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Stare Decisis as Judicial Doctrine

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Abstract

Stare decisis *has been called many things, among them "a principle of policy," "a series of prudential and pragmatic considerations," and simply "the preferred course." Often overlooked is the fact that* stare decisis *is also a judicial doctrine, an analytical system used to guide the rules of decision for resolving concrete disputes that come before the courts.*

This Article examines stare decisis *as applied by the U.S. Supreme Court, our nation's highest doctrinal authority. A review of the Court's jurisprudence yields two principal lessons about the modern doctrine of* stare decisis. *First, the doctrine is comprised largely of malleable factors that carry neither independent meaning nor predictive force. Second, most of the factors that populate the doctrine are best understood as evincing, either explicitly or implicitly, a driving concern with the reliance interests that could be upset by the decision to overrule a given precedent.*

When stare decisis *is reconceptualized in terms of these reliance implications, there emerges a blueprint for doctrinal reform. In short, this Article suggests that the Court should begin by clearing away the distracting, indirect proxies for reliance that dominate the current jurisprudence. In their stead, the Court should construct a new framework that focuses directly, rigorously, and systematically on the fundamental reliance considerations themselves. Such an undertaking, it must be acknowledged, will present significant challenges. But embracing those challenges is necessary if we hope to move toward a doctrine of* stare decisis *that delivers on its longstanding promise to promote stability, coherence, and the rule of law.*

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I. Introduction

There is a grand irony about *stare decisis*. The doctrine, which involves a court's choice to stand by a precedent notwithstanding suspicions (or worse) about its wrongness,[1] enjoys lofty status as the emblem of a stable judiciary. Indeed, the Supreme Court has lauded *stare decisis* as possessing "fundamental

1. *See, e.g.*, LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 208 (2008) (describing *stare decisis* as reflecting "a resolution to stand by [prior] rulings, at least presumptively, in the face of one's belief that one probably would have decided differently"); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("*Stare decisis* is defined in Black's Law Dictionary as meaning 'to abide by, or adhere to, decided cases.'" (citations omitted)).

importance to the rule of law,"[2] promoting "the evenhanded, predictable, and consistent development of legal principles,"[3] and contributing to "the actual and perceived integrity of the judicial process."[4]

Yet despite its billing, *stare decisis* has a remarkable tendency to incite disagreements that contradict the very principles it is supposed to foster.[5] The Supreme Court's treatment of *stare decisis* has yielded unusually scathing dissents lamenting that application of the doctrine is driven by outcome preferences and that "[p]ower, not reason" is the "currency of [the] Court's decisionmaking."[6] Troubling though they may be, these charges are hardly

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2. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987).

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

4. *Id.*; *see also, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921) ("[A] case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings."); TRIBE, *supra* note 1, at 208 (defining *stare decisis* as "the principle that carefully considered constitutional interpretations issued by the organs of government should not be revisited absent circumstances more compelling than a mere change in the identity of the individuals who authored the interpretations in question"); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1179 (2006) ("[O]nly by following the reasoning of previous decisions can the courts provide guidance for the future, rather than a series of unconnected outcomes in particular cases.").

5. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2098–99 (2009) (Stevens, J., dissenting) (arguing that the majority's treatment of precedent "can only diminish the public's confidence in the reliability and fairness of our system of justice"); Jill E. Fisch, *The Implications of Transition Theory for* Stare Decisis, 13 J. CONTEMP. LEGAL ISSUES 93, 94 (2003) ("The resulting uncertainty of application has caused some commentators to argue that the doctrine is politically charged and subject to easy manipulation.").

6. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting). For a recent illustration, consider Justice Breyer's dissent from the bench in *Parents Involved in Community Schools v. Seattle School District No. 1*, Nos. 05-908 and 05-915 (June 28, 2007). Audio recording: Opinion Announcement in Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (June 28, 2007), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion/, at 32:53 min. The case, which involved the legality of mechanisms for influencing the racial makeup of public schools, was decided shortly after the arrival of Chief Justice Roberts and Justice Alito. In reading his dissent, Justice Breyer offered an interesting statement that might be taken to suggest those arrivals had led the Court to reverse course: "It is not often in the law that so few have so quickly changed so much." *Id.*; *see also, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586–87 (2003) (Scalia, J., dissenting) ("I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine."); *id.* at 592 ("To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is."); *cf.* Richard H. Fallon, *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1111 (2008) (noting "the injection of acidly skeptical writing—much of it by political scientists—questioning whether *stare decisis* actually matters in Supreme Court decisionmaking").

surprising. The Court repeatedly has cautioned that *stare decisis* is a flexible "principle of policy"[7] as opposed to "an inexorable command."[8] Moreover, the catalog of factors that inform the *stare decisis* inquiry is lengthy and uncertain—befitting, one supposes, of a doctrine whose core is a fluctuating "series of prudential and pragmatic considerations."[9] The sheer number of these considerations, combined with the fact that the Court often selects a few items from the catalog without explaining how much work is being done by each, makes it difficult even to find a starting point for thinking critically about *stare decisis* as a judicial doctrine.

My primary project in this Article is to isolate the various components of the Supreme Court's *stare decisis* jurisprudence and to study their individual and collective functions. That analysis yields two overarching conclusions. First, the modern doctrine of *stare decisis* is essentially indeterminate. The various factors that drive the doctrine are largely devoid of independent meaning or predictive force. Fairly or not, this weakness exposes the Court to criticism for appearing results-oriented in its application of *stare decisis*.[10]

The second conclusion is forward-looking, and it provides the groundwork for transforming *stare decisis* into something more predictable, meaningful, and theoretically coherent. Most of the considerations that populate the Court's current jurisprudence are best understood—or, perhaps, reimagined—as efforts to gauge the *reliance interests* that would be affected by the decision to overrule a given precedent. There is no inherent problem with such a focus. To the contrary, reliance interests are a critical part of what gives *stare decisis* its value; precedents are among the key "materials on which the community necessarily places its principal reliance in trying to figure out what the 'law' is."[11] The trouble is that the litany of *stare decisis* considerations turns out to

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7. Helving v. Hallock, 309 U.S. 106, 119 (1940); *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established.").

8. *Payne*, 501 U.S. at 828; *see also, e.g.*, Hertz v. Woodman, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

9. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992); *see also* Fisch, *supra* note 5, at 94 ("Indeed, it is arguably a misnomer to describe *stare decisis* as a legal doctrine as well as perhaps misleading to describe precedents in terms of obligation.").

10. *See, e.g.*, Randy E. Barnett, *The Seinfeld Hearings*, WALL ST. J., July 13, 2009, at A13 ("Unless [the Senators holding a confirmation hearing] can explain how we know which precedents to follow and which to reverse—apart from liking the results—all pontificating about 'stare decisis' is really about nothing.").

11. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 63 (2003).

be a set of imperfect, and sometimes inconsistent, proxies for the implicated reliance effects.

Therein lies the blueprint for doctrinal reform. The initial step toward a solution is to clear away the distracting proxies. In their stead, the Court should construct a new framework for rigorous and systematic analysis of the underlying reliance interests themselves. Ultimately, the output of that reliance analysis would be weighed against the value of reaching the correct result on the merits to determine whether *stare decisis* trumps in a given case.

Generally speaking, reliance interests are already accepted as part of the Court's *stare decisis* jurisprudence, which seeks to "protect[] the legitimate expectations of those who live under the law."[12] Nevertheless, even when the Court describes notions of reliance as relevant to a given case, it tends to fall back on abstract pronouncements about the importance of settled expectations. While this tendency is perfectly understandable given the difficulty of evaluating reliance effects, it is also deeply flawed. By taking up the challenge and endeavoring to analyze reliance interests directly, the Court has the opportunity to reshape *stare decisis* into a theoretically coherent, intrinsically sound judicial doctrine.[13]

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12. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part); *see also, e.g.*, CARDOZO, *supra* note 4, at 151 ("There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants."); Victor E. Schwartz et al., *Toward Neutral Principles of* Stare Decisis *in Tort Law*, 58 S.C. L. REV. 317, 321 (2006) ("Requiring courts to ground their decisions in existing legal principles encourages the public to rely on the judicial system in shaping personal and business dealings in accordance with fixed rules of law."); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and* Stare Decisis, 48 SYRACUSE L. REV. 1515, 1565 (1998) ("[U]nderlying the doctrine of *stare decisis* is the principle of protecting justifiable reliance upon established law.").

13. One note on scope: This Article focuses primarily on the Court's treatment of constitutional questions as opposed to statutory questions. The Court generally accords enhanced deference to precedents that involve statutory interpretation, reasoning that it is much easier for Congress to revise a statute than it is for the country to amend the Constitution. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) ("[C]onsiderations of *stare decisis* have added force in statutory cases because Congress may alter what we have done by amending the statute. In constitutional cases, by contrast, Congress lacks this option, and an incorrect or outdated precedent may be overturned only by our own reconsideration or by constitutional amendment."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."). The wisdom of this practice has been considered at length in the academic literature. *See, e.g.*, William N. Eskridge, *The Case of the Amorous Defendant: Criticizing Absolute* Stare Decisis *for Statutory Cases*, 88 MICH. L. REV. 2450 (1990).

II. Jurisprudence by Proxy

The following sections analyze and evaluate the key "prudential and pragmatic considerations"[14] that comprise modern *stare decisis* jurisprudence. I hope to show that the vast majority of these considerations are best conceptualized as flawed proxies for the reliance interests implicated by the decision to overrule a precedent.

