144 (2010) (“Originalists qua originalists have no position on the allocation of legal authority in any particular legal system.”); Caminker, *supra* note 26, at 858 (“The entire federal judiciary could just as plausibly be the appropriate autonomous interpretive unit.”).

263. See *supra* section III(A)(1).

264. See *supra* section III(B)(1).

265. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation . . .”).

commonly explained by a pair of institutional assumptions: The challenges inherent in the Article V amendment process warrant a more active role for the judiciary in reconsidering constitutional precedents; and Congress's failure to amend a statute in response to a judicial construction is a form of implicit acquiescence.<sup>266</sup> Both claims are susceptible to challenge. There are credible explanations other than acquiescence—from the limited capacity of the legislative agenda to the touchy politics of removing an entitlement that was previously endorsed by the judiciary—that might explain the legislature's failure to amend a statute.<sup>267</sup> Nor is it obvious why, if inaction really were tantamount to approval, acquiescence by the *sitting* Congress should be sufficient to ratify the judicial interpretation of a statute that was passed by an *earlier* Congress.<sup>268</sup> Further, the unique status of the Constitution as a “framework for government” arguably counsels in favor of greater, not lesser, solicitude for continuity in the constitutional realm, suggesting that the difficulty of formal amendment is a virtue to be preserved as opposed to a miscalculation that warrants a doctrinal end around.<sup>269</sup>

Putting aside the debatable wisdom of according enhanced deference to statutory precedents,<sup>270</sup> the question of immediate concern is how such deference should be understood within the analytical framework I have tried to develop. In particular, given the proliferation of competing schools of statutory interpretation such as textualism and purposivism,<sup>271</sup> it might be thought to follow that the integration of interpretive method and precedent is equally necessary in the statutory context as in the constitutional context.

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There are recognized exceptions for statutes that imply a delegation of lawmaking authority. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“*Stare decisis* is not as significant in this case . . . because the issue before us is the scope of the Sherman Act. From the beginning the Court has treated the Sherman Act as a common law statute.” (citation omitted)).

266. See *Patterson*, 491 U.S. at 172–73 (observing that in the context of statutory interpretation, “unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done”); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–24 (2005) (summarizing the conventional arguments in favor of strong statutory stare decisis).

267. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1403–08 (1988) (challenging the argument regarding legislative acquiescence).

268. Barrett, *supra* note 266, at 336–37; Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 193–95 (1989).

269. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 431 (1988) (“Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules. The reasons for making amendment hard apply as well to overrulings.”); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180 (2006) (“One purpose of having a written constitution is to create a stable framework for government. . . . Overruling [bedrock] doctrines would create just the kind of uncertainty and instability that constitutions (even more than other laws) are designed to avoid . . .”).

270. For further analysis, see generally Eskridge, *supra* note 267.

271. See, e.g., Gluck, *supra* note 241, at 1762–64 (contrasting textualist and purposivist approaches to statutory interpretation).

The existence of varying philosophies for interpreting statutes does not end the inquiry. In constitutional cases, the need for integrating interpretive method arises from the existence of multiple superficially plausible<sup>272</sup> approaches for defining the nature of substantive harm that results from a mistaken interpretation. Depending on one's philosophy, the relevant impact of retaining an erroneous rule might be characterized in terms of social welfare, justice, popular sovereignty, or beyond.<sup>273</sup> Without an integration of interpretive method, there is no metric for assessing the value of replacing an incorrect rule with a correct one.

Whether the integration of interpretive method is also a precondition to the application of *stare decisis* in the statutory context depends on whether there is similar room for debate in defining the ramifications of misconstrued statutes. Are there a variety of plausible metrics for assessing the value of a correct statutory interpretation? If so, the integration of interpretive method is required in order to facilitate the application of *stare decisis*. For example, it may be that the severity of a statutory mistake should be viewed in terms of the extent to which the judicial construction deviated from the legislature's intentions. Or perhaps the importance of correcting a statutory error should turn on whether the judicial construction has proven "inconsistent with the sense of justice or with the social welfare."<sup>274</sup> Assuming that these (or other) approaches to valuing statutory accuracy can be plausibly maintained, the integration of interpretive method would be necessary to facilitate the principled treatment of precedent. That assumption appears sound as a preliminary matter, but it would require further scrutiny before the requirement of integrating a particular interpretive philosophy could be convincingly established.

Much the same is true of the application of this Article's analysis to the treatment of precedent in common law cases. Common law adjudication can lead to the formation of "established doctrines and principles."<sup>275</sup> When the question inevitably arises as to whether a court should break from such a doctrine or principle, there must be some theory for evaluating how harmful it would be to let matters stand. That brings us once again to the issue of how to infuse the concept of harm with legal salience. Is it about economic inefficiency, moral injustice, dubious public policy, or other considerations? The answer to that question, which depends on one's normative theory of what the common law is driving at, will inform the choice between retaining and overturning flawed precedents.

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272. As noted earlier, debating about which of these approaches is best is not the type of project I am undertaking here.

273. *See supra* Part III.

274. *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (quoting *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting CARDOZO, *supra* note 76, at 150) (internal quotation marks omitted)).

275. Waldron, *supra* note 67, at 7.

### Conclusion

Contending that a theory of precedent compels a particular result of its own volition runs into a problem of infinite regress, calling to mind Stephen Hawking's anecdote about "turtles all the way down."<sup>276</sup> Certain factors that are relevant to the choice between retaining and overruling a flawed precedent are amenable to preliminary scrutiny in isolation from interpretive method.<sup>277</sup> But the doctrine of stare decisis is founded on the premise that the value of leaving the law settled must ultimately be weighed against the value of getting the law right.<sup>278</sup> Negotiating that tension, I have argued, requires the integration of interpretive methodology as informed by underlying normative premises. In the absence of such integration, there is no suitable mechanism for defining the value of constitutional accuracy across cases.

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276. STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 1 (1988).

277. *See supra* Part II.

278. *See supra* note 10 and accompanying text.