Note to My Northwestern Readers. Thanks so much for your willingness to share your reactions to these chapters, which are drawn from my forthcoming book on precedent and stare decisis. I’ve included the Introduction to give some background about the project, as well as portions of Chapters 5 and 6, which in many respects are the core of the book.

The book is just entering the publication process, which means I have plenty of time to incorporate your suggestions. Thanks in advance for your help!
CONTENTS

Introduction

1. Framing the Study of Precedent

2. The Stakes of Deference

3. Strength of Constraint

4. Scope of Applicability

5. Precedent and Pluralism

6. Precedential Strength in Doctrinal Perspective

7. Precedential Strength in Structural Perspective

8. Compromise, Common Ground, and Precedential Scope

9. Implications and Transitions

   Conclusion
INTRODUCTION

The summer of 2005 was a time of transition at the U.S. Supreme Court. Soon after the Court decided the last of its pending cases in June, Sandra Day O'Connor announced her plan to retire. Justice O'Connor had served on the Court since 1981. She made history as the first female justice, and her trademark pragmatism made a deep impression on American law. Around the halls of the Court, it is commonly said that any time a justice departs, the institution is made anew. With a jurist of Sandra Day O'Connor’s stature on the cusp of leaving, that sentiment seemed as true as it had ever been.

Just two months after Justice O'Connor’s announcement came the news that William Rehnquist had died. He had served on the Court since 1972, taking over as Chief Justice in 1986. His legacy extended beyond his legal decisions and into countless aspects of the Court’s procedures and practices. Viewed alongside the retirement of Justice O'Connor, Chief Justice Rehnquist’s passing foretold the end of one era and the dawn of another. The most recent departure from the Court had been that of Harry Blackmun, who retired in 1994. Now eleven years later, the Court faced the loss of two justices of enormous influence—who between them had served for more than fifty years—in the course of only a few months.

Initially, Justice O'Connor's seat on the Court was to be filled by John Roberts, who was serving as a federal appellate judge. But after Chief Justice Rehnquist’s death, President George W. Bush revised Judge Roberts’s nomination. Judge Roberts would now take over as Chief Justice, with Justice O'Connor’s successor—eventually, Samuel Alito—to be selected later.

Supreme Court justices earn their appointments based on their individual qualities and achievements. Upon their confirmation, however, they join a tribunal with two centuries’ worth of practices, customs, and decisions. A key issue for every new justice is how to balance respect for the Court’s past with solicitude for its future.

That issue would arise in illuminating fashion during Judge Roberts’s confirmation hearing before the Senate Judiciary Committee. Like previous nominees, Judge Roberts was asked about the degree of
respect that is owed to the Supreme Court’s prior opinions—in other words, its precedents. In American legal culture, courts commonly describe precedents as carrying great weight. By respecting their precedents, courts validate a time-honored principle: *stare decisis et non quieta movere*, a Latin phrase meaning “[t]o stand by things decided, and not to disturb settled points.” ¹ The phrase, which is commonly abbreviated as *stare decisis*, captures the idea that today’s judges should not lightly disrupt the decisions of their predecessors. Even so, it is always possible for a court to overrule its precedents, so long as there is sufficient justification for doing so. The goal is to preserve the law’s stable core without permanently entrenching every judicial mistake.

During an exchange with Judge Roberts, Senator Arlen Specter raised the topic of *stare decisis* in the context of *Roe v. Wade* (1973), the Supreme Court’s landmark ruling on abortion rights. Yet the Senator’s question went beyond *Roe* and addressed “principles of *stare decisis*” more generally. Judge Roberts responded in kind. He began with an appeal to history, explaining that America’s founders “appreciated the role of precedent in promoting evenhandedness, predictability, stability, [and] the appearance of integrity in the judicial process.” He then turned to the Supreme Court’s modern approach to precedent, which considers factors like whether prior decisions have “proven to be unworkable” or “been eroded by subsequent developments.”

Judge Roberts noted that to overrule a precedent is to give “a jolt to the legal system.” At the same time, he cautioned that deference to precedent is only presumptive, not absolute. It is true that the overruling of precedent can tax the system. But sometimes “that’s a price that has to be paid.” He illustrated with the example of *Brown v. Board of Education* (1954), in which the Court broke from its past to make clear that racial segregation in public services violates fundamental constitutional precepts. ²

The experience of Judge Roberts—now Chief Justice Roberts—was far from unique. Since his appointment, three more justices have taken seats on the Court: first Samuel Alito, then Sonia Sotomayor, and finally Elena Kagan. The role of precedent arose during each of their

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¹ *BLACK’S LAW DICTIONARY* (8th ed. 2004).
confirmation hearings. All three of them offered explanations similar to that of then-Judge Roberts: the Court’s precedents warrant meaningful deference, but such deference is not absolute. And they have continued to endorse this understanding of precedent upon taking their positions on the Court. Indeed, every sitting justice has acknowledged the importance of deferring to precedent under certain circumstances. Each justice has also noted that precedent must sometimes yield. The question is when.

That question has been at the center of many of the Court’s most controversial rulings. It was there when the Court upheld the central holding of *Roe v. Wade*. It was there when the Court rejected a challenge to the *Miranda* warnings that police officers must give to suspected criminals. More recently, it was there when the Court ruled that the First Amendment affords strong protection to political ads by corporations and labor unions—a ruling President Barack Obama criticized during the 2010 State of the Union address not simply for being wrong, but for having “reversed a century of law.” These disputes over precedent are pervasive and important. They are also deeply complex. The complexity reaches all the way down to the foundational issue of why a judge would ever willingly accept a ruling she believes to be wrong.

* * *

The study of precedent is the study of mistakes. Some past decisions were misguided from the outset. Others began sensibly enough but became shaky over time as facts changed. The issue in either case is what to do next. Should today’s judges stand by prior decisions they view as incorrect? Or should they set the record straight and improve the law going forward?

At first glance the answer may seem obvious: judges should never consciously repeat the mistakes of the past. But the calculus turns out to be complicated. People might have made investments and modified their behaviors in reliance on past judicial decisions. There is also the worry that if judicial decisions are reversed too readily, the law will lose its durability and impersonality and be reduced to whatever

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today’s judges say it is. And it is always possible that, notwithstanding
the contrary belief of today’s judges, the previous decision actually
represents the more accurate interpretation of the law. In light of
possibilities like these, maybe it is better—at least sometimes—to let
things be.

As then-Judge Roberts noted during his confirmation hearing, the
Supreme Court has articulated a host of considerations to inform the
choice between retaining and jettisoning a decision that is incorrect in
the eyes of today’s justices. Key factors include the precedent’s
procedural workability, the soundness of its factual premises, the
extent to which subsequent decisions have eroded its foundations, and
the reliance it has generated. Still, the justices continue to disagree
over the role of precedent in particular cases. To some, the best
explanation for this disagreement is that stare decisis is really no
principle at all. On that account, fidelity to precedent seldom (if ever)
sways a justice from her preferred course. There is so much play in the
joints that even as they talk about stare decisis, the justices manage to
preserve the precedents they like and overrule the ones they don’t.

These sentiments occasionally come from the justices themselves.
Justice Scalia once criticized a majority opinion for treating the
doctrine of stare decisis as a “result-oriented expedient” rather than a
consistent principle. 4 A decade earlier, Justice Marshall directed a
comparable criticism at a majority opinion that upset settled law. He
concluded that “[n]either the law nor the facts” had changed; “[o]nly
the personnel of this Court did.” To Justice Marshall, the lesson was
clear: “Power, not reason, is the new currency of this Court’s
decisionmaking.” 5

Comments like these reflect a tension in the Supreme Court’s
treatment of precedent. While there is widespread agreement among
the justices about the factors that are potentially relevant to a dubious
precedent’s retention or overruling, there has been far less discussion
of how stare decisis fits into various theories of judging. Nor has the
Court devoted much attention to explaining why certain outcomes are
so problematic as to trigger prompt overruling, while others should be
tolerated in pursuit of values such as stability, continuity, and the
protection of settled expectations. The lack of a comprehensive

explanation can sometimes make it seem like the Court is being inconsistent in its treatment of precedent. The effect is especially pronounced within the realm of constitutional law, which draws the Court into debates over the protection of fundamental liberties and the essential structure of government. Some thirty years ago, Henry Monaghan described the problem in terms that remain resonant today: “Because a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations. As a result, stare decisis seemingly operates with the randomness of a lighting bolt: on occasion it may strike, but when and where can be known only after the fact. A satisfactory theory of constitutional adjudication requires more than that.”6

Without a meaningful role for precedent, the law sacrifices a large share of its continuity, constraint, and impersonality. Decisions of the Supreme Court become the products of fluctuating assemblages of justices who come and go from the bench rather than the outputs of an enduring institution that maintains its identity over time. The danger is not that the overruling of precedent will lead to rioting in the streets or widespread resistance to the Supreme Court’s edicts. The costs are more in the nature of untapped potential. Time and again, the justices have underscored that deference to precedent promotes the rule of law. But those affirmations occur at the level of abstract theory. By translating them into practice, the Court can bolster the idea that its decisions flow from enduring legal principles rather than individual proclivities, and that the Constitution truly is more than “what five Justices say it is.”7

Allow me to illustrate by reference to Citizens United v. Federal Election Commission (2010), which I mentioned above and about which I will have more to say in the pages ahead. In Citizens United, a five-justice majority voted to overrule precedent by enlarging the First Amendment liberties of corporations and labor unions. Four justices resisted that result, but they fell one vote short. For now, let us reserve judgment on whether the better argument was that of the five-justice

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majority or the four-justice dissent. Instead, think about the impact of the case going forward. Absent some presumption of deference to precedent, whether *Citizens United* remains the law of the land—which is to say, what the First Amendment means as applied to an important area of campaign finance regulation—depends on whether personnel changes at the Court turn the four-justice dissent into a five-justice majority. Nor does the cycle end there. Assume that *Citizens United* is reversed after a new justice arrives at the Court, but that in short order a member of the majority coalition retires and is replaced by a differently-minded justice. Without a meaningful doctrine of stare decisis, the pendulum could just as easily swing back. All of this despite the fact that the Constitution itself will not have changed a bit.

*Citizens United* suggests a broader point about the Supreme Court’s role in the constitutional order. In 2016, Lawrence Norden wrote in *The Atlantic* that “it is no exaggeration to say that the next appointments to the Supreme Court will have a profound impact on political power in the United States.” The underlying premise is clear: In modern constitutional law, the salient mechanism of change is not the formal amendment process, but rather the appointment of new justices to the Supreme Court.

This reality, I submit, is dispiriting and detrimental. Constitutional principles should be overarching and enduring. Deference to precedent advances the valuable ideal that it takes something more than a group of nine (or, in a split decision, five) individuals to declare what the Constitution requires. To be sure, the identity and interpretive predilections of individual judges will always matter. The composition of the courts will and should remain a topic of interest to political campaigns and social movements. But the fact that judges matter does not resolve the issue of *how much* they should matter. A meaningful doctrine of precedent asks the individual judge to subordinate—not always, but sometimes—her personal view of a case to the historical practice of her court as an institution. Judges still matter under a regime of stare decisis. They just matter *less*. And that is a valuable thing in a system that aspires to promote the rule of law as opposed to the rule of individual men and women.9

9 Cf. Monaghan, *Stare Decisis and Constitutional Adjudication*, supra note __, at 752 (“A general judicial adherence to constitutional precedent supports a consensus about
This book develops a theory of precedent designed to enhance the stability and impersonality of constitutional law. The problem with the Supreme Court’s current approach to precedent is not that the justices are behaving in an unprincipled manner. The problem is that the modern doctrine of stare decisis is undermined by principled disagreements among justices acting in good faith. The doctrine’s structure and composition all but guarantee that conclusions about the durability of precedent will track the justices’ individual views about whether decisions are right or wrong and whether mistakes are harmful or benign. To rehabilitate the doctrine of stare decisis so it can bridge philosophical divides, we need to rethink the way in which precedent interacts with constitutional theory.

The starting point is recognizing the implications of a basic fact about our legal culture. We have not reached anything approaching consensus regarding the proper method for understanding and applying the Constitution. Rather, ours is a second-best world of pervasive disagreement over constitutional interpretation. That requires a second-best theory of stare decisis attuned to the challenges of judicial disagreement and the value of precedent in overcoming them. It remains possible for stare decisis to play the vital role the Supreme Court has described for it in enhancing the continuity and impersonality of constitutional law. For that to occur, we need to reconsider the doctrine from the ground up. The prevailing approach to precedent implies a greater degree of agreement about constitutional theory than actually exists. If stare decisis is to fulfill its promise, we must account for the unique challenges posed by disagreements—good-faith, principled disagreements—about the proper ends and means of constitutional interpretation.

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Having foreshadowed the arguments toward which the book will build, allow me to circle back to explain the path it will take.

In the first part of the book, I aim to provide a descriptive and analytical account of precedent that is independent of the normative claims that will come later. Chapter 1 begins by distinguishing two the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law.”).
common situations: those in which a court is considering the effect of its own prior decisions, and those in which a court must apply decisions from a tribunal of superior rank. The former scenario involves what are sometimes called horizontal precedents; the latter involves precedents that operate vertically, running from higher courts to lower courts. Though both situations deal with the impact of prior decisions on later courts, they are governed by different rules in the U.S. federal system. While a court always has the power to reconsider its own past decisions, lower courts do not enjoy comparable discretion to revise the opinions of higher courts. The Supreme Court has insisted on this point, making clear that lower courts may never reject a Supreme Court decision—even if the decision is obviously flawed, has been eroded over time, or has been called into question by the justices themselves. These different rules require distinguishing vertical and horizontal precedents even while recognizing that some of the arguments for (and against) deference will overlap.

After drawing a line between vertical and horizontal precedents, Chapter 1 turns to another pivotal distinction, this one between precedential strength and precedential scope. In evaluating the role of precedent, it can be tempting to focus exclusively on the degree of constraint that prior decisions exert on future disputes. It is a precedent’s strength that ultimately determines whether there is a sufficient justification for overruling it. Yet strength is only part of the story. No matter how strong a precedent is deemed to be, the precedent has no constraining force in situations it does not reach. There must be a threshold determination whether a prior decision applies to a later case. Sometimes it is quite clear that one case governs another, so the only valid options for the later court are to reaffirm or overrule. But in many other cases, whether a precedent applies to the case at hand is a thorny and contentious question. Keeping in mind these dual considerations of strength and scope is crucial to analyzing and, hopefully, improving the treatment of precedent.