A. Logical and Consequential Considerations

1. Soundness

Sometimes the focus of *stare decisis* gets bound up with resolving a case on the merits.[15] For example, the Court might explain its decision to overrule a precedent by asserting that the precedent is "badly reasoned."[16]

The Court exhibited this type of approach in the recent *Citizens United v. Federal Election Commission*[17] case, where it reconsidered *Austin v. Michigan Chamber of Commerce*.[18] In the course of rejecting *Austin*'s holding that "political speech may be banned based on the speaker's corporate identity,"[19] the *Citizens United* Court declared that "*Austin* was not well reasoned."[20] Writing in dissent, Justice Stevens seized on the majority's assertion, responding that "[t]he Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*."[21] He elaborated: "The opinion 'was

14. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

15. *See, e.g.*, Fisch, *supra* note 5, at 99 ("Central to the Court's approach, in most cases, is an evaluation of the quality of the old legal rule.").

16. Payne v. Tennessee, 501 U.S. 808, 827 (1991); *see also, e.g.*, Arizona v. Gant, 129 S. Ct. 1710, 1725 (2009) (Scalia, J., concurring) ("Justice Alito insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results."); *cf.* Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009) ("We think that the marginal benefits of *Jackson* . . . are dwarfed by its substantial costs.").

17. *See* Citizens United v. FEC, 130 S. Ct. 876, 886 (2010) ("[*S*]*tare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

18. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990).

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

20. *Id.* at 912.

21. *Id.* at 938 (Stevens, J., dissenting in part).

not well reasoned,' our colleagues assert, and it conflicts with First Amendment principles. This, of course, is the Court's merits argument."[22]

The exchange in *Citizens United* highlights an important theoretical distinction. Justice Stevens' dissent articulates the valuable, yet oft-neglected, insight that "restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus."[23] More generally, the question whether a precedent is correct on the merits is exogenous from whether the precedent should be reaffirmed on grounds of *stare decisis* irrespective of its rightness or wrongness. As Fred Schauer has noted, "[i]f precedent is seen as a rule directing a decisionmaker to take prior decisions into account, then it follows that a pure argument from precedent, unlike an argument from experience, depends only on the *results* of those decisions, and not on the validity of the reasons supporting those results."[24] The flipside is that "[w]hen the strength of a current conclusion totally stands or falls on arguments for or against that conclusion, there is no appeal to precedent, even if the same conclusion has been reached in the past."[25]

Despite being logically problematic, the Court's occasional conflation of correctness on the merits with deference to precedent seems simple enough to explain.[26] Those concepts often appear in proximity because the Court needs to talk about *stare decisis* only where it suspects or concludes that a precedent is wrong. After all, if the precedent were correct on the merits, the Court would reaffirm it without regard to *stare decisis*.[27] We might sort matters out by resolving that whenever the Court suggests it is not constrained to follow precedents that are "badly reasoned," all it can really mean is that in those situations, the apparatus of *stare decisis* becomes engaged and the Court turns to other considerations to determine whether it should defer. Understood in

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22. *Id.* at 938–39.

23. *Id.* at 939.

24. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987). Professor Schauer continues: "Only if a rule makes relevant the result of a previous decision regardless of a decisionmaker's current belief about the correctness of that decision do we have the kind of argument from precedent routinely made in the law and elsewhere." *Id.*

25. *Id.*

26. For an example of the Court properly decoupling the two issues, see Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) ("[W]hether or not [the precedent] was correct as an initial matter, there is no special justification for departing here from the rule of *stare decisis*.").

27. *See, e.g.*, Richard H. Fallon, Stare Decisis *and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) ("If a court believes a prior decision to be correct, it can reaffirm that decision on the merits without reference to *stare decisis*."); Fisch, *supra* note 5, at 97 ("[*S*]*tare decisis* is significant only in cases in which the second court disagrees with the previously-adopted legal rule.").

this way, the "badly reasoned" inquiry is not a component of *stare decisis* doctrine; it is a signal that the doctrine is in play and, in the ultimate balance, a value the Court weighs against *stare decisis* considerations in deciding whether to abide by a flawed opinion.[28]

Before accepting this conceptualization, it is worth considering one potential exception that might enable a precedent's rightness or wrongness to retain some independent meaning within the *stare decisis* inquiry. Think of it as the degrees-of-wrongness theory. The argument begins from the proposition that not all wrong precedents are created equal.[29] Rather, while some incorrect precedents are at least debatable, others are flat-out wrong—or, in the lexicon of the Court, "manifestly erroneous."[30] The degree of a precedent's wrongness thus becomes an element of the *stare decisis* inquiry that must be evaluated in determining whether the precedent should be preserved.[31]

The most plausible means of defending this degrees-of-wrongness theory is to ground it in the reliance interests that are affected by the overruling of a precedent. When the Court settles a dispute in a certain way, it is natural that people and institutions affected by the dispute will rely on the Court's decision in shaping their understandings and behaviors. Years later, if the Court confronts the same matter only to reach the opposite conclusion, those who relied on the earlier opinion might find that their efforts have been wasteful or counterproductive. When the Court is deciding whether to overrule a precedent, one of the issues it must confront is the extent to which stakeholders have relied on the precedent in organizing their behaviors and understandings. That calculus is an integral part of "protect[ing] the legitimate expectations of those who live under the law."[32]

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

29. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) ("[W]hen a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law.").

30. United States v. Gaudin, 515 U.S. 506, 521 (1995); *see also* CARDOZO, *supra* note 4, at 158 ("The United States Supreme Court and the highest courts of the several states overrule their own prior decisions when manifestly erroneous.").

31. *Cf.* Crawford v. Washington, 541 U.S. 36, 75 (Rehnquist, C.J., concurring in the judgment) (noting that in deciding whether to stand by a precedent, "doubt that the new rule is indeed the 'right' one should surely be weighed in the balance").

32. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part).

Degrees-of-wrongness theory accordingly might be justified as reflecting the critical reliance interests at stake whenever the doctrine of *stare decisis* is invoked. The underlying rationale would be that manifestly erroneous precedents are less likely to command reliance than precedents whose errors are more debatable. For example, where a "precedent demonstrably conflicts with the statutory or constitutional provision it purports to interpret, the role of reliance is significantly diminished, and possibly eliminated."[33] Stakeholders will recognize the precedent in question as indefensibly flawed, and they will refrain from organizing their affairs in dependence on the precedent's staying power. Instead, they will minimize their dependence on the precedent and await its inevitable overruling. When the day of reckoning arrives, the reticence of stakeholders to accept the precedent means the Court can consummate the overruling with little concern that reliance interests will be upset.

My trouble with this argument is its assumption of widespread agreement about what makes a precedent *manifestly* erroneous as opposed to *debatably* erroneous. It seems to me that there is no real hope of forging such a consensus even among the nine Justices occupying the bench at any given time, let alone the multitudes of onlookers whose fortunes might somehow be impacted by a Supreme Court decision.[34] The cases are legion in which the Justices who comprise the majority and the Justices in dissent each appear to view the contrary position as not just wrong, but *manifestly* wrong. And the problem is exacerbated by the existence of divergent judicial methodologies. If Justice *A* is an ardent constitutional originalist whereas Justice *B* views the Constitution as a living document that changes dramatically over time, it should come as little surprise that each Justice will often view the other as having rendered a manifestly erroneous decision. The same is true of dueling interpretative philosophies regarding any number of specific constitutional provisions, ranging from how to perceive the Eighth Amendment's prohibition against "cruel and unusual" punishments to whether there is such a thing as a "dormant" aspect to Article I's Commerce Clause or a right to "substantive due process" under the Fourteenth Amendment.[35]

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33. Amy Coney Barrett, Stare Decisis *and Due Process*, 74 U. COLO. L. REV. 1011, 1062 (2003).

34. *Cf. id.* at 1062–63 ("[E]ven clear errors sometimes inspire reliance that would be costly to upset.").

35. *See* Fisch, *supra* note 5, at 101 ("The outcome of the case may reflect a variety of policy, methodological and political choices, but is unlikely to demonstrate that the minority view is objectively without merit.").

It is also worth reiterating that my analysis focuses on the application of *stare decisis* by the United States Supreme Court. In that Court, cases are often chosen for inclusion on the docket precisely because they have caused a rift among lower courts.[36] The Justices enjoy the benefit of prior analysis by the lower courts, as well as briefing and argument from attorneys who tend to be extremely good.[37] At that level, in all but the rarest cases, "[w]hether a precedent is seen as *clearly* wrong is often a function of the judge's self-confidence more than of any objective fact."[38]

That brings us to a related problem with using a precedent's degree of wrongness as a proxy for the reliance it has commanded. Given the difficulty in forging any consensus about what makes an opinion manifestly erroneous, it is neither fair nor sensible to penalize lawyers, litigants, or society at large for failing to conclude that a precedent was so wrong as to be ripe for overruling.[39] The Court itself has made clear that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."[40] The implication is that "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance,"[41] regardless of whether that holding seems (to someone or another) unusually dubious on the merits.

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36. *See id.* ("Few legal issues reach the Supreme Court if their resolution is obvious. The presence of a circuit split, a virtual prerequisite to a grant of certiorari, indicates disagreement among federal appellate judges.").

37. *Cf.* Nelson, *supra* note 29, at 59 ("By the time an issue reaches the United States Supreme Court, it typically has percolated through a number of lower courts, and the Court's members therefore have the benefit of seeing how some other judges analyzed it.").

38. Henry Paul Monaghan, Stare Decisis *and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 762 (1988); *see also* TRIBE, *supra* note 1, at 208 (noting that adherence to *stare decisis* suggests the acknowledgement that "not being the repository of all wisdom, one's views just might be mistaken"). For a recent example of disagreement over the proper method for assessing the soundness of a precedent's reasoning, see Montejo v. Louisiana, 129 S. Ct. 2079, 2097 (2009) (Stevens, J., dissenting). Justice Stevens contended:

> First, and most central to the Court's decision to overrule *Jackson*, is its assertion that *Jackson*'s "reasoning" . . . does not justify continued application of the rule it created. The balancing test the Court performs, however, depends entirely on its misunderstanding of *Jackson* as a rule designed to prevent police badgering, rather than a rule designed to safeguard a defendant's right to rely on the assistance of counsel.

Id.

39. *Cf.* Pearson v. Callahan, 129 S. Ct. 808, 823 (2009) ("Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions. . . . If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." (citations omitted)).

40. Hohn v. United States, 524 U.S. 236, 252–53 (1998).

41. Quill Corp. v. North Dakota, 504 U.S. 298, 321 (1992) (Scalia, J., concurring in part)

Finally, even if we grant the possibility of some exceptional situations in which a precedent's wrongness is so egregious and so widely acknowledged that no stakeholder would dare rely on it, the solution is not to retain the "manifestly erroneous" element as part of *stare decisis* doctrine. In such a case—as in all cases—it is perfectly appropriate for the Court to consider how the reliance implications of overruling a precedent would play out.[42] But the inquiry must be directed at the reliance interests themselves, not the distracting side-issue of a precedent's degree of wrongness.

There is also a second, albeit weaker, approach for defending the inclusion of degrees-of-wrongness theory within the doctrine of *stare decisis*. The premise would be that manifestly erroneous decisions are uniquely detrimental in terms of their effect on social welfare. Such an argument might draw on the *rationale* of those decisions, on the assumption that there is something especially pernicious about judicial reasoning that veers too far beyond the bounds of reasonable interpretation.[43] Alternatively, the argument might focus on the *results* yielded by the decisions, reflecting the belief that the further a judicial opinion deviates from the correct interpretation of a constitutional provision, the more welfare-diluting that opinion is likely to be.

We would be justified in questioning the assumptions underlying both versions of this argument. It is one thing to accept that wrong interpretations are less desirable than correct interpretations, but quite another thing to conclude that, among wrong interpretations, the wrong-er are necessarily more detrimental to society. In any event, this debate is beside the point. Even if we accept the underlying assumptions, and regardless of whether the argument is couched in terms of rationale or results, it fails for the same fundamental reason discussed above—the unsustainable nature of any rule that depends on consistently distinguishing between manifestly erroneous precedents and debatably erroneous precedents, especially at the Supreme Court level.

2. Workability

In undertaking its *stare decisis* analysis, the Court accords reduced deference to precedents that have "def[ied] practical workability."[44] The

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(emphasis in original).

42. *Cf.* Fisch, *supra* note 5, at 107 ("[A] court's decision to adhere to a shaky precedent that people expect to be overruled might frustrate reasonable expectations more than overruling the precedent.").

43. *See generally* Nelson, *supra* note 29.

44. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992); *see also, e.g.*, Montejo v. Louisiana, 129 S. Ct. 2079, 2088 (2009) ("[T]he fact that a decision has proved

question the Justices ask is whether an opinion has proved too difficult to apply for courts, attorneys, and other stakeholders.

The Court recently dealt with workability in *Altria Group, Inc. v. Good*.[45] At issue was the vitality of *Cipollone v. Liggett Group, Inc.*,[46] a fractured decision from 1992 in which a four-Justice plurality held that the federal Labeling Act preempted certain state-law claims for fraudulent misrepresentation aimed at cigarette manufacturers.[47] In *Altria*, the Court reaffirmed *Cipollone* with a majority now agreeing that *Cipollone* "represents 'a fair understanding of Congressional purpose.'"[48]

Justice Thomas dissented on behalf of himself and three others.[49] Criticizing the majority for its reaffirmance of the *Cipollone* model, he argued that *Cipollone* "has proved unworkable in the lower federal courts and state courts."[50] He also quoted the district court in the *Altria* litigation, which observed that "courts remain divided about what [*Cipollone*] means and how to apply it" and that "*Cipollone*'s distinctions, though clear in theory, defy clear application."[51] Reasoning that "[t]he Court should not retain an interpretative test that has proved incapable of implementation," Justice Thomas concluded that *Cipollone* "should be abandoned for this reason alone."[52]

'unworkable' is a traditional ground for overruling it."); Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (plurality opinion) ("Eighteen years of essentially pointless litigation have persuaded us that [the applicable precedent] is incapable of principled application."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996) ("Since it was issued, [the applicable precedent] has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("[W]e do not find [the applicable precedent] to be unworkable or confusing."). *Contra* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("[T]he earlier cases lead, at worst, to different interpretations of different, but similarly worded, statutes; they do not produce 'unworkable' law." (quoting United States v. IBM Corp., 517 U.S. 843, 856 (1996))).

45. Altria Group, Inc. v. Good, 129 S. Ct. 538, 551 (2008).

46. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 513–20 (1992).

47. *Id.* at 530–31.

48. *Altria*, 129 S. Ct. at 547–48.

49. *Id.* at 551 (Thomas, J. dissenting).

50. *Id.* at 555.

51. *Id.*

52. *Id.* Justice Thomas explained: "We owe far more to the lower courts, which depend on this Court's guidance, and to litigants, who must conform their actions to the Court's interpretation of federal law." *Id.*; *see also* Payne v. Tennessee, 501 U.S. 808, 829–30 (1991) (reasoning that the applicable precedents "have defied consistent application by the lower courts").

Our project here is not to debate who had the better of the argument in *Altria*. It is to address the antecedent issue of whether a precedent's workability deserves to be part of *stare decisis* doctrine. The answer depends on whether workability carries any independent significance in determining the appropriate amount of deference owed to a questionable precedent.

Of course, all else being equal, it is preferable for the Court to choose a workable rule of decision rather than an unworkable one. Unworkable rules are clumsy and unpredictable, creating needless costs and diluting the benefits of a stable society governed by the rule of law.[53] But the reason for favoring workable doctrines is because that is a sensible approach to selecting the rule of decision to govern an area of law. The choice does not reflect any inherent link between a precedent's workability and its claim to deference. In fact, *stare decisis* as properly understood provides a potential justification for upholding a precedent even though it has bred confusion and proved cumbersome to apply. For purposes of *stare decisis*, saying that a precedent is "unworkable" is functionally equivalent to saying it is "badly reasoned." These statements indicate only that a *stare decisis* inquiry is necessary, not how the inquiry should play out.

The previous section explained how reliance interests might be invoked to defend the inclusion of a precedent's wrongness as part of *stare decisis* analysis. A similar argument is available with respect to workability: Precedents that have been easy for lower courts and other stakeholders to understand and apply are relatively likely to have engendered a great deal of reliance. This is because when stakeholders see that a given doctrine is functioning smoothly and efficiently, they are (all else being equal) inclined to assume that the precedent is a stable component of Supreme Court jurisprudence.[54] They also are willing and able to organize their affairs based on the assumption that the precedent will remain binding law.[55] By contrast, a precedent that is a nightmare to understand probably does not generate significant reliance; onlookers will view the problematic precedent as creating

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53. *See, e.g.*, Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) ("Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of stare decisis once it is proved to be unworkable in practice; the mischievous consequences . . . from the perpetuation of an unworkable rule are too great."); Thomas R. Lee, Stare Decisis *in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. Rev. 643, 670 (2000) ("[U]nworkable decisions are by definition uncertain, so their retention should be expected to require ongoing and inefficient expenditures on measures aimed at divining their application and effect.").

54. *See* Lee, *supra* note 53, at 699–700 ("Adherence to precedent is usually the cost-minimizing course of action . . . .").

55. *Id.*

an unsustainable situation that will, sooner or later, be corrected in a subsequent decision.[56] Similarly, a precedent that has proven unworkable may generate minimal reliance because stakeholders are simply unable to predict what results it will yield.[57] Thus, the argument concludes, distinguishing between workable and unworkable precedents is a valuable part of the *stare decisis* inquiry.

The central flaw in this argument is its failure to account for reasonable yet intractable disagreements over whether a precedent really is unworkable. Such disagreements undermine any claim that reliance interests can be extrapolated from a precedent's perceived workability. *Altria* is a case in point. As noted by the dissenters, numerous lower courts had struggled to understand and apply *Cipollone*.[58] In *Altria*, the trial court noted that judges were "divided about what the decision means and how to apply it."[59] While the dissenters viewed these factors as sufficient to justify overruling *Cipollone*,[60] in the end they were outvoted. Five Justices conceded that *Cipollone* lacks "theoretical elegance" but nevertheless found it sound enough to carry the day.[61] In the end, while one could have pointed to a wealth of support for the view that *Cipollone* was fundamentally unworkable, hindsight shows that it would have been foolhardy to rely on the assumption that *Cipollone* would fall (at least for now).