Next, I introduce two more sets of distinctions that are helpful in understanding the law of precedent. The first is the type of case a court is called upon to resolve. Conventional wisdom holds that judicial interpretations of statutes are entitled to maximum deference going forward, whereas interpretations of the Constitution receive weaker deference. I offer some reasons for being skeptical about this distinction, and I argue that in all events, the fact that constitutional
precedents receive relatively weak deference under existing law does not mean such deference is weak in absolute terms. Even if statutory cases receive the most insulation from overruling, that leaves a broad range of possibilities for how much deference should attach to constitutional decisions. The intricacies of constitutional stare decisis will be my focus for much of the book, though many aspects of my analysis will apply to statutory (and common-law decisions) as well.

The remainder of Chapter 1 surveys the various functions that precedents serve in modern American law. Precedents are means of transmitting knowledge from past to present, so they can improve judicial decisionmaking even when there is no obligation to follow them. In some cases, though, it is not left to the later court to make up its mind about whether to follow precedent. Instead, the later court is duty-bound to stand by the decision of the earlier court. This is easiest to see in the context of vertical precedent, as when a federal trial court is required to follow a Supreme Court decision despite reservations about that decision on the merits. Precedent can also constrain future iterations of the court that issued it. The Supreme Court is properly understood as constrained to follow its precedents under certain conditions: namely, when the Court’s articulated criteria for overruling are not satisfied. This constraining function presents both the strengths and weaknesses of precedent-based judging in their starkest form. At its best, precedent limits the discretion of subsequent judges and contributes to a stable, consistent, and impersonal system of law. Yet a strong doctrine of precedent can also lead to the repetition and entrenchment of earlier judges’ miscues. These are the stakes of the debate.

I elaborate on the stakes in Chapter 2, which begins by chronicling some of the commonly-cited benefits of deference to precedent. They include the conservation of judicial resources, the protection of settled expectations, and the preservation of a stable environment to facilitate planning. They also include impersonality. A commitment to precedent can encourage the equal treatment of litigants, reducing the extent to which the idiosyncrasies of their situations affect the outcome of their disputes. At the same time, deference to precedent can allow the law to transcend the identity of the judge who happens to be presiding over a particular case. If a judge must follow precedent, her individual preferences and tendencies become less salient.
On the other side of the scale are the costs of abiding by precedent. Imagine that five justices of the Supreme Court conclude a prior decision reflects an erroneous understanding of the Constitution. Those justices also happen to be stalwart proponents of stare decisis, for reasons including continuity and impersonality. They accordingly vote to reaffirm the decision notwithstanding their misgivings about its rationale. While they believe themselves in possession of a sound basis for doing so, the justices relinquish the opportunity to replace (what they believe to be) an incorrect rule with a more accurate one. They consciously allow a mistake to go uncorrected. I will end up defending a meaningful doctrine of precedent notwithstanding these countervailing considerations. But the costs must be appreciated if the doctrine of stare decisis is to strike the appropriate balance between continuity and change.

Before closing the second chapter, I offer a few words about the consistency of stare decisis with the Constitution. Issues of legitimacy are complicated and fascinating, but I do not dwell on them for the simple reason that they are uncontroversial in modern judicial practice. Justices of the Supreme Court vary in their readiness to overrule flawed decisions, but no justice has challenged the lawfulness of stare decisis. Still, a few commentators have raised such a challenge, so I briefly examine some possibilities for defending the legitimacy of stare decisis in constitutional cases. Those possibilities draw on the Constitution’s text, the background understandings and practices in place at the time of the founding, the structure of the federal judiciary, and the need for judges to act in a collective, cooperative fashion notwithstanding their interpretive disagreements.

Chapters 3 and 4 unpack the complementary concepts of precedential strength and precedential scope. I explain how both concepts operate under the Supreme Court’s existing approach to precedent, and I emphasize how they are shaped by underlying conclusions about the ends and means of constitutional interpretation.

To begin with precedential strength: Nearly a century ago, Justice Louis Brandeis described the tension inherent in the doctrine of stare decisis as pitting the importance of leaving the law settled against the value of getting the law right.10 This characterization has endured, and

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for good reason. In deciding whether to overrule a flawed decision, it is natural to inquire into the bad effects the decision has created and to predict the beneficial effects that would accompany a change of direction. But the factors that make a decision good or bad are neither static nor universal. They depend on the interpretive theory that a particular judge adopts. For some judges, a prior decision’s implications for justice and fairness shape whether it is harmful or benign. Other judges treat those considerations as legally irrelevant. Likewise, some judges measure the severity of a mistaken interpretation based on how sharply it departs from the Constitution’s original meaning at the time of the founding. Others find the Constitution’s original meaning to be less relevant than considerations such as a decision’s pragmatic or moral ramifications.

The point is simply that judges rely, whether explicitly or implicitly, on their theories of interpretation to determine whether a prior decision is correct in its reading of the Constitution. This can and does lead to principled disagreements. If some Supreme Court justices focus on the Constitution’s original meaning while others focus on contemporary mores or policy judgments, it should be unsurprising if they part ways over the soundness of certain precedents. Those same variances in interpretive philosophy also inform the subsequent—and distinct—determination of precedential strength, which dictates whether a prior decision should be reaffirmed despite its flaws. Every judicial decision has a host of consequences, ranging from on-the-ground practical effects to broader implications for governmental design and political morality. Determining what types of consequences are legally relevant depends on a given judge’s interpretive philosophy. In turn, assessing whether a prior decision is so problematic as to warrant overruling requires analyzing the decision’s legally relevant implications while excluding other matters. That enterprise is necessarily shaped by interpretive philosophy, and it will look different depending on a judge’s methodological and normative commitments.

The same is true of a precedent’s scope of applicability, which I discuss in Chapter 4. Evaluating whether a prior decision is relevant to a newly arising dispute requires determining what the prior decision means. In making that determination, a common step is to draw a line between judicial statements that were necessary to a case’s resolution and statements that were dispensable, with the former representing the decision’s holding and the latter mere dicta. That distinction
informs the definition of precedential scope: Holdings are entitled to
deferece in future cases, whereas dicta are nonbinding and may be
accepted or rejected at the pleasure of the subsequent court.

Notwithstanding its historical pedigree, the holding/dicta
distinction fails to explain existing federal practice, including at the
Supreme Court. While the Court occasionally insists on a strict line
between binding holdings and dispensable dicta, it regularly defers to
aspects of its opinions—including sweeping rules and doctrinal
frameworks—that range beyond the application of specific law to
concrete fact. Whether this phenomenon should be lauded or jeered
depends on underlying beliefs about the judicial role, the requirements
of the Constitution, and the utility of precedent in constraining
subsequent decisionmakers. Some interpretive philosophies seek to
minimize the extent to which judicial pronouncements displace
considerations such as the original meaning of the Constitution’s text.
On those theories, it is sensible to construe precedents narrowly. Other
theories make greater use of precedent as a tool of judicial constraint
or a source of common ground among differently-minded judges,
supporting the view that precedents should be defined in relatively
broad terms. These are only two of several possibilities I will discuss,
but they introduce the broader point. Just as attitudes toward the
strength of precedent are bound up with underlying interpretive
preferences, so too are accounts of precedential scope.

With the relationship between precedent and constitutional
philosophy established, the book moves from why it is important to
reconsider the role of precedent to how that reconsideration should
proceed. In pursuing this inquiry, my focus is the operation of stare
decisis at the U.S. Supreme Court. Over the past three decades the
justices have devoted considerable effort to discussing why precedent
deserves presumptive respect and why that presumption must
sometimes yield. In Chapters 5 and 6, I address the various factors the
Court has enumerated to guide its applications of stare decisis. Of
particular interest is the extent to which those factors possess objective
content that does not depend on an individual judge’s interpretive
philosophy. Separating stare decisis from disputes over constitutional
interpretation is vital if judicial responses to precedent are to
transcend individual beliefs about how best to understand the
Constitution’s teachings.
Stare decisis can bolster the stability and impersonality of constitutional law only if it sometimes requires a justice to accept an outcome she thinks is incorrect. If the pull of precedent gives way every time a justice concludes a prior decision is wrong, the impact of stare decisis dissipates. Yet that is precisely what we should expect from a doctrine of stare decisis that allows the interpretive philosophies of individual justices to dictate whether a prior decision is reaffirmed or overruled. As I explain in Chapter 5, because a justice’s interpretive philosophy colors her determination of which considerations are legally relevant, it also goes a long way toward informing her applications of stare decisis under existing law.

This concern would be less pressing if there were widespread agreement about the proper ends and means of constitutional interpretation. Imagine a Supreme Court comprised of nine justices who agree about how the Constitution ought to be interpreted, including which types of considerations are legally relevant and which are not. Imagine that the justices also agree about what makes a flawed precedent particularly bad—perhaps, for instance, that it creates serious injustice. That consensus would open the door for a consistent and systematic approach to precedent. *Plessy v. Ferguson* (1896), which validated racial segregation in public accommodations, would furnish a ready example of a flawed decision that was too unjust to tolerate.\(^\text{11}\) By contrast, a case like *National Bellas Hess v. Department of Revenue* (1967), which arguably misconstrued the authority of states to impose tax obligations on out-of-state sellers, might be retained; even if the decision is incorrect, it is difficult to construe it is immoral.\(^\text{12}\) More generally, the justices’ conclusions about the durability of precedent would continue to depend on their theories of constitutional interpretation. But because those theories would be universally held—at the Court, at least—they would facilitate a consistent approach to precedent.

Now relax the assumption that the justices are in harmony, and assume instead that they are sharply divided over the appropriate methods of constitutional interpretation. The most obvious effect of disagreement is that the justices will split over whether certain precedents are wrong or right. But they will also disagree about another point: the factors that make a flawed precedent not simply

\(^{11}\) 163 U.S. 537.
\(^{12}\) 386 U.S. 753.
wrong, but in need of overruling. That latter debate will tend to track the justices’ differences of opinion over the appropriate principles for interpreting the Constitution. In other words, there will be two points of fracture. One relates to the characterization of a precedent as incorrect, and the other relates to the considerations that justify a flawed precedent’s overruling. Yet both inquiries will be informed by the same methodological and normative priorities that divide the justices in the first place. Whether a precedent is overruled will depend, at base, on the interpretive philosophy that commands a majority of sitting justices.

This is not how stare decisis is supposed to work. The reason why the Supreme Court often links precedent to the rule of law is because deference to past decisions can unite justices of varying interpretive stripes. Two (or three, or nine) justices may disagree about how the Constitution should be interpreted but still share a common dedication to precedent. It draws together justices who would otherwise disagree on the merits. But when the decision to overrule tracks the interpretive preferences of individual justices, the connection between stare decisis and judicial impersonality is severed. Precedent stops serving as common ground for overcoming philosophical disagreements. Invocations of stare decisis restate disagreements instead of bridging them.

A comparable analysis applies to the definition of a precedent’s scope of applicability. Defining a precedent’s contours depends in significant part on interpretive preferences: how much one values uniformity and guidance, the extent to which one is comfortable displacing the best interpretation of the Constitution’s text, and so on. Pervasive disagreements over constitutional theory create challenges in fashioning a consistent account of precedential scope.

The key to developing better approaches to precedential strength and precedential scope is acknowledging the impact of deep-seated disagreements among judges about the proper way to interpret the Constitution. In our world of pervasive interpretive disagreement, we need to think about the role of precedent differently than we would under conditions of widespread interpretive harmony. The question is no longer which factors are potentially relevant to a precedent’s retention or overruling. The inquiry must be narrowed to include only those factors that are susceptible of principled application by justices
across the philosophical spectrum. We need a second-best theory of
stare decisis to complement our second-best world of interpretive
disagreement.

This position may seem counterintuitive, for it requires ignoring
certain considerations that would be relevant to a precedent’s
durability under conditions of interpretive agreement. Even so,
disregarding some of those considerations and cabining others is
necessary for stare decisis to overcome interpretive disputes rather
than repackaging them. The objective of this reconceptualization is
neither to increase nor decrease the power of precedent in any given
case. It is to disentangle a precedent’s correctness on the merits from
its claim to deference notwithstanding its flaws.

Chapter 6 applies these principles to determinations of
precedential strength. The approach I defend has some features in
common with the doctrine of stare decisis that currently prevails at the
Supreme Court. Several factors loom large on both accounts: a
decision’s procedural workability, the accuracy of its factual premises,
and the reliance it has yielded. Even so, using precedent to bridge
judicial disagreements means fine-tuning those factors to ensure that
their invocation does not collapse into disputes over interpretive
philosophy.

Though revising the inquiry into considerations such as
workability and factual accuracy is important, the most significant
change I propose relates to a precedent’s substantive effects. As I have
suggested, the relevance of such effects depends on one’s theory of
constitutional interpretation. Some theories prize matters of justice
and morality, others pragmatic results, still others compatibly with
founding-era understandings. If these are the drivers of whether a
precedent is overruled, the application of stare decisis will track
interpretive philosophies that differ from justice to justice. There is
nothing unprincipled about such a regime. Each justice might make
decisions about precedent that are consistent with her overall
interpretive philosophy. Still, this vision of stare decisis relinquishes
the ability to draw together justices who are sympathetic to different
interpretive schools. In so doing, it gives away a large share of the
promise of precedent.
Because their impact depends on contested matters of interpretive philosophy, substantive effects must generally be excluded from the stare decisis calculus. Allowing substantive effects to guide the analysis all but guarantees that the treatment of precedent will be bound up with deeper methodological disputes. Evaluating a precedent’s substantive effects might be appropriate in a world of interpretive agreement, in which the justices work from a shared set of assumptions about which of a prior decision’s consequences are legally relevant. But that is not our world. In our second-best world of interpretive pluralism, a precedent’s substantive effects should bear on its retention only in a small category of exceptional cases. The category is comprised of decisions that an individual justice views as not simply wrong or bad, but extraordinarily harmful. Of course, each justice must make that assessment based on her individual interpretive preferences. As a result, different justices will reach different conclusions about which precedents fit the bill. Once a justice decides that a mistaken precedent is responsible for causing extraordinary harm, she is justified in refusing to stand by that precedent for the sake of continuity. This exception coheres with the common understanding of stare decisis as significant but nonabsolute. Sometimes a precedent is too bad (from the perspective of an individual justice) to tolerate. In those cases, the pull of precedent gives way.

While the exception for extraordinary harm contemplates occasional situations in which individual attitudes toward constitutional interpretation are paramount, its narrowness reinforces the importance of compromise in the ordinary course. A robust doctrine of precedent regularly calls upon the justices to subordinate their individual conclusions in deference to the Court’s institutional history. Disregarding a precedent’s substantive effects goes hand-in-hand with the idea that it takes more than disagreement to justify a precedent’s overruling. Only when a decision strikes a justice as so inordinately harmful that it cannot be tolerated does this principle yield.