A similarly evocative illustration comes from *Dickerson v. United States*,[62] where the Court reconsidered *Miranda v. Arizona*'s[63] famous ruling that in criminal cases, "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[64] Rebuffing Congress's attempt to displace *Miranda* with an

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56. *See, e.g.*, Barrett, *supra* note 33, at 1062 ("If . . . a litigant demonstrates that precedent demonstrably conflicts with the statutory or constitutional provision it purports to interpret, the role of reliance is significantly diminished, and possibly eliminated."); Tom Hardy, Note, *Has Mighty* Casey *Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 HASTINGS CONST. L.Q. 591, 596 (2007) ("[A]n unworkable legal rule is unlikely to be relied upon.").

57. *See* Lee, *supra* note 53, at 669–70 ("But when precedent produces confusion in the form of unpredictable results, the costs from retaining the 'unworkable' decision generally may outweigh the uncertainty created by overturning the precedent.").

58. Altria Group, Inc. v. Good, 129 S. Ct. 538, 555 (2008) (Thomas, J., dissenting).

59. Good v. Altria Group, Inc., 436 F. Supp. 2d 132, 142 (D. Me. 2006), *vacated*, 129 S. Ct. 538 (2008).

60. *Altria*, 129 S. Ct. at 555 (Thomas, J., dissenting).

61. *Id.* at 547–48 (majority opinion).

62. Dickerson v. United States, 530 U.S. 428, 431 (2000).

63. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

64. *Id.*

alternative test for evidentiary admissibility, the *Dickerson* Court turned to *stare decisis*. On the issue of workability, the majority determined that the *Miranda* requirements were easier "for law enforcement officers to conform to, and for courts to apply in a consistent manner," than Congress's alternative test would be.[65] Two dissenting Justices disagreed, noting that "[i]t is not immediately apparent . . . that the judicial burden has been eased by the 'bright-line' rules adopted in *Miranda*. In fact, in the 34 years since *Miranda* was decided, this Court has been called upon to decide nearly 60 cases involving a host of *Miranda* issues."[66] The workability of *Miranda*, it turns out, was largely in the eye of the beholder.[67]

The point is not that workability is irrelevant to choosing the appropriate rule of decision to govern a case. It surely has a role to play. But as opinions such as *Altria* and *Dickerson* demonstrate, there tend to be plausible grounds for debating whether Supreme Court precedents have proven unworkable. The existence of those debates makes it impossible to draw definitive conclusions about the relationship between perceived workability and reliance interests. In any given case, it might be that stakeholders have continued to rely on a precedent (like *Cipollone* or *Miranda*) notwithstanding doubts about its workability. Or perhaps they have dialed back their reliance on the hunch that an overruling is imminent. There is no way to know in the abstract without investigating the specific facts and circumstances surrounding a precedent.

B. Temporal and Doctrinal Considerations

Another set of concerns that emerges in *stare decisis* jurisprudence involves the effects of time. This category includes evolving factual

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65. *Dickerson*, 530 U.S. at 444.

66. *Id.* at 463 (Scalia, J., dissenting); *see also* Montejo v. Louisiana, 129 S. Ct. 2079, 2097 (2009) (Stevens, J., dissenting) ("[T]o reach the conclusion that the *Jackson* rule is unworkable, the Court reframes the relevant inquiry, asking not whether the *Jackson* rule . . . has proved easily administrable, but instead whether the Louisiana Supreme Court's cramped interpretation . . . is practically workable."); *id.* (concluding that the "answer to that question, of course, is no"); *id.* ("When framed more broadly, however, the evidence is overwhelming that *Jackson*'s simple, bright-line rule has done more to advance effective law enforcement than to undermine it.").

67. *Compare* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) ("[W]e find the application of the [governing precedent's] rule as elusive as did the District Court, and . . . we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem."), *with id.* at 134 (Douglas, J., dissenting) ("The Court calls the rule 'unworkable.' But it is not enough to attach that label. . . . [T]he truth of the matter is that there are no cases (not even the three cited) even remotely warranting the conclusion that [the precedent] is 'unworkable.'").

assumptions and understandings, the increased (or is it decreased?) claim to deference that a precedent garners with age, and how the prior overruling of analogous decisions affects the Court's willingness to stand by a precedent.

Notwithstanding their prominent role in *stare decisis* cases, these considerations provide little help in formulating a principled doctrine.

1. Evolving Understandings

A common feature of *stare decisis* debates is an assessment of the world *now* versus the time the precedent was *decided*.[68] The Court has described the inquiry as "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[69]

Consider *Atkins v. Virginia*,[70] which overturned *Penry v. Lynaugh*[71] and held that the Eighth Amendment's prohibition against "cruel and unusual" punishment forbids the execution of persons who are mentally retarded.[72] In examining whether a punishment is cruel and unusual, the Court historically has deemed it necessary to examine society's "evolving standards of decency."[73] The Court in *Atkins*—decided in 2002—set out to determine whether those standards had changed materially since 1989, when *Penry* was handed down and the execution of mentally retarded persons was found constitutionally permissible.[74] One of the points highlighted by the *Atkins* Court was that in the years following *Penry*, several states had prohibited the execution of mentally retarded persons, while no state had enacted legislation to permit such executions.[75] Phrased in terms of Eighth Amendment doctrine, this

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68. *Cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) ("The decision of the Court, if, in essence, merely the determination of a fact, is not entitled . . . to that sanction which, under the policy of stare decisis, is accorded to the decision of a proposition purely of law."). Justice Brandeis noted: "[N]ot only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile." *Id.*

69. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1991); *see also, e.g.*, Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) ("We cannot find in the respondents' claims any demonstration that circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions.").

70. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

71. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

72. *Atkins*, 536 U.S. at 307, 321.

73. *Id.* at 312.

74. *Id.* at 307.

75. *See id.* at 316 (stating that the "legislatures that have addressed the issue have voted overwhelmingly in favor of prohibition").

development suggested that the critical fact—society's evolving standards of decency—had shifted in a meaningful way, altering the calculus used to determine whether such executions are cruel and unusual punishments. The Court concluded that *Penry* could not stand.[76]

A similar phenomenon is visible in cases where the factual context has stayed the same, but our understanding of the facts has changed. In *Illinois Tool Works Inc. v. Independent Ink, Inc.*,[77] for example, the Court confronted a claim that a seller illegally tied together two of its products, one of which was patented.[78] Resolving the claim required the Court to consider a pure question of economics: When a seller receives a patent on a product, does it necessarily follow that the seller possesses market power?[79] The Court previously had determined that the answer was yes.[80] Since that time, "Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee."[81] In *Illinois Tool Works*, the Court finally rejected its prior position, announcing that market power would no longer be presumed.[82] Instead, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."[83]

This type of factual updating is unremarkable. Judges who are asked to decide a case will invariably take into account the relevant facts.[84] There is no alternative. Nor, however, is there any reason why this type of inquiry should be shoehorned into *stare decisis* analysis. There is little practical difference between a precedent grounded in faulty reasoning[85] and one grounded in outmoded factual assumptions. In both situations, the precedent is wrong on the merits. In both situations, *stare decisis* nevertheless might counsel in favor of preserving the precedent. And in both situations, it is improper to conflate the precedent's flaws—logical or factual—with whether the precedent should be preserved on *stare decisis* grounds notwithstanding its defects.

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76. *Id.* at 321; Roper v. Simmons, 543 U.S. 551, 574 (2005).

77. Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 46 (2006).

78. *Id.* at 32.

79. *Id.* at 35.

80. *Id.*

81. *Id.* at 45.

82. *Id.* at 46.

83. *Id.*

84. *See, e.g.*, W. Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797, 803 (1967) ("[W]hen it is obvious that one's previous actions turned out badly, or that circumstances are essentially different, the intelligent human being reviews the problem anew . . . .").

85. *Supra* Part II.A.1.

Still, the Court has included the factual backdrop among the canons of available *stare decisis* considerations, which makes it necessary to ask whether there is a coherent theory for linking that factor with the appropriate level of deference to precedent. In trying to formulate such a theory, we again come to an argument from reliance interests. The extent of reliance on a Supreme Court decision, the argument goes, derives in part from the integrity of the decision's factual assumptions. When those assumptions have changed significantly, there will be less reliance on the precedent by stakeholders, who will expect the Court to update—which is to say, overrule—the decision in light of new circumstances.

But determining whether facts and assumptions have markedly evolved is not always so easy. To illustrate, return to *Illinois Tool Works*. The evolving fact in that case had to do with assumptions about the market power generated from owning a patent.[86] Disproving that proposition is not quite as straightforward as, say, refuting the "Ptolemaic view that Earth was the center of the solar system."[87] In the latter situation, the incorrect factual assumption is clear and widely understood. Can we speak in similarly definitive terms about the market power conferred by a patent—or, to return to *Atkins* and *Penry*, about the evolution of society's standards of decency as they relate to the execution of mentally retarded persons?

For a similar example, consider the Court's treatment of one of the twentieth century's most infamous opinions, *Lochner v. New York*.[88] *Lochner*, of course, held that a law limiting how many hours bakery employees could work violated the Fourteenth Amendment by "interfer[ing] with the right of contract between the employer and employees concerning the number of hours in which the latter may labor."[89] The Court's holding reflected its broader view about how the liberty of contract restricted governmental authority to legislate on economic matters.[90] That approach was abandoned in 1937 by *West Coast Hotel Co. v. Parrish*,[91] where the Court upheld a minimum wage law and embarked upon a new era of construing the liberty of contract far more narrowly.[92] According to the Court's later explanation in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[93] the jurisprudential shift from *Lochner*

86. Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).

87. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 236 (3d ed. 2000).

88. Lochner v. New York, 198 U.S. 45, 64 (1905).

89. *Id.* at 53.

90. *Id.* at 64.

91. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

92. *Id.* at 397.

93. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992).

to *West Coast Hotel* owed to evolving facts and understandings: "[T]he lesson that seemed unmistakable to most people by 1937 [was] that the interpretation of contractual freedom protected in [cases following *Lochner*] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[94]

Now, *West Coast Hotel* clearly viewed *something* differently than *Lochner* did. And *West Coast Hotel* did cite "recent economic experience" as justifying the Court's new approach.[95] But is it really convincing to assert that the shift out of the *Lochner* era was predicated upon an issue as complex, debatable, and fundamentally unlegal as the plusses and minuses of "relatively unregulated market[s]"?[96] More to the point for our purposes, can it plausibly be argued that stakeholders in the 1930s should have updated their economic understandings and ceased relying on *Lochner* in the years leading up to *West Coast Hotel* due to prevailing winds of political and economic theory? I think the answer must be no.

This all goes to show why evolving factual assumptions, though relevant to how a case should be decided on the merits, are inapposite to the reliance interests that underlie the distinct issue of *stare decisis*. If the Court confronts a precedent like *Lochner*, and if it determines that the factual underpinnings of that precedent have changed in an important way, then by all means it should take the change into account when deciding upon the proper rule of decision.

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94. *Id.* at 861–62 ("[T]he clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law."); *cf. id.* at 862–63 (taking a similar approach to *Plessy v. Ferguson*, 163 U.S. 537 (1896), which was overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954)); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) ("[T]he judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned.").

95. *West Coast Hotel*, 300 U.S. at 399.

96. *Casey*, 505 U.S. at 862; *see also id.* at 960–61 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("When the Court . . . recognized its error in [*West Coast Hotel*], it did not engage in the *post hoc* rationalization that the joint opinion attributes to it today; it did not state that *Lochner* [was] based on an economic view that had fallen into disfavor . . . ."). Chief Justice Rehnquist continued:

> Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time [and were based on the belief that] "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930s is, insofar as anything the joint opinion advances, entirely speculative.

Id.

That is where the role of factual underpinnings begins, and that is where it ends. Once the Court has determined that the governing precedent is flawed, the underlying factual assumptions provide neither a reason for reaffirming nor a reason for overruling. The resolution of that issue—which is the province of *stare decisis*—must be driven by something else.

2. *Antiquity*

The Court sometimes instructs that older opinions are entitled to more deference than newer ones.[97] Interestingly enough, it occasionally takes the opposite position, explaining that recent opinions receive the greatest deference.[98] This ambivalence itself is enough to raise doubts about whether a precedent's antiquity can help to predict whether it will be upheld. Nevertheless, it is worth taking a moment to explore the underlying theories that these two divergent practices seem to reflect.

On the side of enhanced *stare decisis* effect for recent precedents, one potential justification is that reversing course too quickly could harm the Court's legitimacy.[99] As discussed in greater detail below, this sort of rationale is problematic in several respects. Most notably for present purposes, there is no reason to believe that the Court's legitimacy is in greater danger when

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97. *See, e.g.*, Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009) ("[T]he opinion is only two decades old, and eliminating it would not upset expectations."); United States v. Morrison, 529 U.S. 598, 622 (2000); Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.).

98. *Compare Montejo*, 129 S. Ct. at 2098 (Stevens, J., dissenting) ("[A]lthough the Court acknowledges 'antiquity' is a factor that counsels in favor of retaining precedent, it concludes that the fact *Jackson* is 'only two decades old' cuts 'in favor of abandoning' the rule it established."), *and id.* ("I would have thought that the 23-year existence of a simple bright-line rule would be a factor that cuts in the other direction."), *with id.* at 2093 (Alito, J., concurring) ("The dissent . . . invokes *Jackson*'s antiquity, stating that 'the 23-year existence of a simple bright-line rule' should weigh in favor of its retention. . . . But in [*Arizona v. Gant*], the Court had no compunction about casting aside a 28-year-old bright-line rule." (citing Arizona v. Gant, 129 S. Ct. 1710 (2009))), *and id.* ("I can only assume that the dissent thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young, nor too old . . . ."); *see also generally* Fisch, *supra* note 5, at 104 n.42.

99. *See, e.g.*, Philip P. Frickey, Stare Decisis *in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENT 123, 140 (1985) (arguing that overruling an eight-year-old precedent "might make the Court appear particularly arbitrary" and stating that "[t]he usual concern about overruling a recent precedent is that it may have fallen victim simply to a change in personnel rather than reasoned reconsideration"). *Contra* South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("It has been argued that we should not overrule so recent a decision . . . . I doubt that overruling *Booth* will so shake the citizenry's faith in the Court.").

it overrules a recent precedent than when it refuses to overrule a flawed precedent in an explicit effort to enhance its own public standing.[100]

To justify the opposite presumption—that long-standing precedents are entitled to the most deference—the best argument draws on the concept of reliance. The idea would be that the length of time an opinion has been on the books is correlated (positively) with the amount of reliance it has engendered, for the simple reason that stakeholders have had more time to understand the opinion, embrace it as governing law, and shape their conduct accordingly.[101] Recent opinions, by comparison, deserve relatively little deference because they are less likely to have generated significant reliance, giving the Court the opportunity to set matters straight before too much water is under the bridge. As Justice Scalia has put it, "[t]he freshness of error not only deprives [a precedent] of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it."[102]

But while the two concepts may be linked in some cases, antiquity has no necessary bearing on reliance. Reliance implications depend on a host of factors that may or may not align with a precedent's antiquity. A hundred-year-old decision interpreting the Constitution's Emoluments Clause,[103] for example, might not have garnered any appreciable reliance because few Americans have had occasion to rely on the Court's treatment of that provision. Yet a much more recent opinion involving the taxability of income earned on municipal bonds[104] might have engendered widespread reliance despite its youth as sensitive investors quickly modified their behavior in response. Antiquity itself tells us nothing.

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100. *See* Fallon, *supra* note 6, at 1150 ("As the *Lochner* era illustrates, for the Supreme Court to fail to renounce a sufficiently reviled decision could itself have devastating consequences for its perceived legitimacy."); *see also* Citizens United v. FEC, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring) ("[I]n the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal [of the rule of law] than to advance it, we must be more willing to depart from that precedent.").

101. *See, e.g.*, *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting) ("[T]he respect accorded prior decisions increases . . . with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity.").

102. *Id.*

103. U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . .").

104. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 128 S. Ct. 1801, 1804 (2008).

The Court adopts a similar approach in dealing with a precedent's track record of reaffirmance. In the words of one recent opinion, deference to precedent is particularly important where a rule of decision "has become settled through iteration and reiteration over a long period of time."[105] We might posit two explanations for this rule. First, opinions that have been reconsidered and reaffirmed are more likely to be correct on the merits; reviewing the issue on multiple occasions reduces the risk of an erroneous result. Such a theory, I have argued above, cannot serve as a component of *stare decisis* doctrine, which must operate independently of merits considerations to carry any real meaning.

The second explanation revolves around reliance. One might argue that reaffirmance of a precedent leads to enhanced reliance, reflecting a popular belief that the Court is less likely to reverse a decision it has embraced on multiple occasions. By that logic, an opinion like *Marbury v. Madison*[106] deserves significant *stare decisis* effect in part because its continual reaffirmance has left stakeholders without any reason to doubt its vitality, and thus without any reason to scale back their reliance.

This argument, though, ends up unraveling. At least in some cases, the converse inference turns out to be just as plausible. A precedent may have drawn the Court's continued attention precisely because some Justices harbor doubts about it. Take, for example, *Booth v. Maryland*,[107] which held that during the sentencing phase of a capital murder trial, the Eighth Amendment "prohibit[ed] a jury from considering a 'victim impact statement'" that "describe[d] the effect of the crime on the victim and his family."[108] *Booth* was reaffirmed and extended two years later in *South Carolina v. Gathers*.[109] Given the reaffirmance, one might have expected that reliance on *Booth* and *Gathers* would have been justifiable going forward. And yet both opinions were soon reversed, over Justice Marshall's powerful dissent, in *Payne v. Tennessee*.[110]

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105. Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.); *see also, e.g.*, Dickerson v. United States, 530 U.S. 428, 443–44 ("If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."); Erie R. Co. v. Tompkins, 304 U.S. 64, 84 (1938) (Butler, J., dissenting) ("The doctrine of [*Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)] has been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge.").

106. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

107. Booth v. Maryland, 482 U.S. 496, 498 (1987).

108. *Id.*

109. South Carolina v. Gathers, 490 U.S. 805, 810–11 (1989).

110. Payne v. Tennessee, 501 U.S. 808, 825 (1991).

To be sure, the reversal in *Payne* followed certain personnel changes on the Court; the majority included two Justices who were not around for *Booth* and one who was not around for *Gathers*.[111] Nevertheless, the example underscores that reliance implications are complex and multivalent, requiring evaluation on a case-by-case basis rather than adherence to inflexible heuristics. Returning to our previous example, it is more fruitful to think about the profound disruption that overruling a case like *Marbury* would create for our societal and governmental structure than it is to draw lessons from the fact that *Marbury* has been reaffirmed five, or fifty, or five hundred times.

3. Remnants and Anachronisms

Another intriguing subset of precedents are those that have escaped overruling for themselves but that belong to disfavored lines of cases—in the parlance of the Court, precedents whose "underpinnings" have been "eroded" by subsequent decisions.[112] When a precedent falls into this category, the Court is more inclined to treat it as an anachronism that should be overturned.[113] The Court has framed the inquiry as "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[114]

Recall *Illinois Tool Works*, where the Court noted that the "presumption of market power in a patented product," formerly accepted in the field of

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111. *See id.* at 850 (Marshall, J., dissenting) ("It takes little detective work to discern just what *has* changed since this Court decided *Booth* and *Gathers*: this Court's own personnel.").

112. *See* United States v. Gaudin, 515 U.S. 506, 521 (1995) ("And we think *stare decisis* cannot possibly be controlling when . . . the decision in question has been proven manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court.").

113. *See* Fisch, *supra* note 5, at 96 ("Over a series of decisions, a precedent that is never formally overruled may lose much of its force through incremental judicial decisionmaking.").

114. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992); *see also, e.g.*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1469 n.8 (2009) (noting that if the majority were to adopt the dissent's broader reading of a precedent involving the construction of arbitration agreements, "given the developments of this Court's arbitration jurisprudence in the intervening years . . . [the precedent] would appear to be a strong candidate for overruling"); Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) ("Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles."); *Gaudin*, 515 U.S. at 520 ("But the reasoning of *Sinclair* has already been repudiated in a number of respects."); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

intellectual property, had since been rejected.[115] The Court deemed it appropriate to consider whether the presumption should likewise be rejected "as a matter of antitrust law."[116] Recognizing that "the patent misuse doctrine" within the universe of intellectual property had "provided the basis for the market power presumption" in antitrust, the Court concluded that it would be "anomalous to preserve the presumption" in the antitrust context "after Congress has eliminated its foundation."[117]

A similar illustration comes from *Lawrence v. Texas*,[118] dealing with the constitutionality of a state statute "making it a crime for two persons of the same gender to engage in certain intimate sexual conduct."[119] The Court previously held that such laws were valid in *Bowers v. Hardwick*.[120] Some seventeen years later, the Court revisited the issue in *Lawrence* and reached the opposite conclusion.[121]

Explaining its reversal of course, the *Lawrence* Court relied in part on a recent case involving a state's treatment of homosexuality in a different context.[122] That case was *Romer v. Evans*,[123] where a divided Court invalidated an amendment to the Colorado Constitution that "prohibit[ed] all legislative, executive, or judicial action at any level of state or local government designed to protect . . . homosexual persons."[124] In *Lawrence*, the Court explained how *Romer* invalidated state action that was "born of animosity toward the class of persons affected."[125] While *Romer* was not facially inconsistent with the Court's prior upholding of laws that criminalized intimate conduct between persons of the same gender, its broader principles were deemed to have undercut that precedent.

The *Lawrence* Court also invoked a second intervening precedent as eroding the "foundations" of *Bowers*:[126] *Planned Parenthood of Southeastern*

115. Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).

116. *See id.* ("The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law.").

117. *Id.* at 42.

118. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

119. *Id.* at 562.

120. Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986).

121. *Lawrence*, 539 U.S. at 579.

122. *Id.* at 574.

123. Romer v. Evans, 517 U.S. 620, 623 (1996).

124. *Id.* at 624.

125. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting *Romer*, 517 U.S. at 634).

126. *Id.* at 576.

Pennsylvania v. Casey, which upheld the core holding of *Roe v. Wade*[127] that there is a constitutional right to nontherapeutic abortion in certain circumstances.[128] According to the *Lawrence* Court, *Casey* "reaffirmed the substantive force of the liberty protected by the Due Process Clause"[129] and "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"[130]—protection that extends to the decision to enter into a consensual, intimate relationship with someone of the same gender.[131]

Ultimately, the *Lawrence* Court concluded that *Bowers* was so misguided as to have been wrong even "when it was decided."[132] For purposes of *stare decisis*, that statement is less illuminating than the Court's invocation of *Romer* and *Casey*. In the Court's view, by the time *Lawrence* came up for decision, the jurisprudential vision underlying *Bowers* had become outmoded due to developments in related areas.[133] While *Bowers* technically had remained good law, *stare decisis* did not pose any real obstacle to its overruling.[134] The opinion was dismissed as a remnant of discredited ways of thinking about the Constitution.[135]

Cases like *Lawrence* and *Illinois Tool Works* provide vivid illustrations of the "remnant" factor in action. Still, they do not adequately explain why reduced deference is appropriate as a matter of theory. In searching for such an explanation, we are left to our own devices. The two most plausible justifications involve the precedent's wrongness on the merits and the effects of overruling the precedent on reliance interests.

To begin with the merits: One theory for overruling a remnant of abandoned doctrine is that abandoned lines of cases reflect incorrect interpretations of the law.[136] Any lingering vestiges survive not because they

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127. Roe v. Wade, 410 U.S. 113, 154 (1973).

128. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

129. *Lawrence*, 539 U.S. at 573.

130. *See id.* at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.").

131. *Id.* at 573 n.74.

132. *Id.* at 578.

133. *Id.* at 576–77.

134. *Id.*

135. *Id.*

136. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedental Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1560 (2000) ("The fact that *Roe*'s doctrinal legs have been cut from underneath it clearly affects what judicial doctrine should be, suggesting that the Court should reconsider *Roe* and that a major chunk of the stare

are correct, but rather because the Court has not yet gotten around to discarding them.[137] That being so, the theory is that the Court should overrule remnants at its earliest opportunity.

As we have seen, this sort of argument lacks traction because conflating wrongness with *stare decisis* tells us nothing about whether the Court should stand by a precedent notwithstanding doubts about its merits.[138] Even putting that problem aside, there is another objection to using the remnant factor as yielding definitive conclusions about a precedent's correctness: At least in some cases, it seems equally reasonable to assume that there is a good reason why a precedent has persisted even though related cases have fallen—for example, because the surviving precedent is correct on the specific issue it addresses.

An interesting case study involves state taxation of out-of-state or interstate activities. In *Quill Corp. v. North Dakota*,[139] the Court evaluated a North Dakota law that required out-of-state retailers to collect and remit taxes on goods destined for use in North Dakota.[140] The Court had invalidated a similar statute twenty-five years earlier in *National Bellas Hess, Inc. v. Department of Revenue*,[141] holding that the statute "violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce."[142] In *Quill*, the Court overruled itself on the due process question and renounced *Bellas Hess*'s rule.[143] According to the Court, "[o]ur due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*," and "we have abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable . . . to require it to defend the suit in that State."[144] It concluded that "to the extent that our decisions have indicated that the Due Process Clause requires physical presence

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decisis reasoning of *Casey* for reaffirming *Roe* is no longer persuasive (if it ever was).").

137. *See id.* ("The question of whether Precedent *A* has been undermined by Precedent *B* (or series of precedents *B*, *C*, *D*, and *E*) is another way (albeit a roundabout, convoluted way) of asking whether Precedent *A* is right or not.").

138. *Supra* Part II.A.1.

139. Quill Corp. v. North Dakota, 504 U.S. 298, 308, 317–18 (1992).

140. *Id.* at 301.

141. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 756–58 (1967).

142. *Quill*, 504 U.S. at 298.

143. *Id.* at 307–08.

144. *Id.* at 307.

in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process."[145]

Notwithstanding its ruling on due process, the Court still had to decide whether North Dakota's tax was an unconstitutional burden on interstate commerce.[146] The majority considered the argument that the rule of *Bellas Hess* should be discarded because in subsequent cases "concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement."[147] Yet it determined that "our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes."[148] The Court asserted that the specific rule announced in *Bellas Hess* could be squared with modern Commerce Clause jurisprudence even though inflexible, brightline tests seemingly had fallen out of favor.[149] It also acknowledged the extensive reliance *Bellas Hess* had engendered, noting that the rule of that case "has become part of the basic framework of a sizeable industry."[150] In the end, the Court concluded that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law."[151] *Quill* thus provides a cautionary tale against sweeping generalizations about the merits and sustainability of doctrinal remnants.

We might envision a related argument advocating reduced deference for remnants on the theory that doctrinal outliers generate inconsistency, creating costly inefficiencies in the judicial system and beyond.[152] When one precedent in a line of otherwise consistent decisions takes a sharp turn, it can require the Court to engage in precarious line-drawing to determine where future cases fit in. This difficulty trickles down to lower courts, attorneys, and other

145. *Id.* at 308.

146. *See id.* at 305 ("[W]hile a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.").

147. *Id.* at 317.

148. *Id.*

149. *See id.* ("[A]lthough in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar . . . requirement, . . . the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law.").

150. *Id.*; *cf. id.* at 321 (Scalia, J., concurring in part) ("Having affirmatively suggested that the 'physical presence' rule could be reconciled with our new jurisprudence, we ought not visit economic hardship upon those who took us at our word.").

151. *Id.* at 317 (majority opinion).

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

stakeholders, complicating their assessments of the legal landscape. Where the distinction between run-of-the-mill precedents and outlier precedents is murky, the aggregate effects may be considerable.