The picture that emerges is one of precedent serving as a source of common ground among differently-minded justices, one that facilitates impersonal decisionmaking and coordinated action. The text of a statute or constitutional provision provides a useful source of common ground. There is no need for two justices to argue about whether, say, each state should have the same number of Senators. The
Constitution’s clear text furnishes the answer. It will furnish the answer when there are five justices on the Court who give primacy to the Constitution’s original meaning. It will furnish the same answer when there are five justices who view the Constitution as a living document that evolves over time.

Precedent can play a similar role. It allows some points to be taken as given rather than perpetually debated. And it does so in a fashion that is fundamentally neutral. To be sure, nearly every precedent has its backers and its critics. But the general practice of precedent-following does not work exclusively to the advantage of living constitutionalists, or originalists, or anyone else. Some precedents are consistent with the Constitution’s original meaning. Others are consistent with living constitutionalism. This is important, because it limits what the individual justice sacrifices by committing herself to precedent. It is not as if a justice is asked to jettison her own interpretive philosophy and pledge fidelity to another. Rather, she agrees to defer to the Court’s precedents, some of which she will favor and some of which she will not.

I build upon these themes by considering more directly the decisionmaking process of the individual jurist. Up until this point, I defend second-best stare decisis on the assumption that the justices of the Supreme Court are jointly committed to maintaining a meaningful doctrine of precedent. I think this assumption is sound: Justices across the methodological spectrum have emphasized the importance of stare decisis to a stable and impersonal rule of law, and I see no reason to doubt their sincerity or resolve. Even so, I relax this assumption and contend that a justice is well served to cast her lot with stare decisis irrespective of whether her judicial peers—present or future—follow suit. By adhering to precedent, even a single justice can promote fundamental values of continuity and impersonality while contributing to the entrenchment of stare decisis as an ongoing practice.

All of this depends on the effectiveness of attempting to limit the impact of factors such as a precedent’s substantive effects. Chapter 7 discusses an alternative approach to precedential strength grounded not in the substance of stare decisis doctrine, but rather in the structure of Supreme Court decisionmaking. The proposal is to require a supermajority vote in order to overrule a precedent. The rationale is straightforward. The more votes it takes to overrule, the more likely it
becomes that an overruling will require cooperation among justices who have different theories of constitutional interpretation. And the greater the likelihood that such cooperation is required, the lower the chances that a precedent will be jettisoned due to nothing more than personnel shifts—and accompanying changes in the Court’s interpretive locus.

While a supermajority voting rule has the potential to enhance the impersonality of judicial decisionmaking, I will suggest that it is less promising than the doctrinal revisions to stare decisis as described in Chapter 6. The supermajority rule operates by increasing the number of individual perspectives that are necessary in order to change the law. But it does not ask the individual justice to subordinate her own interpretive preferences to the role of the Court as an institution. That is a missed opportunity for reinforcing the prevalence of the rule of law over the rule of individual women and men.

In Chapter 8, I turn to the implications of interpretive disagreement for the definition of a precedent’s scope of applicability. As a descriptive matter, debates over precedential scope cannot be reduced to distilling the holding of a case and separating it from the dicta. The Supreme Court commonly accords deference to aspects of its opinions that range far beyond the narrow application of law to fact. The legitimacy and desirability of that practice depend on underlying beliefs about constitutional interpretation and judicial decisionmaking. The problem is familiar by now. Those underlying beliefs vary greatly from judge to judge and justice to justice, yet the doctrine of stare decisis must be grounded in considerations that steer clear of contestable interpretive and normative commitments.

In light of the challenges posed by interpretive pluralism, I urge a revised approach to precedential scope that leverages areas of agreement within existing law. With occasional exceptions, it is generally accepted by Supreme Court justices across the methodological spectrum that judicial asides and hypotheticals are not entitled to deference in future cases. It likewise is generally accepted that a judicial opinion can establish a precedent by setting forth a doctrinal rule or framework even if the rule or framework obviously ranges beyond the facts presented to the court for resolution. Given their widespread acceptance, these two principles provide building
blocks for an approach to precedential scope that adds consistency while respecting what has gone before.

A more difficult question involves a prior court’s statement of its reasoning. The Supreme Court sometimes treats decisional rationales as entitled to deference in future cases. At other times, the Court defers only to a decision’s legal rule, characterizing expressed rationales as extraneous. In the face of this divide, I urge a compromise: The reasons offered in support of a decision do not warrant deference in all cases, but neither may they be discounted in a way that undermines the logic of the decision that announced them. This distinction, imperfect as it might be, responds to interpretive pluralism by walking the line between excessive deference to peripheral statements and inadequate respect for the considered expressions of prior courts.

Chapter 9 asks what the theory of second-best stare decisis means for leading schools of constitutional interpretation. I discuss the ways in which second-best stare decisis coheres with and complements certain interpretive philosophies, as well as the ways in which it challenges them. Leading methodologies such as living constitutionalism and originalism are compatible with second-best stare decisis in significant respects, including the use of precedent to guide and constrain future decisionmakers. Yet tensions will certainly arise. The living constitutionalist will sometimes be asked to stand by an originalist decision that she views as inconsistent with contemporary mores or sound policy judgments. The originalist will sometimes be asked to validate a decision that she views as having departed from the original meaning of the Constitution’s text.

Despite these costs, deference to precedent is justified by the ideal of the Supreme Court as an enduring institution rather than the contingent product of individual predilections. There is also a more practical consideration at work: If living constitutionalists are unlikely to convince many originalists to join their cause, and if originalists are similarly unlikely to convince many living constitutionalists to come aboard, perhaps the best approach is one that gives something to—and asks something from—both.

The book concludes with brief parting thoughts about the relationship between precedent, impersonality, and continuity in
modern constitutional law. The reality of American law and politics is that constitutional change happens through judicial appointments, not formal amendments. This is entirely reasonable. The people elect their president, and each president tries to select Supreme Court justices who view the law in a particular way. This does not imply the Court is a “political” institution, at least if that word is taken to mean the justices make their decisions based on political preferences. There is room for principled disagreement in the interpretation of the Constitution.

When some justices leave the Court and others arrive, the dynamics can change such that interpretive approaches that formerly were in the minority come to predominate. Again, this is unremarkable. Nor should it surprise us if a shift in the Court’s interpretive locus leads to the reconsideration of precedents that reflect now-disfavored ways of understanding the Constitution. But ebb and flow is not the only way to design a system of constitutional adjudication. As an alternative, we can imagine a system in which constitutional law retains a stable, continuous core even as individual justices come and go. That is the world of second-best stare decisis.

Legal continuity comes at a cost that must be acknowledged. Stare decisis means tolerating interpretations that one believes to be mistaken. It also means declining opportunities to innovate when the Court has already resolved an issue. Like the turtles adorning this book’s cover—turtles featured on the lampposts that ring the Supreme Court in Washington, D.C.—a court that commits itself to stare decisis will proceed incrementally, deliberately, slowly in pushing the law forward. It will continue to fashion new rules in cases of first impression. But where the law is settled, it will tend to leave things as they stand. Legal change occurs not through the courts, but through other channels: channels like the enactment of state and federal legislation to protect important rights, and the proposal of constitutional amendments for national consideration and debate. Where the political process cannot or will not act, the law generally remains intact—even at the cost of enduring a past mistake.

The costs of continuity are real, but so are the benefits. The potential vacillation of constitutional law following changes in judicial personnel is replaced by an abiding sense of stability and impersonality. By deferring to precedent, the justices subordinate their
individual perspectives to the Court’s institutional identity. They establish their commitment to an enduring institution that cannot be reduced to the tendencies of a sitting majority. And they make good on the promise of the Constitution as more than what five justices say it is. The judges change, but the law remains the same.
CHAPTER 5: PRECEDENT AND PLURALISM

The previous two Chapters examined how constitutional philosophy affects approaches to precedent. A Supreme Court justice who adopts a general practice of deferring to precedent faces two principal questions of implementation. One is how strongly to defer. The other is how to determine when a precedent applies and when it does not. The answers to these questions depend on underlying matters of interpretive theory, normative commitment, and constitutional understanding.

Determining which precedents are vulnerable to overruling requires explaining why it is important for the law to be correct in the first place. This turns out to be complex and controversial. For some, accurate interpretation is valuable because it promotes popular sovereignty as exercised through the people’s ratification of the Constitution. For others, key considerations include morality and justice as understood in light of contemporary mores. Still others focus on consequentialist benefits and effective social policy. And the list goes on. To figure out which decisions should be stricken from the books even at the expense of continuity, we need to know both how to identify judicial mistakes and how to figure out which mistakes are worse than others.

These debates are more than theoretical; they also implicate the treatment of precedent in practice. When a justice determines that the Court went astray in recognizing the constitutional right of corporations to advocate for political candidates, how should she assess the harm that would result from leaving the offending precedent on the books? Is it a matter of consequentialist analysis? Does it depend on the precedent’s effects on popular sovereignty? Do moral judgments have some role to play? Questions like these are crucial to determining the magnitude of a constitutional mistake, yet they admit of no answer until they are connected with a deeper interpretive theory.13

If a justice’s interpretive methodology emphasizes factors such as freedom from governmental oppression, a case like Plessy v. Ferguson (1896) will be in urgent need of overruling given its endorsement of

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racial segregation. 14 But a case like *Miranda v. Arizona* (1966), even if deemed incorrect in its approach to police questioning, is much more difficult to view as oppressive to individuals. 15 Any argument for overruling would need to invoke other considerations. Alternatively, if a justice’s interpretive methodology is grounded in popular sovereignty, the denial of a constitutional right “to nondiscriminatory treatment by a private employer” might be tolerable, because the political process theoretically can provide legislative protections against employment discrimination when the courts have failed to act. 16 Yet the same denial could be problematic for theories centered on individual fairness or equal protection.

These types of questions abound in the application of stare decisis. To take just a few examples:

- If a justice believes the Supreme Court incorrectly withheld constitutional protection from same-sex couples for their private relationships, what metric should she use to evaluate the harmfulness of leaving the erroneous precedent intact? 17

- If a justice believes the states possess broad powers to impose tax-collection obligations on out-of-state sellers, how should she evaluate the harm caused by a precedent that unduly limits those powers? 18

- If a justice believes *Roe v. Wade* (1973) was mistaken in recognizing a constitutional right to abortion, how should she weigh the ramifications of retaining *Roe* versus overruling it? 19

To answer these questions and others like them, we need an organizing theory to tell us which effects of precedent are legally salient. That was the thesis of Chapter 3. A justice’s interpretive

14 163 U.S. 537.
15 384 U.S. 436.
theory is what determines whether the effects of a flawed decision are legitimate reasons for overruling it, or rather consequences that are lamentable but ultimately inapposite to the judicial process.

The same goes for a precedent’s scope of applicability, as explained in Chapter 4. A justice who thinks precedents warrant presumptive deference needs to figure out when a prior decision is relevant to the case at hand. A potential starting point is the distinction between binding holdings and dispensable dicta. But the question remains why that distinction is appropriate for defining the scope of precedent—a question whose difficulty is exacerbated by the lack of a consistent approach at the Supreme Court. Any answer will imply a particular set of understandings about the manner in which the Constitution ought to be interpreted and implemented.

All of this would be complicated enough if the justices were in perpetual agreement about the precepts of constitutional interpretation. In such a scenario, each justice would still occasionally disagree with her peers, past and present alike. For example, two originalist justices might reach divergent conclusions about the original meaning of a particular provision of the Constitution. Or two pragmatic justices might disagree about whether a constitutional rule is effective in practical terms. Notwithstanding these divergences, the justices would be in basic agreement about what it means to interpret the Constitution faithfully and competently.

Overlapping interpretive and normative commitments would also facilitate a unified approach to precedent. The justices might rally around the view that a flawed precedent is most troubling when it offends popular sovereignty, or when it violates contemporary mores, or otherwise. Similarly, they might agree that the need for constraint justifies defining precedents in broad terms, or that a proper understanding of the judicial role requires limiting precedents to their essential applications of narrow rules to concrete facts. Whatever the content of their interpretive agreements, the justices would be poised to pursue a consistent vision of precedent.

Of Harmony and Discord

In reality, American constitutional practice is awash in interpretive disagreements. This is true of the federal judiciary as a whole, and it is
true of the Supreme Court in particular. Justice Scalia noted in 2013 that the justices were not “in agreement on the basic question of what we think we’re doing when we interpret the Constitution.” The extent of disagreement becomes even more pronounced when we consider shifts in interpretive philosophy that occur over the years as individual justices come and go.

The modern Supreme Court does not consistently adopt any particular methodology of constitutional decisionmaking. Take, for instance, the originalist school of interpretation. Some justices have been clear about their adherence to originalism, and the Court often refers to the Constitution’s original meaning in the course of explaining its decisions. Occasionally, originalism even takes center stage. A prominent example is the Court’s recent ruling that the Second Amendment protects an individual’s right to possess firearms. There, a majority of justices joined an opinion adopting “the original understanding of the Second Amendment.”

Notwithstanding this endorsement of originalism, in other cases the Court resolves constitutional questions with little or no attention to original meanings. Sometimes the Court’s analysis is steeped in political theory, such as the belief that an unfettered marketplace of ideas is the lynchpin of expressive liberty. The field of campaign-finance law provides a ready illustration. When the Supreme Court ruled in Citizens United v. FEC (2010) that corporations cannot be barred from candidate advocacy, the majority opinion was driven by conceptual arguments about what the First Amendment “stands against”: namely, “attempts to disfavor certain subjects or viewpoints.” The majority also invoked the Constitution’s original meaning in concluding “[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.” But the crux of the decision was the determination—not obviously linked to any investigation of original meanings—that “independent expenditures, including those made by corporations, do not give rise to corruption or

22 558 U.S. 310, 340.
23 Id. at 353.
the appearance of corruption.”  

In other instances, the justices base their decisions on assessments of perceived constitutional purposes or longstanding political traditions. An example arose in 2014 when the Court interpreted the Recess Appointments Clause. A majority of justices noted that “in interpreting the Clause, we put significant weight upon historical practice” and “must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”

There are also cases in which contemporary moral sensibilities are prevalent, as exemplified by the Court’s recognition of a constitutional right to same-sex marriage in *Obergefell v. Hodges* (2015). The majority in *Obergefell* made clear its analysis was informed by evolving constitutional norms. It noted that “[t]he history of marriage is one of both continuity and change,” and it added that “[t]he nature of injustice is that we may not always see it in our own times.” While the Court’s prior “cases describing the right to marry presumed a relationship involving opposite-sex partners,” they did not entrench such a view for time immemorial. Instead, the *Obergefell* majority revised the Court’s caselaw in order to pursue “a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”

The point is that the Court regularly shifts between interpretive approaches without suggesting its “different methods are reducible to one master method,” much less furnishing a passkey for undertaking such a decryption. I will refer to this approach as *pluralistic*, reflecting a vision of constitutional decisionmaking characterized by the absence of commitment to any particular interpretive theory.

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24 *Id.* at 357.
25 See *id.* at 385 (Scalia, J., concurring).
27 135 S. Ct. 2584, 2595, 2598.
28 *Id.* at 2602.
To believe multiple styles of constitutional argument are legitimate is not necessarily to be a pluralist. The Court might conclude that, for example, some constitutional provisions are properly understood in light of their original meanings, while others entail consulting contemporary sensibilities. The Court would also need to explain the underlying normative basis of a theory that points toward original meanings in some cases and contemporary mores in others. No such explanation has been forthcoming. For better or worse, the Court has been willing to emphasize different argument styles from case to case without presenting an overarching theory grounded in a defined set of normative values. It has, in short, been pluralistic in its reasoning.

Collective Action and Individual Choice

The Supreme Court’s penchant for pluralism arises in two ways. The first arises via the Court’s nature as a multimember institution that decides cases by majority vote. The Court is a group of different individuals appointed by different presidents and possessing of different views about the law. It operates through collective action, which means that for an interpretive theory to predominate, it must consistently win the allegiance of at least five justices. And if the theory is to have staying power, it needs continued support even as some justices leave the bench and others join.

The need for buy-in from multiple justices decreases the likelihood that any given constitutional theory will predominate in the Court’s caselaw, particularly over a sustained period of time. This is not to say it is impossible for five (or more) sitting justices to agree about the proper theory of constitutional interpretation. Still, given the rarity with which seats on the Court open up, it is quite the challenge to assemble five justices who share the same philosophy. When we factor in the divisiveness of American politics and the probability of shifts in the balance of political power—including the power of judicial appointment—sustained agreement over time is even more difficult to come by.

The nature of the Supreme Court as a multimember institution is not the only driver of interpretive pluralism. Pluralism can also emerge as the preferred approach of an individual justice. Debates over constitutional law include differences of opinion about whether judges should be applying interpretive theory at all. For example, Judge J.
Harvie Wilkinson recently characterized leading constitutional theories as little more than “competing schools of liberal and conservative judicial activism.” Skepticism about interpretive theory reaches all the way to the Supreme Court. The experience of John Roberts is illustrative. During his confirmation hearings in 2005, the soon-to-be Chief Justice noted that rather than drawing on abstract theory, he favors “bottom up” judging. As he explained 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 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 upon the nature of the case before you[,] I think.

Chief Justice Roberts’s testimony helps to highlight why the Court’s interpretive pluralism is not solely the product of its status as a multimember institution. It is also the result of individual choice. Nor is Chief Justice Roberts alone in his preference for pluralism. Five years after his confirmation, Justice Elena Kagan offered her own endorsement of a “case-by-case” approach to determining which sources and arguments are relevant in the context of a particular dispute. For case-by-case justices, interpretive pluralism is an individual phenomenon as much as an institutional one.

In defining the role of precedent, opting to decide cases in a pluralistic, case-by-case manner is just as resonant as aligning oneself with a particular school of interpretation. As Adrian Vermeule points out, opting to “take each case as it comes . . . constitutes an implicit

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30 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” lie in overcoming theory and being guided instead by “self-denial and restraint.” Id. at 116.
32 111th Cong. 81 (2010).
choice of interpretive method and an implicit allocation of interpretive authority. It is a choice to commit interpretation to the case-specific discretion of the judges on the spot, as opposed to the discretion of judges at other times and places who might formulate general interpretive doctrine to govern the adjudicative process.” Irrespective of whether such pluralism is superior to the adoption of a discrete interpretive theory, the two concepts play similar roles in judicial decisionmaking.

Even so, there is a fundamental difference between interpretive pluralism and theory-based judging when it comes to the treatment of precedent. Pluralism denies that cases should be decided in accordance with preexisting commitments to interpretive methodologies and underlying normative justifications. That premise distinguishes pluralism from other interpretive approaches. It also presents a serious challenge when the question before the Supreme Court is whether a flawed precedent is so problematic as to warrant overruling. By design, judicial pluralism avoids ex ante prioritization of values and methodologies. Yet prioritization is necessary if the application of stare decisis depends—as I have claimed that it does—on conclusions about the harmfulness of a precedent’s effects. There must be some mechanism for determining which of those effects are relevant and which are not.

The Challenges of Pluralism

In Chapter 2, I discussed several reasons for deferring to prior decisions. Prominent among them is the utility of precedent in enhancing the cohesiveness and impersonality of courts. At the level of the Supreme Court, a strong system of precedent encourages the justices to think and act like parts of an enduring institution.

The unifying effects of precedent are critical in a legal system characterized by interpretive pluralism. Pluralism increases the chances that substituting one justice for another will lead to the application of an entirely different interpretive methodology, particularly when the Court is closely divided. Deference to precedent can smooth out the path of the law by preserving a stable core even as justices come and go. Past decisions provide common ground and

separate the inclination of the individual justice from the content of the law. The aspiration is, to quote Amy Barrett, “a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation.”

But precedent’s ability to unite the Court is threatened by the prevalence of interpretive pluralism. I have argued that the importance of replacing a flawed interpretation with a correct one depends on a justice’s methodological choices and normative commitments. I have made a similar claim about the definition of a precedent’s scope of applicability. When the justices disagree about baseline matters of interpretation, the Court’s decisions are likely be inconsistent in their conceptions of precedent. Invocations of precedent tend to restate interpretive disagreements instead of bridging them. In the worst-case scenario, the ideal of constitutional law as stable and enduring can give way to the notion that judicial identity and legal meaning are one and the same.

None of this is to say interpretive pluralism is, all things considered, a bad thing. Whether it would be better for U.S. legal practice to move closer to a consensus theory of interpretation is an intricate question, and one far beyond my purview here. I mean only to suggest that pluralism, in both its institutional and individual varieties, makes it more difficult to fashion a workable approach to judicial precedent. A theory of precedent requires a consistent way of defining decisions’ scope of applicability. It also requires a stable metric for evaluating the relevant effects of a flawed decision. Pluralism complicates both pursuits. Before there can be a well-functioning doctrine of precedent, there must be a plan for responding to the challenges of pluralism.

**Second-Best Stare Decisis**

The Supreme Court’s doctrine of stare decisis encompasses several discrete considerations, albeit considerations that are applied loosely and flexibly. While the justices continue to disagree over the proper treatment of precedent in individual cases, both the doctrinal structure

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and the animating tension between legal continuity and legal correctness are established features of the Court’s jurisprudence.

Neither reciting the governing rules nor acknowledging the choice between continuity and correctness is sufficient to achieve consistency. The threshold problem is that the value of getting the law right is a controversial proposition. The difficulty is particularly acute within the realm of constitutional law. Specifying the value of correct interpretation carries profound implications for the treatment of precedent, because it determines what is at stake in tolerating an interpretive error.

One response is to view stare decisis through a particular methodological lens by examining how a justice should treat precedent if she is an originalist, or a common law constitutionalist, or a pragmatist, and so on. This type of analysis is invaluable for understanding how precedent operates within various methodological schools. It helps judges and commentators who are considering a particular methodology to evaluate its assumptions and implications. It also informs arguments for why one methodology is superior to others.

In the pages ahead, I am going to defend a different approach to precedent, one that is designed for justices who disagree with each other on matters of interpretive philosophy. The objective is to tailor the doctrine of stare decisis to a world in which constitutional interpretation is rife with methodological and theoretical disagreements.

Those disagreements define what I call the second-best world of constitutional law. The second-best world stands in contrast to an idealized state of affairs in which the justices largely agree on the appropriate ends and means of constitutional interpretation. Whether or not interpretive pluralism is healthier than widespread interpretive agreement, pluralism creates unique challenges for the treatment of precedent. From the standpoint of developing a workable and coherent doctrine of stare decisis, a world of pluralism is a second-best world.

In the economic and legal literature, the theory of the second best is a tool for optimizing the performance of an imperfect system. Its central insight is straightforward: If a system suffers from one flaw, it
might make sense to intentionally introduce another imperfection in response to the first. Or, more formally:

Suppose that at least some of the conditions necessary to produce a given ideal or first-best constitutional order fail to hold. Even if it would be best to achieve full satisfaction of all those conditions, it does not follow that it is best to achieve as many as possible of the conditions, taken one by one. Rather, multiple failures of the ideal can offset one [another], producing a closer approximation to the ideal at the level of the overall system.\(^{35}\)

Once we exit the ideal world, we cannot take for granted that the best approach is to approximate the ideal as closely as possible. The question is how best to proceed in the actual world where we find ourselves. The answer may include steps that would, if viewed in isolation, seem like deviations from the ideal state of affairs.

Second-best analysis offers important lessons for the doctrine of stare decisis. I have argued that the prevalence of interpretive pluralism creates challenges for the treatment of precedent that would not exist under conditions of widespread agreement over constitutional philosophy. We might imagine two possible responses. One option is to leave the existing doctrine unchanged while hoping pluralism will not be too much of a drag on its effectiveness. That approach is consistent with the current status of precedent at the Supreme Court. The Court’s discussions of stare decisis are sophisticated in many respects, but they do not account for the ways in which interpretive philosophy influences attitudes toward precedent.

The other option for responding to pluralism, and the one that I will defend, is grounded in the theory of the second best. It resists the idea that stare decisis should operate the same way in a system marked by interpretive pluralism it would in a system of interpretive harmony. Instead, stare decisis ought to take a different shape in response to pluralism’s prevalence. For example, considerations that would be relevant to the durability of precedent under ideal conditions might be excluded from the calculus when pluralism is the order of the day. This suggestion may seem counterintuitive, because it entails countering


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one flaw in the system by consciously introducing another. But that is the essence of second-best thinking: When part of a system deviates from its ideal state, sometimes the most promising path forward entails making other adjustments instead of acting as if the initial flaw doesn’t exist.

Second-best thinking about interpretive theory is nothing new. Leading constitutional scholars have examined the interplay between second-best analysis and legal interpretation, and I will draw on their work in thinking specifically about a second-best theory of judicial precedent. The central issue I will engage is how the Supreme Court’s doctrine of stare decisis could be revised to operate more effectively against a backdrop of pluralism.

The second-best theory of stare decisis uses compensating adjustments to allow precedent to serve its purposes even in a pluralistic environment. Without a second-best accommodation, applications of precedent tend to reflect deeper methodological and normative commitments. In many cases these commitments remain submerged, but occasionally they bubble up to the surface. In 2003, the Supreme Court concluded that retaining a precedent that failed to protect same-sex relationships would “demean[] the lives of homosexual persons.”36 Years later, the Court warned that withholding constitutional protection from corporate electioneering would validate a “brooding governmental power” at odds with “confidence and stability in civic discourse.”37 The same case produced a concurrence that chronicled various problems the Court has alleviated through its willingness to depart from precedent.38 Included on the list was the Court’s most heralded reversal-of-course—its repudiation of racial segregation in \textit{Brown v. Board of Education} (1954)\textsuperscript{39}—which is so widely lauded precisely because the justices sought to eradicate an insidious harm. These examples demonstrate how arguments for overruling are grounded in conclusions about a given precedent’s conceptual and normative flaws. Those conclusions, in turn, reflect choices about the types of effects that are relevant to a precedent’s retention or dismissal.

\textsuperscript{36} \textit{Lawrence}, 539 U.S. at 575.
\textsuperscript{37} \textit{Citizens United}, 558 U.S. at 349.
\textsuperscript{38} See id. at 377 (Roberts, C.J., concurring).
\textsuperscript{39} 347 U.S. 483.
Under conditions of interpretive harmony, determining the relevance of legal harms would pose little problem for the doctrine of stare decisis. Given their agreement about interpretive theory, the justices would possess a uniform metric for evaluating precedents’ effects. Every justice would deem precedents harmful based on some prespecified and universal criterion, be it morality, popular sovereignty, welfare maximization, or otherwise. The justices might not always reach the same conclusions, but they would speak the same language.

In the real world of interpretive pluralism, the calculus changes. The proliferation of competing methodologies makes reaching agreement about the relevance of legal harms more difficult. The prospect of agreement is slimmer still when the Supreme Court is viewed as an enduring institution whose composition changes over time. By tethering a decision’s continued vitality to the perceived gravity of its offenses—a perception that will vary from justice to justice—the prevailing approach to stare decisis robs precedents of independent value beyond their attractiveness on the merits. The same phenomena of interpretive pluralism and “reasonable disagreement”\(^{40}\) that threaten the durability of particular decisions end up destabilizing stare decisis itself.

The foregoing discussion relates to the degree of deference a precedent commands. Problems of pluralism also affect the inquiry into precedents’ scope of applicability. Though precedential scope is often described in terms of binding holdings and dispensable dicta, we have seen that the situation on the ground is more complex. Divisive questions include whether a precedent should receive deference for its articulated rule, what to make of judicial asides, and how future justices should treat an opinion’s expression of its rationale. The answers depend on underlying assumptions about the competence, institutional role, and constitutional authority of the courts. Establishing a consistent account of precedential scope requires doctrinal accommodations that can overcome interpretive disputes.

Before we can pursue a doctrine of precedent that makes good on its promise of uniting judges across time and enhancing the impersonality of constitutional law, there must be a reconceptualization to account

\(^{40}\) See Richard H. Fallon, Jr., Implementing the Constitution 103 (2001) (“Stare decisis . . . furnishes a functionally crucial response to the phenomenon of reasonable disagreement.”).
for the pervasiveness of interpretive disputes. Our second-best world of interpretive disagreement requires a second-best doctrine of stare decisis.

Under the second-best approach, precedent becomes a tool of unification rather than division. It represents a shared commitment to respecting the Court’s institutional past. This commitment sometimes calls upon the Court to uphold a precedent notwithstanding its deleterious (in the view of today’s justices) effect. Such deference carries a cost; the conscious perpetuation of error should not occur lightly. But the question is not whether stare decisis has a price. It is whether the price is worth paying. I will contend that the virtues of deference often justify the toleration of error, so long as stare decisis is applied in a manner that is consistent, impersonal, and—to the greatest extent possible—indeed, independent of disputes over interpretive philosophy. Indeed, quotidian disputes over constitutional methodology are a leading reason why stare decisis is so important. Without deference, a change in the composition of the Court is a change in the fabric of the law. The driving objective of second-best stare decisis is the separation of precedent from interpretive theory in a way that transcends the identities and proclivities of individual judges.