At bottom, though, this argument represents another way of talking about the proper result on the merits. It reflects the underlying notion that consistent lines of precedent are more desirable than inconsistent ones. The implication is that in choosing the proper rule of decision to govern any given case, the Court should prefer rules that are consistent with existing law and that reduce the need for costly, uncertain line-drawing. This approach makes a great deal of pragmatic sense. But it does not inform the question of how much deference is owed to a precedent irrespective of the merits, making it exogenous to the doctrine of *stare decisis*.

The interplay between *Quill* and *Bellas Hess* also suggests the flaws in trying to justify the remnant consideration on reliance grounds. The reliance argument would presume that stakeholders are relatively unlikely to put faith in the continued vitality of a precedent that appears to be a remnant of an abandoned doctrine.[153] The reason is that stakeholders will view such precedents as ripe for overruling just as soon as the Court finds the right opportunity. The *Quill* Court's treatment of *Bellas Hess* shows why this rationale should not be accepted as a general rule.[154] Despite the strong indications that *Bellas Hess* belonged to a simpler, bygone era of Commerce Clause jurisprudence,[155] the Court preserved the decision by finding that it "turned on a different logic and thus remained sound."[156] The Court also focused on the reliance interests that would be *upset* by overruling *Quill*, making plain its view that stakeholders had not abandoned all hope.[157]

Examples like *Quill* undermine the notion that some sort of consensus necessarily develops around remnants of abandoned doctrines whereby onlookers assume that an overruling is imminent. In reality, the situation is more complicated, and assessing whether a given precedent is a remnant

153. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 332 (1992) (White, J., dissenting in part) ("To the extent Quill developed any reliance on the old rule, I would submit that its reliance was unreasonable . . . .").

154. *See id.* at 314 (majority opinion) ("Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule.").

155. *See id.* at 331 (White, J., dissenting in part) ("Though legal certainty promotes business confidence, the mail-order business has grown exponentially despite the long line of our own post-*Bellas Hess* precedents that signaled the demise of the physical presence requirement.").

156. *Id.* at 317 (majority opinion).

157. *Id.*

doomed to overruling or rather a stalwart survivor that will continue to fend off challenges is often uncertain. As Justice Scalia explained in his concurrence in *Quill*, it is "important that we retain our ability . . . sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict."[158] But "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance (though reliance alone may not always carry the day)."[159]

The point is punctuated by a series of recent decisions involving the constitutional adequacy of criminal sentencing procedures. In 2000, the Court shook up the doctrinal backdrop for sentencing decisions in *Apprendi v. New Jersey*.[160] The case involved a New Jersey statute that authorized a judge to increase a criminal defendant's sentence if the judge determined, based on the preponderance of the evidence, that the defendant's offense was a hate crime. The defendant in *Apprendi* argued that this procedure violated his constitutional rights. The Supreme Court agreed, holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[161]

The Court also announced a curious exception: Its ruling did not apply to "the fact of a prior conviction."[162] The explanation for this exception traces back to *Almendarez-Torres v. United States*,[163] where the Court indicated that prior criminal convictions may, consistent with the Constitution, be treated as mere sentencing factors rather than actual elements of the charged offense.[164] The Court in *Apprendi* recognized that its statements about the constitutional requirements for sentencing were in tension with *Almendarez-Torres*, going so far as to acknowledge the "arguable" possibility that "*Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested."[165] That issue, though, was not before the *Apprendi* Court, which saw fit to leave *Almendarez-Torres* intact.[166]

We might have expected *Almendarez-Torres* to fall soon after *Apprendi*. Nearly a decade later, that has not occurred. Despite having received numerous requests to overrule *Almendarez-Torres*, and despite having extended and

158. *Id.* at 320–21 (Scalia, J., concurring in part).
159. *Id.* at 321 (emphasis in original).
160. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
161. *Id.*
162. *Id.*
163. Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998).
164. *Id.*
165. *Apprendi*, 530 U.S. at 489–90 (footnote omitted).
166. *Id.* at 490.

expounded upon *Apprendi*'s rule in several significant cases,[167] the Court has left *Almendarez-Torres* on the books.

Perhaps *Almendarez-Torres* cannot last much longer. Or perhaps it will hang on indefinitely. Either way, *Apprendi* and its progeny tell us little about whether *Almendarez-Torres* should be relied upon by stakeholders such as prosecutors, defense attorneys, and legislators. It might be that all factual determinations that extend a criminal sentence eventually will need to be submitted to a jury. It might also be that there is a defensible justification for treating prior criminal convictions as occupying a special category. In terms of assessing the reliance implications of overruling precedent, the key issue is not whether we view *Almendarez-Torres* as having its foundations eroded by *Apprendi* and related cases. Rather, in asking whether a case like *Almendarez-Torres* deserves deference, the inquiry should be much more direct: Do the reliance interests implicated by the decision justify upholding it even if the Court suspects or concludes that it is incorrect on the merits?

4. Unclean Hands

If a precedent represents a break from the cases that came before it, it tends to receive diminished *stare decisis* effect. The principle resembles an "unclean-hands" exception to the doctrine of *stare decisis*: An opinion borne of inadequate respect for its ancestors should expect the same irreverent treatment from its heirs.[168]

A vivid example is *Pennsylvania v. Union Gas Co.*,[169] which was overruled by *Seminole Tribe of Florida v. Florida*.[170] In *Union Gas*, a four-Justice plurality concluded that Congress may use its powers under the Commerce Clause to authorize lawsuits for money damages against states.[171] (A fifth Justice concurred in the judgment.) The plurality reasoned that, "to the extent that the States gave Congress the authority to regulate commerce, they

167. *See, e.g.*, United States v. Booker, 543 U.S. 220, 226 (2005) (applying the Sixth Amendment to the Federal Sentencing Guidelines); Blakely v. Washington, 542 U.S. 296, 305 (2004) (applying the Sixth Amendment to state sentencing laws).

168. *Cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817 (1982) ("[E]ach Justice may find it advantageous to follow rules announced by his predecessors, so that successors will follow his rules in turn.").

169. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989) (plurality opinion).

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

171. *Union Gas*, 491 U.S. at 5 (plurality opinion).

also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable."[172]

Flash forward to 1995, when the Court revisited the issue in *Seminole Tribe*.[173] This time the Court went the other way, holding that Article I of the Constitution does not authorize Congress to subject nonconsenting states to lawsuits for money damages.[174] In defending its refusal to stand by *Union Gas*, the majority countered that *Union Gas* itself represented a reversal of course: "The plurality's rationale . . . deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in" *Hans v. Louisiana*,[175] which the majority described as embracing the "constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III."[176] For this and other reasons, the Court felt "bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled."[177]

Once again, there are two principal ways we might explain the inclusion of the unclean-hands consideration within the Court's *stare decisis* jurisprudence.

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172. *Id.* at 19–20.

173. Technically, *Seminole Tribe* dealt with Congress's power to regulate commerce with Indian tribes, not commerce among the several states as in *Union Gas*. *Seminole Tribe*, 517 U.S. at 47. The distinction is immaterial for our purposes.

174. *Id.*

175. Hans v. Louisiana, 134 U.S. 1, 20–21 (1890).

176. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996); *see also id.* at 65 ("Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment."); *id.* at 66 ("[B]oth the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III.").

177. *Id.*; *see also, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring) ("[A]s the majority explains, [the relevant precedent] was an 'aberration' insofar as it departed from the robust protections we had granted political speech in our earlier cases."); United States v. Gaudin, 515 U.S. 506, 521 (1995) ("That leaves as the sole prop for *Sinclair* its reliance upon the unexamined proposition . . . that materiality in perjury cases . . . is a question of law for the judge. But just as there is nothing to support *Sinclair* except that proposition, there is . . . nothing to support that proposition except *Sinclair*."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995) (opinion of O'Connor, J.) ("Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error . . . ."); United States v. Dixon, 509 U.S. 688, 704 (1993) ("*Grady* lacks constitutional roots. The 'same-conduct' rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy."); Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("[*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.").

The first is that deviations from established lines of precedent are more likely to be wrong on the merits than opinions that are consistent with their predecessors. Even if we accept that (oversimplified) premise, it is unhelpful with respect to applying *stare decisis* in any given case; instead, it lapses into conflation of merits issues with the proper question of how much deference is due irrespective of a precedent's soundness.[178]

The second possible explanation for the unclean-hands consideration reflects the importance of reliance interests. The argument would be that deviations from established precedent engender relatively little reliance because onlookers expect the Court to bring the outlying opinions back into line. Likewise, stakeholders will be reluctant to rely on precedent that is the product of overruling for fear that if the law was sufficiently fluid to permit the pendulum to swing one way, it might allow the pendulum to swing back.

On either rationale, this reliance argument is difficult to accept. It seems dubious to assert that a case like *Union Gas* inspired relatively little reliance because stakeholders viewed it as a deviation from *Hans*. What is more, the reliance argument is undermined by the fact that unclean-hands analysis will often be indeterminate. Just think about the roster of questions that need to be answered before an opinion can be classified as an interloper undeserving of deference: Does it matter whether the Court squarely confronted the opinion's antecedents as opposed to tacitly undercutting them? Is there any kind of temporal limit on how far down a line of precedents the Court should look—a sort of "adverse possession" whereby an opinion is eventually cleansed of its transgressions and made worthy of full deference? Why doesn't the decision of the later, outlier Court have a claim to enhanced deference precisely because it was issued after the earlier precedents?[179] And so on.