Toward a Second-Best Approach

The ensuing Chapters develop the theory of second-best stare decisis. Consistent with my emphasis on the value of continuity, I seek to preserve the existing doctrine of stare decisis to the greatest extent possible. At the same time, the second-best approach identifies revisions and accommodations designed to insulate stare decisis from disputes over interpretive philosophy.

On the issue of precedential strength, second-best analysis yields two potential strategies for addressing the challenges of pluralism. The first solution, which I explain in Chapter 6, focuses on reconstructing the doctrine of stare decisis around considerations that can operate independently of interpretive philosophy. Familiar considerations such as procedural workability, factual accuracy, and reliance expectations can be redefined to reduce their dependence on constitutional theory, making them suitable for application by judges across the methodological spectrum. At the same time, some factors that might be relevant under conditions of interpretive harmony—including
jurisprudential coherence, flagrancy of error, and a precedent’s perceived harmfulness—cannot function against the backdrop of pluralism. Second-best stare decisis generally excludes those factors from the examination of a precedent’s fitness for retention.

In developing my account of second-best stare decisis, I begin by taking for granted that a majority (at least) of Supreme Court justices continues to support stare decisis as a general matter. This assumption is based on the justices’ statements in case after case about the centrality of precedent and the virtues of deference. The justices commonly describe stare decisis as a mechanism for “maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.”41 They depict the doctrine as integral to “the very concept of the rule of law underlying our own Constitution,” which “requires such continuity over time that a respect for precedent is, by definition, indispensable.” 42 They recognize precedent as promoting “the evenhanded, predictable, and consistent development of legal principles,” while at the same time “foster[ing] reliance on judicial decisions” and “contribut[ing] to the actual and perceived integrity of the judicial process.” 43 Deference to precedent “permits society to presume that bedrock principles are founded in the law rather in the proclivities of individuals,” an effect that “contributes to the integrity of our constitutional system of government.” 44 Indeed, “[f]idelity to precedent” is “vital to the proper exercise of the judicial function.” 45 It is nothing less than a “foundation stone of the rule of law.”46 As these statements illustrate, the doctrine of stare decisis enjoys strong support at the Supreme Court. The controversy surrounds its application to particular cases.

Nevertheless, I briefly relax the assumption of a Court that remains committed to stare decisis. My inquiry shifts to why an individual justice should accept second-best stare decisis without any guarantee that her present and future judicial colleagues will follow suit. I defend the second-best theory as a valuable tool for promoting continuity, impersonality, and coordinated action, and I explain why

42 Casey, 505 U.S. at 854.
an individual justice’s support for the theory should not depend on the behavior of her peers or successors on the Court.

As an alternative to the doctrinal approach to precedential strength, Chapter 7 describes a structural response to interpretive pluralism that requires overrulings to receive support from a supermajority of justices. The structural response increases the likelihood that overrulings will rest on factors that bridge methodological divides; the greater the number of votes required to achieve a particular result, the better the chances that some votes must come from justices who disagree with one another on matters of interpretive theory. Unlike the doctrinal version of second-best stare decisis, the supermajority requirement does not promote judicial impersonality on the individual level by encouraging a justice to subordinate her views to those of her predecessors. I will emphasize this distinction in depicting the doctrinal approach to precedential strength as superior to its structural cousin. Nevertheless, the simplicity of the supermajority requirement makes it worthy of consideration by those who see value in legal continuity but who have reservations about the efficacy or wisdom of altering the content of stare decisis doctrine.

Second-best stare decisis also suggests a revised approach to defining a precedent’s scope of applicability, as I explain in Chapter 8. Existing practice supports the principle that rules announced by the Supreme Court warrant deference in future cases. Much the same is true of the principle that judicial asides and hypotheticals do not warrant deference. Given their widespread acceptance, these norms can guide determinations of precedential scope in the second-best world. As for statements of rationale contained in Supreme Court decisions, second-best stare decisis counsels an intermediate position that treats such statements as worthy of deference, but only to the extent they illuminate a precedent’s rule of decision.

Stepping back, my basic claim is that for stare decisis to do what the justices have said it should do, the existing doctrine must be reconsidered. Most importantly, analysis of the strength and scope of precedent must be separated from debates about interpretive philosophy, even if those debates would be relevant to the treatment of precedent under ideal conditions. Instead of linking precedent to competing interpretive theories, the second-best approach seeks to
infuse stare decisis with independent content that holds steady regardless of a justice’s methodological or normative inclinations.

When a justice defers to her predecessors despite reservations about the merits of their decisions, she reinforces the generality of constitutional law. Fidelity to precedent can “transform[] the Court from an ever-changing collection of individual judges to an institution capable of building a continuing body of law.” 47 It also underscores the distinction between the judiciary and the political branches, promoting a vision in which changing the law and changing the judge are very different things.

Disagreements over interpretive theory are here to stay. Outright disavowals of theory also appear to be sturdy components of the constitutional landscape. But stare decisis need not be undermined by such phenomena. Untangled from debates over interpretive theory, second-best stare decisis embodies a fundamental commitment to continuity and impersonality—a commitment to the rule of law rather than the rule of men and women. It contributes to the perception and reality of a Supreme Court that speaks “for the Constitution itself rather than simply for five or more lawyers in black robes.” 48

48 Earl M. Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 WIS. L. REV. 467, 484.
CHAPTER 6: PRECEDENTIAL STRENGTH IN DOCTRINAL PERSPECTIVE

This Chapter considers the implications of second-best stare decisis for determinations of precedential strength. The first step is examining how the Supreme Court’s existing doctrine of stare decisis operates in a world of interpretive pluralism. From there, I suggest a series of doctrinal revisions to overcome the challenges of pluralism. I seek to preserve and refine components of the existing doctrine that provide meaningful guidance in a second-best world of pluralism, while limiting or excluding components whose content depends on methodological and normative commitments that vary from judge to judge. Notwithstanding other benefits that can arise from a system of precedent-based judging—benefits such as predictability, efficiency, and the protection of expectations—the core of second-best stare decisis is impersonality and continuity. Precedent allows the law to transcend the moment.

Second-best stare decisis leaves individual justices at liberty to apply their preferred methods of interpretation in cases of first impression and in diagnosing whether a precedent was erroneous. But it revises the Court’s rules of precedent to pursue a doctrine that works across methodological lines. In doing so, it facilitates coordinated action among justices who are inclined to view the world differently.

This latter feature most clearly separates a commitment to second-best stare decisis from a commitment to interpretive methodologies such as originalism or living constitutionalism. Fostering agreement around a particular interpretive methodology is a tall order in our pluralistic legal culture. It requires some justices to take the dramatic step of disavowing their constitutional philosophies. By contrast, asking an originalist or living constitutionalist to recognize a meaningful role for precedent does not require her to abandon her interpretive philosophy wholesale. Second-best stare decisis reflects a shared sacrifice, because it calls upon every justice to give presumptive respect to some decisions—and, by implication, to the methodologies and values that yielded them—that she views as flawed. The endorsement of second-best stare decisis is more egalitarian, and less jarring, than the displacement of one interpretive methodology by another.

The Doctrine of Stare Decisis
Stare decisis is founded on the principle that today’s judges do not write on a clean slate. That same principle applies to the doctrine of stare decisis itself. Precedent is an integral component of American legal practice. Its importance reaches back to the founding, and beyond. The resonance of stare decisis is apparent in Alexander Hamilton’s characterization of precedent as a safeguard against the exercise of “arbitrary discretion in the courts.”49 It is equally evident in James Madison’s view that the Constitution’s ambiguities would be “liquidated” over time through judicial and political decisions.50

Within the Supreme Court’s caselaw, stare decisis has gone beyond abstract principles to yield a discrete set of relevant considerations. When a new justice takes her place on the bench, she is greeted by a preexisting doctrine of stare decisis, just as she encounters preexisting doctrines on scores of other topics. The Court has described several factors as relevant to the analysis. The most prominent account comes from Planned Parenthood of Southeastern Pennsylvania v. Casey (1992), where the Court discussed its decision in Roe v. Wade (1973) regarding the constitutional status of abortion rights. In surveying the components of stare decisis doctrine, the Casey majority identified the following factors:

So in this case we may enquire whether Roe’s central rule has been found unworkable; whether the rule’s limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law’s growth in the intervening years has left Roe’s central rule a doctrinal anachronism discounted by society; and whether Roe’s premises of fact have so far changed in the ensuing two

49 The Federalist No. 78 (Alexander Hamilton).
50 See, e.g., The Federalist No. 37 (James Madison) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”); Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 VA. L. REV. 1, 10–14 (2001) (explaining and contextualizing Madison’s position); cf. The Federalist No. 78 (A. Hamilton) (noting that in the face of inconsistent laws, “it is the province of the courts to liquidate and fix their meaning and operation”).
decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.\textsuperscript{51}

In developing a second-best approach to precedent, it will be useful to begin with the factors included in \textit{Casey}'s influential account. For ease of exposition, I have reordered them and described them as procedural workability, factual accuracy, jurisprudential coherence, and reliance and disruption. After discussing the suitability of each factor in our second-best world, I extend the analysis to additional considerations that often play a role in the Supreme Court's applications of stare decisis. Among the most important of those considerations are whether the perceived severity of a precedent's error should affect its retention, and how to account for a precedent's negative consequences.

\textbf{Procedural Workability}

The inquiry into workability responds to the "mischievous consequences to litigants and courts" that can result from a vague or byzantine rule of decision.\textsuperscript{52} The rationale for paying attention to workability is intuitive. Precedents that have created "uncertainty and arbitrariness of adjudication" warrant reconsideration.\textsuperscript{53} Those precedents impose costs that all judges can recognize as undesirable.

The characterization of a decision as workable or unworkable sometimes seems to track views about the decision's soundness on the merits.\textsuperscript{54} This correlation might suggest the diagnosis of workability cannot be separated from a justice's interpretive and normative preferences. And, in fact, there is little doubt that when workability is


\textsuperscript{52} Swift & Co. \textit{v.} Wickham, 382 U.S. 111, 116 (1965).


\textsuperscript{54} Compare, for example, Dickerson \textit{v.} United States, 530 U.S. 428, 444 (2000) (defending the relative workability of the \textit{Miranda} rule), \textit{with id.} at 463 (Scalia, J., dissenting) (disputing \textit{Miranda}'s "supposed workability").
defined too broadly, methodological and normative commitments can
creep into the analysis. At base, however, a decision’s workability is
independent of disputes over interpretive philosophy. The workability
analysis is amenable to principled application regardless of a
particular justice’s interpretive predilections. It simply requires a
reconceptualization.

The critical step is rejecting the premise that a precedent becomes
unworkable because a justice disagrees with its rationale or is troubled
by its results. Saying a precedent is poorly reasoned or has wrought
moral or practical harms is not an argument from workability. It is an
argument about the precedent’s interpretive approach and substantive
effects.

The proper reasons for paying attention to a decision’s workability
are procedural in nature. They deal with whether courts, litigants, and
other stakeholders have been able to understand and apply a rule
without undue difficulty. A rule of decision that is hopelessly
convoluted or exceedingly vague renders a precedent unworkable
regardless of its rationale and substantive effects. Likewise, a rule of
decision that is unmistakably clear must be acknowledged as
procedurally workable even if its substantive effects have been
disastrous.

I will discuss the treatment of substantive effects in greater depth
below. For now, the key is distinguishing substantive effects from
considerations of procedural workability, the latter of which possess
independent force regardless of a justice’s interpretive methodology.
Whether a precedent has been clear enough for courts to understand
and apply does not depend on whether a particular justice is an
originalist, a pragmatist, or a common law constitutionalist. That
makes procedural workability an appropriate consideration for the
doctrine of stare decisis in our second-best world of interpretive
pluralism.

This is not to say the justices will always agree. There are different
degrees of workability, and disputes will surely arise about whether a
particular precedent is—notwithstanding some procedural flaws—
capable of furnishing adequate guidance to the bench and bar. Second-
best stare decisis is compatible with that reality. The second-best
approach is not quixotic. It does not seek to eliminate disagreements in
judgment. The goal is to facilitate reasoned deliberation in a common grammar that transcends interpretive disputes. Second-best stare decisis can tolerate competing conclusions in the context of an individual case. What it rejects are criteria that have no independent content unless they are situated within a particular methodological framework. Because the creation of workable decisions—and the revision or eradication of unworkable ones—has value across a range of methodological perspectives, procedural workability stands as a legitimate component of second-best stare decisis.

**Factual Accuracy**

Judicial decisions contain factual premises, and those premises can be wrong. The error may have existed from the beginning, as when the Supreme Court repeats a mistaken statement by a litigant regarding federal immigration policy.\(^{55}\) Or a premise may have disintegrated over time, as when technological developments undermine the Court’s prior characterization of certain forms of media.\(^{56}\) In either situation, factual accuracy is compromised.

As with their treatment of workability, courts occasionally conflate diagnoses of factual error with assessments of a precedent’s legal reasoning. Consider the Supreme Court’s discussion of factual mistakes in *Casey*. The Court concluded there had been no factual developments that undermined the “central holding” of *Roe* regarding viability as the critical point for determining the government’s power to prohibit nontherapeutic abortions.\(^{57}\) In explaining its conclusion, the Court invoked two precedents that it characterized as resting on factual mistakes. The first case was *Lochner v. New York* (1905), which *Casey* described as reflecting inaccurate assumptions about “the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.”\(^{58}\) The second case was *Plessy v. Ferguson* (1896), which *Casey* described as overlooking the pernicious stigmatization of racial segregation.\(^{59}\)


\(^{58}\) *Id.* at 861–62.

\(^{59}\) *See id.* at 863.
The Casey Court’s understanding of what constitutes a factual premise is too capacious to be useful. One can accept that both Lochner and Plessy deserved to be overruled while still recognizing that their respective errors ranged beyond their factual premises. The dispositive change from Plessy to Brown v. Board of Education (1954), and from Lochner to West Coast Hotel Co. v. Parrish (1937), was not empirical reality. It was the opinions and values through which reality is perceived and understood. Opinions and values are vital, but they do not possess the objectivity of facts.

The Casey approach is not the only way to identify which of a judicial decision’s components are factual. Factual content can be understood more narrowly as driven by empirical observations that do not depend on methodological or normative commitments. A useful example comes from the field of broadcast regulation. The Supreme Court ruled in FCC v. Pacifica Foundation (1978) that broadcasters are subject to punishment for disseminating indecent speech. Among the reasons for this conclusion were broadcast media’s pervasiveness and accessibility to children.

Pacifica was controversial from the outset, and it remains so today. Challenges have made their way to the Supreme Court twice in recent years. Both times, the Court disposed of the cases without overruling or reaffirming Pacifica. But Justice Thomas and Justice Ginsburg penned separate opinions renouncing the Pacifica approach. Justice Ginsburg was brief in her remarks, arguing that Pacifica was mistaken from the beginning and had become worse in light of changing technologies. Justice Thomas offered more elaboration along similar lines. He criticized Pacifica and a predecessor case, Red Lion Broadcasting Co. v. FCC (1969), as a “deep intrusion into the First Amendment rights of broadcasters.” He also described technological advances as undermining the idea that broadcasting is uniquely pervasive and therefore more susceptible to regulation.

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60 347 U.S. 483.
61 300 U.S. 379.
62 See 438 U.S. 726, 748–51.
64 Fox Television Stations, 556 U.S. at 531–34 (Thomas, J., concurring).
Whatever the merits of these criticisms, the question for purposes of stare decisis is what happens if a majority of the Court follows the lead of Justices Thomas and Ginsburg and concludes that *Pacifica* is wrong. *Pacifica* exemplifies a case whose factual premises have eroded. It is no longer true to say broadcasters are unique in their pervasiveness or accessibility to children. Because those characteristics were important components of *Pacifica*’s rationale, the decision is properly viewed as subject to reconsideration. The presumptive deference owed to *Pacifica* has been rebutted by the disintegration of its factual predicates. That does not necessarily mean *Pacifica* should be overruled. There may be other reasons for preserving it (for instance, based on the reliance it has engendered) or possibilities for reconceptualizing it (for instance, by focusing on the government’s authority to license broadcasters). Even so, flawed factual premises warrant a fresh look at the decision.

Another example comes from the field of taxation. The Supreme Court addressed the tax obligations of mail-order sellers in *Quill Corp. v. North Dakota* (1992). The case dealt with a state’s authority to impose tax-collection obligations on sellers who maintained no physical presence within the state. Viewed through the lens of precedent, the proper outcome seemed clear enough. The Court’s prior opinion in *National Bellas Hess, Inc. v. Department of Revenue* (1967) had sided with sellers in comparable circumstances. But in the years since *Bellas Hess* was decided, developments in related areas of constitutional law had arguably rendered it a doctrinal outlier. The question in *Quill* was whether the Court should reaffirm *Bellas Hess* despite doubts about its soundness by contemporary standards or overrule the case to enhance the internal consistency of constitutional law.

The Court chose the former course. It reaffirmed that the Commerce Clause forbids a state from imposing tax-collection obligations on mail-order sellers who lack a physical presence in the state. Along with defending *Bellas Hess*’s application of the Commerce Clause as suited to its particular context, the Court noted the importance of reliance expectations. It explained that mail-order sellers had expended significant resources based on the Court’s
previous decision and that altering the rules could threaten “the basic framework of a sizable industry.”

Today’s retail world is different from the one the Court encountered in *Quill*. As Justice Kennedy recently noted, the years since *Quill*’s issuance have witnessed “dramatic technological and social changes” that arguably give many out-of-state sellers “a sufficiently ‘substantial nexus’” to justify imposing tax-collection obligations upon them. 68 According to Justice Kennedy, developments in e-commerce have changed what it means for a business to be “present” in a state.

Like the innovations in the media since *Pacifica*, the technological developments in online retailing since *Quill* are the types of bona fide factual changes that rebut the presumption of deference to precedent even in a second-best world of interpretive pluralism. The Court’s prior opinions considered the degree to which sellers can connect with a given state notwithstanding the lack of any bricks-and-mortar presence. The proliferation of Internet retail has changed that calculus considerably. Some justices might nevertheless conclude out-of-state sellers should remain exempt from tax obligations. But for justices who reject that conclusion, changes to the retail industry brought about by technological advances are sufficient to justify the reconsideration of precedent. Like the broadcast media, interstate retailers operate in an environment that has undergone significant changes. The evolution of the retail environment is a sensible reason for reconsidering precedent, and one that is not bound up with any particular methodology of interpretation. That makes it an appropriate consideration within a system of second-best stare decisis.

Again, it does not necessarily follow that *Pacifica* and *Quill* should be overruled, or that *Lochner* or *Plessy* shouldn’t have been. Whether an overruling is warranted depends on other factors as well. We will reach these additional factors in due course. My present aim is to illustrate how the concept of factual inaccuracy can be pared down to its objective core. A streamlined conception of what constitutes a factual premise facilitates deliberation across methodological lines. An incorrect statement of fact is an incorrect statement of fact, regardless of a justice’s interpretive philosophy.

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67 *Quill*, 504 U.S. at 317.
Jurisprudential Coherence

Under existing law, precedents lose their force if they become “mere survivor[s] of obsolete constitutional thinking.” 69 The operative question, to recall the Supreme Court’s language in Casey, is “whether the law’s growth in the intervening years” has left a precedent as “a doctrinal anachronism discounted by society.”70

In theory, jurisprudential coherence is another consideration that can be separated from methodological disagreements. The consistency of one precedent with another does not depend on any particular interpretive philosophy. It reflects the belief that sound judging aspires to consistent decisions—a commitment shared by justices across the methodological spectrum. But while decisions will sometimes be glaringly incompatible, in other cases the inquiry into jurisprudential coherence runs parallel with debates over a precedent’s soundness. Was the Supreme Court’s pre-Citizens United caselaw inconsistent in failing to protect corporate electioneering notwithstanding the strong protection given to political speech more generally, or did the caselaw properly recognize the unique dynamics of corporate advocacy in elections? Is the Court’s brightline rule regarding the tax liability of out-of-state retailers an anachronistic holdover from an absolutist era, or a specialized application that makes sense within the broader doctrinal scheme? How did the Court’s cases involving abortion rights and equal protection affect the durability of its earlier decision to uphold the constitutionality of a criminal prohibition against same-sex relationships? Without an objective baseline, there is too great a risk of these questions being answered by reference to interpretive commitments that vary from justice to justice, robbing stare decisis of its ability to serve as a bridge between methodologies.

The problem is exacerbated by inconsistency in defining precedents’ scope of applicability. If we lack a clear sense of what a precedent stands for, we cannot determine its compatibility with other cases. But even a uniform definition of precedential scope would leave a great deal of ambiguity in the assessment of jurisprudential coherence. When the Court was deliberating about Citizens United, there was no

69 Casey, 505 U.S. at 857; see also Michael J. Gerhardt, The Power of Precedent 31 (2008).
70 Casey, 505 U.S. at 855.
doubt that its precedents permitted restrictions on corporate electioneering. The question was whether other cases, while not directly applicable, pointed in a different direction. Likewise, when the Court reconsidered the constitutionality of prohibitions against same-sex relationships in *Lawrence v. Texas* (2003), *Bowers v. Hardwick* (1986) was understood to be the governing law. That did not resolve the issue of jurisprudential coherence; the Court also needed to evaluate the impact of other decisions that illuminated broader principles in its caselaw despite not being squarely on point.

If definitions of precedential scope do not settle debates about jurisprudential coherence, other considerations must be doing the work. To be sure, a justice can consider a series of cases, extract their general themes, and ask whether a given precedent deviates from them. The issue will always be whether outliers are justified on their own terms. There might be good reasons for treating corporate electioneering differently from electioneering by individuals, or for recognizing special rules for the tax treatment of out-of-state retailers. Or there might not. These determinations are complicated and contestable.

The best explanation for why *Citizens United* treated the Court’s precedents on corporate electioneering as anomalous (and wrong) rather than context-sensitive (and right) is the majority’s conclusion that the prior decisions were antithetical to core First Amendment values. The same is true of *Lawrence*. The majority’s characterization of *Bowers* as a doctrinal anachronism was connected to the conclusion that *Bowers* permitted states to “demean” the “existence” of consenting adults and to “control their destiny by making their private sexual conduct a crime”—a point the *Lawrence* majority underscored by stating *Bowers* “was not correct when it was decided.”71 The foregoing depictions are emblematic of a more general phenomenon in the Court’s caselaw. They are steeped in methodological and normative commitments—the types of commitments second-best stare decisis seeks to avoid.

As I have noted, factors such as procedural workability and factual accuracy can also intermingle with interpretive philosophy. But those factors are more susceptible to a paring down that separates them from methodological and normative commitments. The inquiry into

71 539 U.S. 558, 578.
jurisprudential coherence admits of no such narrowing, at least in practical terms. Its wide-ranging nature impedes its decoupling from interpretive and normative debates. Notwithstanding its potential relevance in a first-best world of interpretive agreement, the inquiry into jurisprudential coherence must be excluded from second-best stare decisis.

Reliance and Disruption

Procedural unworkability, factual inaccuracy, and jurisprudential incoherence are potential reasons for rejecting a flawed precedent. On the other side of the scale is the impact of an overruling on reliance expectations. The Supreme Court has expressed reluctance about overruling precedents that command significant reliance.72

While disputes over the extent of reliance are significant and unavoidable, they need not collapse into debates about interpretive philosophy. The assessment of reliance is fundamentally an empirical undertaking, albeit one in which the data will never be complete. There is no reason why a justice’s assessment of the reliance a precedent has engendered should vary depending on whether she is an originalist, a living constitutionalist, or otherwise. Despite its complexity, the reliance analysis is an objective inquiry in which a justice’s interpretive predilections do not dictate her conclusions about the degree of disruption an overruling will cause. Reliance accordingly is well-suited to second-best stare decisis.

The difficulty is determining which types of reliance are relevant. The Supreme Court’s caselaw suggests disruption is most problematic in situations involving investment-backed expectations and rights in property and contract.73 Nevertheless, the rationale for protecting reliance can apply to noneconomic liberties as well. Whatever the nature of the underlying right, when stakeholders have taken tangible

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73 Casey, 505 U.S. at 855–56; Quill, 504 U.S. at 317.
steps or made concrete plans in reliance on Supreme Court pronouncements, the disappointment of their expectations is pertinent.

Reliance by governmental officials such as legislators presents a more complicated issue. Some Supreme Court decisions treat governmental reliance as a legitimate part of the stare decisis calculus. A potential counterpoint is *Citizens United v. FEC* (2010), which overruled a precedent that had commanded considerable reliance from Congress and state legislatures. But the *Citizens United* majority did not declare legislative reliance to be inapposite; rather, it described that factor as “not . . . compelling.” In light of the Court’s other opinions giving regard to legislative reliance, it would be curious if the *Citizens United* majority meant to sweep away its past practice without acknowledging what it was doing. The “not . . . compelling” language is better understood to mean that within the context of corporate electioneering, legislative reliance was not sufficiently weighty to save a flawed precedent.

By treating government reliance as meaningful, courts express respect for good-faith efforts by coordinate branches to comply with judicial edicts. Protecting legislative reliance also acknowledges the reality that it is private citizens who bear the costs of sending politicians back to the drawing board when judges change the rules of the game. These considerations suggest governmental reliance is relevant to the stare decisis calculus even in the second-best world of interpretive pluralism.

The same cannot be said for reliance by society at large. Broad notions of societal reliance on precedent have played a role in major constitutional cases. In *Casey*, the Court recognized the interests of “people who have ordered their thinking and living around” the continued vitality of *Roe*. Similarly, when it reaffirmed *Miranda v. Arizona* (1966), the Court cited the status of the *Miranda* warnings as “part of our national culture.” *Roe* and *Miranda* are exceptional in their salience and profile, creating questions about whether the Court’s

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75 *Citizens United*, 558 U.S. at 365.
76 *Casey*, 505 U.S. at 856.
77 *Dickerson*, 530 U.S. at 428.
invocations of societal reliance should extend to other areas of constitutional law. Further, unlike assertions of private and legislative reliance, appeals to societal reliance do not depend on the concrete expectations of stakeholders whom an overruling will affect most directly. The form of analysis is necessarily more abstract.

In addition, the objectives served by protecting societal reliance are promoted to a considerable extent by the very existence of a meaningful doctrine of stare decisis—including one that does not expressly consider society’s reliance on a given precedent. Societal reliance is distinct from private and legislative reliance because it captures the myriad effects that overruling a well-known precedent can have on various communities, such as people who have not taken tangible action based on the precedent. To illustrate, return to the example of *Miranda*. The overruling of *Miranda*—and the corresponding reinvention of the rules of engagement for criminal suspects—could matter immensely to perceptions about the law’s continuity and impersonality, even for those who will never hear their *Miranda* rights read to them. This does not mean *Miranda* is impervious to reconsideration. But it does mean an overruling would affect more than the people most directly affected by *Miranda*’s rule. The best response is to demand a special justification for overruling a precedent—whether *Miranda* or any other decision—that goes beyond disagreement with the precedent’s reasoning. A general practice of deference to precedent is a way of respecting societal reliance on the universe of Supreme Court pronouncements. Such a practice reduces the need for undertaking difficult and controversial inquiries into societal reliance within the context of specific disputes.

Societal reliance might well be a sensible consideration for a doctrine of stare decisis fashioned under first-best conditions of abiding interpretive agreement. In our second-best world, a doctrine of stare decisis must make compromises in order to appeal to a wide cross-section of judges. Societal reliance does not enjoy the same grounding in existing caselaw as do more direct forms of reliance by private citizens and government officials. It rests on an entirely different set of conceptual underpinnings. What is more, societal reliance can receive indirect protection from a doctrine of stare decisis that demands a special justification for overruling precedent. On balance, these arguments lead me to conclude that societal reliance must be excluded from second-best stare decisis. Though private reliance and
governmental reliance raise their fair share of challenges in application, they are better established and more amenable to consistent analysis than reliance by society at large. Expectations still matter in the second-best world, but societal reliance must find its protection in the presumptive respect all precedents receive.

**Flawed Reasoning and Flagrancy of Error**

Beyond the *Casey* factors, another consideration that frequently finds its way into discussions of stare decisis is the reasoning of the precedent under review. The presence of error is not a sufficient ground for overruling a precedent. As the Supreme Court wrote in *Casey*, “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” Nevertheless, the justices sometimes include the soundness of a precedent’s reasoning among the relevant considerations in deciding whether to preserve it.

A way to resolve this apparent tension is by drawing distinctions among precedents based on the flagrancy of their errors. On this account, the fact that a precedent is wrong—or “badly reasoned,” if you prefer—is not a reason to overrule it. By comparison, when a precedent is not simply mistaken but clearly or manifestly so, the extent of its error becomes a reason for doing away with it. Caleb Nelson has provided a powerful defense of this position on both theoretical and historical grounds. He contends that withholding deference from manifestly erroneous precedents may be a desirable alternative to embracing a “general presumption against overruling past decisions.”

Within the contours of a single interpretive school, classifying dubious precedents based on the flagrancy of their error is sensible. If, for example, a justice thinks constitutional rules should be assessed pragmatically based on their costs and benefits, it is natural that the justice will distinguish between precedents whose costs slightly

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78 *Casey*, 505 U.S. at 864; see also *Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting) (“The special justifications needed to reverse an opinion must go beyond demonstrations (much less assertions) that it was wrong; that is the very point of *stare decisis*.”); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 8 (2001).


outweigh their benefits and precedents whose costs greatly outweigh their benefits. In this example, the latter category includes cases of manifest error—sufficient to jeopardize a precedent’s continued vitality—whereas the former category includes cases of ordinary error that do not themselves furnish sufficient justification for overruling. A similar analysis applies to other interpretive methodologies. If one accepts the validity of originalism, it is prudent to distinguish between precedents that reflect probable misreadings of the constitutional text and those that reflect blatant misreadings. Again, such a distinction facilitates the sorting of precedents into the categories of manifest error and ordinary error. That categorization informs the determination of which mistakes the Court should live with and which it should take measures to rectify.

In our pluralistic world, the prospect of distinguishing precedents based on their degree of error becomes more complicated. To illustrate, simply combine the examples discussed in the previous paragraph. If Justice A believes that pragmatism is the proper method of interpreting the Constitution, how is she to determine whether a precedent that is reasoned on originalist grounds reflects an ordinary error or a manifest error? And if Justice B adheres to originalism, how is she to distinguish between ordinary error and manifest error in precedents that are couched in pragmatic terms?

A potential solution, which is based on interpretive fidelity to one’s preferred philosophy, is to treat as manifestly erroneous all precedents that reflect a methodology different from one’s own. An originalist justice would characterize all nonoriginalist interpretations as manifestly erroneous and, thus, subject to overruling. A nonoriginalist justice would take the same view of precedents decided on originalist grounds. And so the divide between ordinary error and manifest error would collapse into disagreements over interpretive philosophy. The problem with this approach is that it sacrifices the ability of stare decisis to unite justices who adhere to divergent theories of

81 Professor Nelson notes this issue, recognizing the risk that “current judges may be committed to an entirely different interpretive method than their predecessors, and they may be too quick to decide that their predecessors’ method was illegitimate.” Id. at 67.

82 See Jill E. Fisch, The Implications of Transition Theory for Stare Decisis, 13 J. CONTEMP. LEGAL ISSUES 93, 101 (2003) (arguing that the outcome of a Supreme Court case “may reflect a variety of policy, methodological and political choices, but is unlikely to demonstrate that the minority view is objectively without merit”).
constitutional interpretation. Interpretive philosophy determines flagrancy of error, and flagrancy of error determines susceptibility to overruling. If precedents are only as strong as the interpretive commitments of five Supreme Court justices, the continuity and impersonality of constitutional law is impaired.

Rather than treating all precedents that arise from rival interpretive schools as egregiously wrong, the justices might show interpretive empathy by placing themselves within the decisional mindset a prior decision reflects. An originalist justice would not treat flawed decisions as manifestly erroneous simply because they were reasoned on pragmatic grounds. Instead, she would evaluate those decisions against a backdrop assumption of pragmatism’s validity. Nor would a pragmatic justice treat all originalist precedents as manifestly erroneous. Instead, she would assess the flagrancy of error from the standpoint of an originalist. This practice would preserve a distinction between the adoption of a given interpretive philosophy and the declaration of manifest error.

But interpretive empathy presents difficulties of its own. Assuming that the justices have the time and capacity to deploy divergent methodologies from case to case, interpretive empathy requires them to embrace, at least hypothetically, an interpretive philosophy they might view as imprudent or illegitimate. An originalist justice is required to channel a competing methodology that is incompatible with the tenets of originalism. The same is true of the pragmatist or common law constitutionalist, who must imagine himself as a momentary originalist regardless of any doubts he may harbor about the originalist enterprise.

Additional problems arise with respect to precedents that do not fit neatly into one interpretive box. Supreme Court decisions often describe different types of arguments as pointing toward the same result. That practice can render it impracticable for a later justice to adopt the methodological mindset of the Court that issued the precedent: There may be no way to determine what, exactly, that mindset was.

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In light of the difficulties associated with interpretive fidelity and interpretive empathy, the flagrancy of a precedent’s error fits uneasily with the doctrine of stare decisis in a pluralistic legal culture. The egregiousness of a precedent’s error coheres with the doctrine of stare decisis only in a world of interpretive agreement. Second-best stare decisis must look elsewhere for its content. It is possible, if unlikely, that a Supreme Court opinion may be not simply wrong but illegitimate and unlawful, for instance because it was written by a justice who expressly ignored the relevant enactments and ruled based on personal affinity or a flip of the coin. Such decisions, of course, are entitled to no deference whatsoever. But beyond that category of extreme cases, second-best stare decisis focuses on factors apart from theory-dependent conclusions about the soundness of a decision’s reasoning.

**Substantive Effects**

The importance of deciding a case correctly naturally is informed by the ramifications of deciding it incorrectly. \(^{84}\) Does it follow that precedents with undesirable consequences should have a limited shelf life?

I submit that the answer is no. The assessment of a precedent’s harmfulness depends on conclusions about legal relevance, which themselves depend on theories of constitutional interpretation. Substantive assessments—and the methodological and normative commitments they reflect—are therefore unsuitable for a world of interpretive disagreement. Second-best stare decisis responds by excluding substantive effects from the overruling calculus in the ordinary course. In selecting the best interpretation of a disputed constitutional provision, the justices will continue to disagree about the types of benefits and harms that are legally relevant. Second-best stare decisis has no objection to that phenomenon. It simply prevents such disagreements from reemerging when the justices turn to the distinct question whether a flawed precedent should be retained or jettisoned.

\(^{84}\) Cf. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *COLUM. L. REV.* 723, 760 (1988) (“The most difficult question in identifying the harmful effects due to a wrongly decided controlling precedent is whether this criterion can be rendered sufficiently principled so that it is not simply a euphemism describing decisions that a Court majority very much dislikes.”).
Treating substantive effects as inapposite reflects a compromise that cuts across methodological and ideological lines.\textsuperscript{85} Justices who would otherwise be inclined to view a precedent’s injustice or inefficacy as a reason for overruling must set those factors aside. Likewise, justices who emphasize values such as popular sovereignty will need to mediate their view that precedents are in greater need of overruling when they impede democratic self-government; the primacy of popular sovereignty is not a value that extends across interpretive methodologies. These are just a few illustrations of a general point: Determining which types of effects are legally relevant is theory-dependent by definition, making it unsuitable for a doctrine of stare decisis designed to bridge interpretive disputes. Conclusions about the salient effects of flawed decisions can serve as the basis for declaring a precedent to be erroneous (or for resolving a case of first impression), but they are generally excluded from the inquiry into a precedent’s retention. Rather than drawing on the substantive value of interpreting the Constitution correctly, second-best stare decisis revolves around factors whose application can be cordoned off from disputes over interpretive theory.

Disregard of substantive effects characterizes the ordinary course of second-best stare decisis. But the ordinary course is not the only course, and there is a category of exceptional situations in which a precedent’s substantive effects may play a legitimate role in the second-best analysis. Cases may occasionally arise in which a justice perceives an overwhelming justification for renouncing a precedent due to its substantive effects. The common law constitutionalist might view a precedent as not merely unfair, but profoundly immoral. The pragmatist might view a precedent as not merely ill-advised, but disastrous in its practical implications. The popular sovereignty originalist might view a precedent as not merely anti-democratic, but an intolerable affront to the authority of the people. And so on.

Despite its general exclusion of substantive effects, second-best stare decisis acknowledges the legitimacy of substantive considerations

in these exceptional cases. Fidelity to precedent is not absolute. It is a presumption, subject to override when certain criteria are met. In most cases, those criteria should exclude a precedent’s substantive effects in order to prevent stare decisis from being mired in debates over interpretive philosophy. Yet second-best stare decisis can recognize exceptional cases in which substantive effects are relevant without jeopardizing the larger project of accommodating the treatment of precedent to a pluralistic world.

The key is ensuring that attention to substantive effects remains the exception rather than the rule. Invoking substantive considerations to justify an overruling triggers a corresponding obligation to imagine what the consequences would be if one’s judicial colleagues were to behave in the same way with respect to precedents they view as severely problematic. This type of aggregated analysis sharply limits the category of cases in which substantive considerations are relevant.

For example, even under the second-best approach, a justice could leave open the possibility that considerations of morality can be relevant to the durability of precedent. But she would reserve those considerations for extreme cases rather than allowing them to permeate the doctrine of stare decisis in every constitutional dispute. A different justice might determine that precedents posing a substantial threat to popular sovereignty—perhaps by inhibiting the free elections necessary for meaningful self-government—should be overturned based on their substantive effects. Still other justices might conclude the effects of constitutional mistakes are most severe when the Court has overstepped its proper role by intervening in a divisive political or social debate. Whichever of these (or other) conceptual lenses a particular justice employs, second-best stare decisis forecloses the broader conclusion that all erroneous precedents are subject to reconsideration based on their substantive effects. While that latter approach may be sensible in a world of interpretive agreement, it fails under conditions of interpretive pluralism.

Acknowledging the relevance of substantive effects in extraordinary cases also makes second-best stare decisis more plausible in practical terms. Sitting and future justices might well balk upon being asked to uphold what they view as the worst of the worst precedents. The substantive-effects exception responds by acting as a safety valve. The
exception provides space for correcting the Court’s most harmful (however that concept is defined) mistakes without creating pressure to distort the ordinary tools of stare decisis analysis. So long as substance-based overrulings are limited to rare and exceptional situations, they do not threaten the enterprise of second-best stare decisis. To the contrary, the doctrine operates as it should: by creating a strong presumption that yields when countervailing considerations are truly compelling.

Second-Best Stare Decisis Beyond the Core Factors

Thus far I have discussed the implications of second-best analysis for the rules of stare decisis as described in Planned Parenthood of Southeastern Pennsylvania v. Casey, which represents the Supreme Court’s most notable prominent of the doctrine. I have also applied the second-best approach to two other factors—the soundness of a precedent’s reasoning and the harmfulness of its substantive effects—that often emerge in disputes over the durability of precedent. Taken together, these considerations are properly understood as the core of the Court’s modern approach to stare decisis. Still, other considerations also crop up from time to time in the Court’s discussions of precedent. I will briefly discuss three of those factors as further examples of how second-best analysis applies to the doctrine of stare decisis.

Age. Older precedents sometimes receive heightened deference in light of their vintage. Their staying power over the years may have proved them to be sound. Older precedents have also had more time to generate reliance by stakeholders. It follows, the argument goes, that older precedents should receive more respect than newer ones—the latter of which can be corrected “before state and federal laws and practices have been adjusted to embody” them.86

The role of a precedent’s age is complicated by Supreme Court opinions privileging newer opinions over older ones. This often occurs in connection with the inquiry into jurisprudential coherence, which I discussed above. When the Court depicts prior decisions as having

been undermined by more recent ones, the effect is to elevate the new over the old. To similar effect is Justice Ginsburg’s statement about being faithful to “later, more enlightened decisions” and while jettisoning past decisions that have become “outworn.” The principle that newer opinions can “undermin[e]” the “doctrinal underpinnings” of older ones means that in some cases, the former take priority over the latter.

The overruling of recent decisions can also be troubling from the standpoint of judicial impersonality. Recall Justice Marshall’s dissent in *Payne v. Tennessee* (1991)—a case dealing with the use of victim-impact evidence—in which he criticized the majority for overruling recent precedents even though “[n]either the law nor the facts,” but “[o]nly the personnel of this Court,” had changed. Abrupt overrulings following changes the Court’s composition can blur the line between the meaning of the Constitution and the identity of the individuals who occupy the bench. It reinforces both the perception and reality that constitutional change occurs primarily through the judicial appointment process rather than the Article V amendment process. As Justice Stevens once observed, “Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office.”

The problem is not that a precedent’s vintage is unsuitable for consideration under a second-best approach. To the contrary, vintage is the type of objective, independent factor that lends itself to application by justices across the methodological spectrum. The problem is the Court has not consistently treated earlier precedents as more venerable than later ones, nor has it offered a convincing account of why overrulings are more problematic when precedents are old. The better approach is to focus directly on issues such a precedent’s reliance implications without filtering the analysis through the foggy lens of a precedent’s age.

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87 John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting); Lawrence, 539 U.S. at 573–76.
88 See, e.g., Dickerson, 530 U.S. at 443.
89 Payne, 501 U.S. at 844 (Marshall, J., dissenting).
Dissent and Criticism. A case’s divisiveness can affect its staying power. Deference is reduced when a precedent was “decided by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings.” 91 Along similar lines, the justices sometimes ask whether a precedent has drawn criticism from the bench and scholarly community, which can affect the extent to which the precedent has generated reliance expectations among stakeholders. 92 The inverse occurred in Casey, where the lead opinion described the criticism faced by Roe as a reason for standing by that decision. 93 But the Casey Court made clear that its rationale reflected the exceptional degree of public interest in Roe. In the ordinary course, it is more common to find criticism as cutting against deference rather than in its favor.

In defending this practice, we might posit that divided opinions are more likely to occur in difficult and divisive cases. Such cases, in turn, are relatively likely to result in unsound decisions. There is also a reliance angle: All else equal, perhaps stakeholders are (or should be) less likely to rely on decisions that are hard-fought and closely divided. By definition, those decisions are the fewest votes away from overruling. And if several justices felt strongly enough about an issue to dissent in dramatic fashion, they may be more likely to persist in their disagreement as they try to win a majority through persuasion or attrition.

There is another side to the story. It is possible that the majority opinion in a divisive case is particularly likely to be soundly reasoned, precisely because the competing arguments received such extensive attention. The Supreme Court took this position in Patterson v. McLean Credit Union (1989), where part of its justification for refusing to overrule a statutory precedent owed to the fact that “[t]he arguments about whether [the precedent] was decided correctly in light of the language and history of the statute were examined and discussed with great care in our decision.” The Court explained that “[i]t was recognized at the time” of the relevant decision “that a strong case could be made for the” opposing view.” Yet “that view did not prevail,” and the Court saw no reason to reopen the debate. 94 Justice Marshall made a similar point in his Payne dissent, which criticized

91 Paye, 501 U.S. at 828–29 (majority op.).
92 See, e.g., Citizens United, 558 U.S. at 380 (Roberts, C.J., concurring).
93 See Casey, 505 U.S. at 867.
the majority for departing from precedent based on arguments the Court had recently rejected.\footnote{See Payne, 501 U.S. at 846 (Marshall, J., dissenting).} Understood in this way, contentious decisions represent the antithesis of the lightly considered statements the Court has described as unworthy of deference due to the superficial deliberation they appear to have received.\footnote{See, e.g., McCutcheon v. FEC, 134 S. Ct. 1434, 1446 (2014) (plurality op.).}

On balance, neither the presence of a spirited dissent nor the persistence of criticism is a dependable proxy for a decision’s likelihood of error on the merits. Moreover, if dissents and criticism are meant as proxies for a decision’s effect on reliance expectations, it is better to evaluate reliance directly. That leaves little reason for infusing dissent and criticism with independent force in the stare decisis analysis.

\textit{Nature of Decisional Rule}. The type of rule an opinion announced affects the deference it receives. I noted in Chapter 1 that the Supreme Court continues to maintain a distinction between its statutory and constitutional precedents, with the former receiving a higher degree of deference. The Court also gives heightened deference to decisions in fields such as property and contract law, on the rationale that those decisions often have the greatest impact on reliance expectations. By contrast, rules of evidence and procedure receive diminished deference. Those types of rules do “not affect the way in which parties order their affairs,” and their revision does “not upset settled expectations on anyone’s part.”\footnote{Pearson v. Callahan, 555 U.S. 223, 233 (2009).}

Inquiry into the nature of a decisional rule is compatible with the principles of second-best stare decisis. Whatever their methodological and normative inclinations, the justices will often be able to agree about whether a rule is substantive or procedural. The more difficult question is whether the nature of decisional rule reveals anything meaningful about the deference owed to a precedent.

It is possible that the nature of a decisional rule correlates with reliance expectations and, thus, with the disruption an overruling would entail. But that is not always the case. Take \textit{Hohn v. United States} (1998). There, the Supreme Court considered whether it had jurisdiction to review denials of certifications of appealability, which petitioners in federal habeas corpus proceedings need in order to
appeal from an adverse district court decision. The Court found itself to possess the requisite jurisdiction, but it acknowledged that its conclusion conflicted with a precedent issued some fifty years prior. Explaining its decision to overrule the precedent, the Court cited its practice of giving reduced deference to procedural rules. In dissent, Justice Scalia agreed that “procedural rules do not ordinarily engender detrimental reliance.” He disagreed with the majority because the case at hand was not ordinary. Even if the relevant precedent had not affected primary conduct by private citizens, Congress had presumably paid attention to it. Irrespective of its procedural nature, the precedent warranted preservation in light of the “reliance of Congress upon an unrepudiated decision central to the procedural scheme it was creating.”

Whatever the proper result in *Hohn*, the colloquy between majority and dissent shows why the nature of a precedent’s decisional rule is not always an accurate proxy for reliance and disruption. Sometimes procedural and evidentiary do not engender reliance, and sometimes they do. In light of that variability, the better course is the direct analysis of reliance interests. Again, this is not because the nature of a decisional rule is out of bounds for second-best stare decisis. The fact that a particular feature of a case has independent content apart from debates over interpretive methodology is necessary for its inclusion in the second-best analysis, but it is not sufficient. The feature must also tell us something meaningful about when precedents should be retained and when they should be overruled.

**Collective Courts and Individual Judges**

A theory of adjudication that would be desirable if endorsed by a majority of Supreme Court justices might lose its resonance if endorsed by only a single justice. The ultimate question is not how the Court as an entity should proceed. It is what “decision procedure should a nine-member body employ to reach the best decisions they can over an array of cases highlighting experiential and political differences among the nine decisionmakers.” The point is relevant to second-best stare

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99 Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 255; see also ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 137 (2011) (“Even if all judges should adopt a given theory, it does not follow that any one should, because others may not.”).
decisis, for it raises the question whether an individual justice should compromise her vision of optimal legal interpretation absent assurances that her colleagues (and successors) will follow suit.

There is no guarantee a Supreme Court justice’s application of second-best stare decisis will convince her colleagues to take the same path. Nor is there any guarantee that the adoption of second-best stare decisis in a majority opinion will entrench that approach in perpetuity. Nevertheless, justices who apply second-best stare decisis can help to establish its prevalence going forward. And even if a justice finds herself paying greater attention to precedent than her colleagues do, she can still make a valuable contribution in her own right. Adopting the second-best approach is about tempering one’s interpretive philosophy for the sake of behaving like a member of an impersonal and enduring institution. To be sure, the benefits of stare decisis are greatest when a majority of justices endorse it. But a single justice who casts her lot with stare decisis can promote the ideals of continuity and impersonality. The act of compromising one’s interpretive predilections underscores the separation between judge and law, as well as the ideal that legal rules are general norms to which courts commit themselves across the span of time. A vote for second-best stare decisis represents a contribution to the rule of law irrespective of the conduct of one’s judicial peers.100 For a single justice, a vote to uphold precedent in a particular case is a means of strengthening a doctrine that provides value to the constitutional system more broadly.

Analyzing a justice’s opportunity costs—in other words, what she gives up by supporting stare decisis—leads to the same conclusion. To illustrate, consider three scenarios that might confront a precedent-friendly Supreme Court justice. In the first scenario, most of her colleagues have decided to overrule an applicable precedent. A few justices have resisted that conclusion, but not on stare decisis grounds; they simply think the majority is mistaken on the merits. Our justice believes the majority has the better of the argument, but she would preserve the applicable precedent for reasons of stare decisis. In this situation, our justice could choose to abandon stare decisis by adding

100 Cf. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 146 (2006) (noting that “[s]o long as the relevant theory does not require or assume a critical mass or threshold of judicial coordination—so long as individual judges may make a strictly divisible or marginal contribution to the aims specified by the theory—then the infeasibility of sustained judicial coordination poses no problem”).
her voice to the chorus of justices in the majority. Yet that approach is unlikely to affect the impact of the Court’s opinion, which already enjoys majority support. Our justice thus gives up little by writing a dissent on grounds of stare decisis.

In making this choice, the justice does not alter the outcome of the case at hand. But she does promote the principle that justices are willing to stand by precedents despite their personal misgivings. If our justice believes it advances the rule of law when judges subordinate—and are seen as subordinating—their individual views for the sake of keeping faith with their court’s institutional history, she makes a contribution by deferring to precedent even if her colleagues do not follow her lead. Likewise, if our justice believes deference to precedent is a useful second-best principle for facilitating coordinated action, her dissenting opinion may enhance the viability of stare decisis in future cases by keeping it on the Court’s agenda. In all events, her choice to dissent carries little cost given that her vote did not affect the outcome of the case.101

In the second scenario, most of the Court’s members believe the precedent under consideration is correct. Our justice disagrees with that conclusion on the merits, but she thinks stare decisis requires upholding the precedent. Our justice could eschew considerations of stare decisis and dissent, but her choice would not change the outcome of the case. On the other hand, our justice could concur in the majority’s result, issuing a separate opinion to explain that her vote is based on stare decisis. Again, this course of action contributes to the vitality of stare decisis going forward while imposing little cost.

Finally, imagine a scenario in which our justice’s colleagues are evenly split. She is the “swing” vote, with the power to control the outcome of the case. There is an applicable precedent on the books, but none of her colleagues give it much import. Instead, they reach their decisions purely on the merits. Now our justice has the opportunity to

101 The Supreme Court occasionally states that closely divided decisions are entitled to less deference going forward. On that logic, an opinion supported by six votes may receive marginally greater deference in future cases than an opinion supported by five votes. I have criticized this practice as unjustified. Even if the practice persists, it is difficult to foresee a situation in which five justices are prepared to overrule a decision but refrain from doing so because it received six votes rather than five, or seven rather than six, and so on.
infuse the doctrine of stare decisis with considerable salience. She can explain that regardless of her views on the merits, she believes proper application of stare decisis requires abiding by the applicable precedent even if it is incorrect. In this way, our justice demonstrates that stare decisis affects not just rationales but results. She succeeds in bringing about the proper outcome (from the perspective of stare decisis) in the case at hand. In doing so, she also strengthens the general practice of precedent-following on the Court. Whatever happens in the years ahead, she will have demonstrated that stare decisis transcends interpretive and normative commitments.

These scenarios do not exhaust the possibilities. Some cases might lead to a wider array of positions among smaller factions of justices. But in the common scenarios I have described, the best course for our justice will be to apply second-best stare decisis regardless of what her colleagues choose to do. Our justice can treat precedent with presumptive deference without worrying about her colleagues’ votes. And if her colleagues ultimately adopt the same mindset as her, we have the framework for a meaningful doctrine of stare decisis in Supreme Court decisionmaking.

A general practice of precedent-following might also arise from the justices’ belief that if they wish for their preferred precedents to stand the test of time, they must be willing to abide by some decisions with which they disagree. Adrian Vermeule explains how judges who are involved in repeated interactions might be inclined to defer to precedent to encourage reciprocation from their colleagues. Michael Gerhardt makes a related point in depicting the justices as recognizing that by showing disdain for disfavored precedents, they put their preferred precedents on shakier ground.

To the extent justices think in such strategic terms, the likelihood increases of creating a meaningful doctrine of stare decisis as a mechanism for protecting the good (from the perspective of an individual justice) at the cost of enduring some bad. But even if the justices disregard these strategic considerations—either because they

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102 I hasten to reiterate that applying second-best stare decisis does not always mean abiding by precedent; there are situations in which precedent should yield.

103 See VERMEULE, THE SYSTEM OF THE CONSTITUTION, supra note __, at 142.

find the prospect of retaliation to be unsuitable to the Court’s work, or because they regard the Court’s future as sufficiently unpredictable that credible threats of retaliation are undermined—there remains the argument I developed above: A vote in favor of stare decisis, even by a single justice, strengthens the doctrine going forward, enhancing its ability to generate benefits such as impersonality, stability, and the facilitation of coordinated action.

While tomorrow’s justices always possess the power to depart from particular precedents or even to abandon the doctrine of stare decisis entirely, today’s justices can make such developments less likely. A justice who operates within a practice of deferring to precedent faces an “argumentative burden” in justifying her choice to overrule.105 She must explain why she perceives a suitable reason for departing from precedent—or why she thinks no such reason is required despite her predecessors’ claims to the contrary. If she doubts her ability to make these arguments in a persuasive manner, she may be inclined to defer to a precedent even if she questions its soundness. That result would only come to pass in a system within which deference to precedent is the customary practice. By respecting precedent today, a justice makes it more likely that precedent will command respect tomorrow.

There is also the question whether precedent-friendly justices should be wary of “ratchet” effects that threaten to chip away at their preferred vision of constitutional law.106 The concern is that if some justices are more inclined than others to defer to precedent, and if that distinction tracks differences in interpretive approach, over time the law may move toward the view preferred by those who eschew stare decisis. Foreseeing this possibility, justices who would otherwise defer to precedent might consider voting to overrule most or all decisions that reflect an interpretive methodology different from their own.

Such a choice would, I think, be unwise. Though it may be possible to make educated guesses about how one justice’s treatment of precedent is likely to be received—and responded to—by her colleagues in the immediate future, the long-term effects on the Court’s caselaw are extremely difficult to predict. To begin, it is not necessarily correct

to view judicial philosophies as static. A commitment to precedent by proponents of one philosophy might have dynamic effects in encouraging proponents of other philosophies to become more receptive to decisions with which they disagree—leading to the establishment of a meaningful doctrine of stare decisis across interpretive schools.

There is also the possibility that stare decisis might create short-term costs but long-term gains for its adherents. An originalist justice who upholds a nonoriginalist decision might make a marginal contribution to the salience of nonoriginalist constitutional rules. But perhaps the originalist justice who stands by precedent will contribute to a perception of originalism as linked with constancy and impersonality, eventually increasing the prominence of the originalist school and leading to the appointment of more originalist justices. Cases of first impression would henceforth be decided according to originalist principles, and originalist precedents would be insulated from overruling.

Nor is it clear that committing oneself to stare decisis will privilege one interpretive methodology at the expense of others. Even if future justices are inclined to overrule precedents that conflict with their preferred constitutional theories, there is no reason to think such justices will disproportionately come from a particular methodological school. It is plausible that the Court could vacillate between periods in which originalist justices regularly overruled nonoriginalist precedents, and periods in which living constitutionalist justices regularly overruled originalist precedents. The aggregate effect would be a certain amount of overruling, but it would not be a ratchet that steadily entrenches one theory while undermining others. The ratchet concern would arise only if frequent overruling were correlated with the prevalence of a particular interpretive philosophy. That need not be the case. Indeed, as I have argued, there is ample room in theories as diverse as originalism and living constitutionalism for meaningful deference to precedents—even precedents that are incorrect when viewed through a given methodological lens.

It remains true that by deferring to a flawed precedent, today’s justice might act in a way that some of her colleagues would not. She might also sacrifice the power to right a constitutional wrong. The extent of the sacrifice is reduced by the fact that second-best stare decisis preserves the justice’s ability to rectify the worst of the worst
constitutional errors even at the cost of continuity.107 But the more important point is that the power to rectify perceived constitutional mistakes is fleeting in a world without stare decisis. Such power lasts only until the Court’s balance of power shifts, at which time a new majority is in position to dispense with contrary precedents. Fidelity to precedent, by contrast, promotes coordinated action among differently-minded jurists regardless of what happens in the years ahead. By helping to establish second-best stare decisis as an influential doctrine, even a single justice can make it harder for future justices to depart from precedent—and, as a result, less likely that they will try.

Concerns about judicial disregard for precedent do not only face forward. They also encourage today’s Court to look backward for times at which prior justices have given precedent less than its due. Consider, for example, those who believe the Warren Court was unfaithful to the Court’s prior teachings on criminal procedure108 or the Rehnquist Court contravened established caselaw on federalism. A Supreme Court justice who possesses such a belief faces a choice. She may abide by the existing precedents, unfaithful as they may have been to older cases. Or she may engage in her own overruling with the goal of restoring the legal rules that were improperly supplanted.

There is support in the Supreme Court’s caselaw for the conclusion that an opinion borne of inadequate respect for its ancestors should expect the same irreverent treatment from its heirs. Hence the Court’s willingness to overrule opinions that “deviated sharply from our established . . . jurisprudence”109 or that represented a jurisprudential “aberration.”110 Yet second-best stare decisis suggests the better course is to stand by existing precedents regardless of what came before. The crucial moment is the present one. The choice before today’s justice is whether to vote in favor of reaffirming or overruling. That choice should occur within the framework of second-best stare decisis, which avoids theory-laden determinations of whether a precedent was faithful to the cases that came before it.

Second-best stare decisis is not aligned with any interpretive methodology. It will counsel against overruling some precedents that

107 See Chapter 6.
108 VERMEULE, THE SYSTEM OF THE CONSTITUTION, supra note __, at 144.
are disfavored by originalists, but it will do the same with respect to precedents that are disfavored by living constitutionalists. A commitment to stare decisis is not a commitment to originalism, living constitutionalism, or any other theory. It is a commitment to the abiding continuity of constitutional law even as individual justices come and go.