There is also the problem of interconnectedness. The law is full of doctrines that are in some sense related. If the presence of an (arguably) inconsistent precedent in any (arguably) related field is enough to call into question an opinion's *stare decisis* effect, few opinions will be entitled to deference. Moreover, searches for arguably inconsistent precedents will frequently turn up conflicting results, leaving the deference issue unresolved and robbing the unclean-hands consideration of any constructive function.

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178. *Supra* Part II.A.1.

179. *Cf.* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 60–61 (1989) ("What is clear is that the reasons for constraining a court to follow a precedent court's rule even when the constrained court believes the rule is ill-advised apply with no less force [when] the constrained court thinks the precedent court's rule is a misinterpretation of an earlier court's rule.").

5. Synchronization

In *United States v. Morrison*,[180] a case dealing with the scope of congressional authority under the Fourteenth Amendment, the Court stated that "[t]he force of the doctrine of *stare decisis* behind [certain precedents] stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court" that issued the decisions.[181] In two precedents the *Morrison* Court opted to follow, "[e]very Member [of the deciding Court] had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment."[182]

Similarly, in the recent wine-shipping cases,[183] both Justice Stevens and Justice Thomas expressed the view that precedents interpreting the Twenty-First Amendment are entitled to heightened deference if they were issued close in time to ratification by Justices that lived through the ratification process.[184] Their rationale, like that of the Court in *Morrison*, is akin to a preference for eye-witness testimony over hearsay: Those Justices who were around to watch the enactment of a constitutional provision are presumed to have unique insight into the provision's proper interpretation.

This presumption, which is based on the synchronization of a provision's enactment with its interpretation by the Court, needs a bit of unpacking. With respect to any precedent the current Court is reconsidering, if there is a record explaining why the enactment-era Justices felt as they did, that record will be available to the later Court. Where it makes clear how the case should come out, the result will be evident. If, by contrast, there is no record to explain how the enactment-era Justices reached their conclusions, any assumption about their special insight seems like a leap. It is unclear why certain judges should be viewed as uniquely qualified to divine the meaning of a constitutional provision simply by virtue of having been around for its enactment. It can be difficult enough to agree on what the *framers* of a

180. United States v. Morrison, 529 U.S. 598, 601–02 (2000).

181. *Id.* at 622.

182. *Id.*

183. *See generally* Granholm v. Heald, 544 U.S. 460 (2005).

184. *See id.* at 495 (Stevens, J., dissenting) ("The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference . . . ."); *id.* at 522 (Thomas, J., dissenting) ("Moreover, I would resolve any conflict in this Court's precedents in favor of those cases most contemporaneous with the ratification of the Twenty-first Amendment.").

provision—those who actually had a role in negotiation, drafting, and enactment—thought they were achieving. The assumption that judges who may or may not have played a part in the enactment process automatically possess some singular understanding is even more wobbly.

Of course, the current Court also faces risks of misinterpretation and misapplication. At least where a case is exceptionally close or difficult, why not defer to the prior Court—which at least *might* have had extra insight—instead of accepting the current Court's best guess?

This is a sensible question, but I think it underestimates the importance of the Court's expression of its rationale. Even where an issue of constitutional interpretation is extremely close, the Court will offer a reasoned explanation of how it has reached its decision. The Court does not simply hand down mandates from on high, but rather acknowledges an obligation to explain itself to the public—and, through that acknowledgement, promotes acceptance, stability, and the rule of law. By contrast, if the current Court defers to a precedent on grounds of synchronization, there is a vacuum where the rationale should have been. The most we can surmise is that the current Court's practice is to defer; we are left with no explanation of why the predecessor Court decided as it did, which is critical to understanding why the law is the way it is. While it is perfectly appropriate for the current Court to consult the sources used by its predecessor, and to pay careful attention to whatever reasoning and analysis was furnished by the prior Court, the notion that close cases should be resolved on synchronization grounds is unpersuasive.

In any event, the synchronization argument goes only to the merits of the case at hand, reflecting the chances that the precedent reflects a correct interpretation of the law. As we have seen, merits-based considerations have no legitimate station within *stare decisis* jurisprudence.

C. Technical Considerations

1. Nature of Decisional Rule

Certain categories of decisional rules receive greater deference than others. A ready illustration comes from *Payne v. Tennessee*.[185] As noted above, the issue there was the admissibility of "victim-impact evidence" at the sentencing phase of capital murder trials.[186] In *Payne*, that evidence involved the suffering

185. Payne v. Tennessee, 501 U.S. 808, 825 (1991).

186. *Supra* notes 107–10 and accompanying text.

of a three-year-old boy whose mother and sister had been murdered.[187] According to the defendant, introduction of the evidence violated the Eighth Amendment by allowing the jury to base its sentencing determination on factors unrelated to the defendant's true blameworthiness.[188]

Payne was not the Court's first foray into victim-impact evidence. Only two years earlier, it held in *South Carolina v. Gathers*[189] that such evidence was forbidden by the Eighth Amendment.[190] *Gathers* was a reaffirmance and an extension of *Booth v. Maryland*,[191] itself decided two years prior.

In *Payne*, a new majority announced that it disagreed with the decisions in *Booth* and *Gathers*.[192] Chief Justice Rehnquist's opinion for the Court interpreted the Constitution as providing that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant," including victim-impact evidence.[193] The Court then moved to *stare decisis*, evaluating whether it should retain *Booth* and *Gathers* notwithstanding its disagreement with them.[194] Among other things, the Court focused on the nature of the rule in question. It explained that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved."[195] By contrast, "the opposite is true in cases . . . involving procedural and evidentiary rules."[196] The issue in *Payne* did not involve anything like a contractual right; rather, it dealt with the admissibility of certain evidence at a death-penalty trial.[197] The Court thus had little trouble finding that *stare decisis* could not preserve *Booth* and *Gathers*.[198]

The current Court has continued to embrace this distinction between property and contract rules on the one hand and evidentiary and procedural rules on the other. A fresh example is *Pearson v. Callahan*,[199] decided in 2009.

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187. *Payne*, 501 U.S. at 814–16.
188. *Id.* at 816–17.
189. South Carolina v. Gathers, 490 U.S. 805 (1989).
190. *Id.* at 810.
191. Booth v. Maryland, 482 U.S. 496 (1987).
192. Payne v. Tennessee, 501 U.S. 808, 825 (1991).
193. *Id.*
194. *Id.* at 827.
195. *Id.* at 828.
196. *Id.*
197. *Supra* notes 186–88 and accompanying text.
198. Payne v. Tennessee, 501 U.S. 808, 830 (1991).
199. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

Pearson dealt with the procedure a trial court should use in resolving a claim of qualified immunity by a government official.[200] The Court previously had addressed this issue in *Saucier v. Katz*.[201] *Saucier* taught that a trial judge must begin by considering whether the official violated the Constitution.[202] If the answer was yes, the judge would then ask whether the violation involved a right that was clearly established.[203] Only if the right was clearly established would the invocation of qualified immunity be defeated.[204]

Some critics, including Justices of the Supreme Court, viewed *Saucier*'s framework as unnecessarily formal and burdensome.[205] *Pearson* eventually responded to that criticism by rejecting the *Saucier* approach as a mandatory rule and, instead, giving trial courts the option of determining that a claimed constitutional right was not clearly established without deciding whether the right was actually violated.[206] On the topic of *stare decisis*, *Pearson* explained that, "[l]ike rules governing procedures and the admission of evidence in the trial courts," the sequence of a trial court's analysis in reviewing a defense of qualified immunity "does not affect the way in which parties order their affairs" and "would not upset settled expectations on anyone's part."[207]

The issue is not always so straightforward. Consider *Hohn v. United States*.[208] There, the Court asked whether it had jurisdiction "to review decisions of the courts of appeals denying applications for certificates of appealability," which a petitioner in a federal habeas corpus proceeding needs in order to appeal from an adverse district court decision.[209] The Court found that it did indeed possess the requisite jurisdiction, but it acknowledged that its conclusion was "in direct conflict" with a precedent issued some fifty years earlier.[210] Explaining its conclusion that the precedent should be overruled, the

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200. *Id.* at 815–16.

201. Saucier v. Katz, 533 U.S. 194, 200–01 (2001).

202. *Id.* at 201.

203. *Id.*

204. *Id.*

205. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now.").

206. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

207. *Id.* at 816 (citations omitted); *see also, e.g.*, United States v. Gaudin, 515 U.S. 506, 521 (1995) (noting that the impact of *stare decisis* "is somewhat reduced . . . in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior").

208. Hohn v. United States, 524 U.S. 236, 253 (1998).

209. *Id.* at 238–39.

210. *Id.* at 251. The discordant precedent was *House v. Mayo*. House v. Mayo, 324 U.S. 42, 44 (1945) (per curiam).

Court noted among other things that it will accord relatively little deference to a "rule of procedure that does not alter primary conduct."[211]

Justice Scalia's dissent described the basis for this practice as the proposition that "procedural rules do not *ordinarily* engender detrimental reliance."[212] As he explained, "ordinarily" is the key; procedural rules can sometimes engender a great deal of reliance. Justice Scalia focused on congressional reliance, asserting that "with [the precedent that *Hohn* overruled] on the books[,] . . . Congress presumably anticipated that [the statutory provision governing certificates of appealability] would be interpreted in the same manner."[213] He concluded that the precedent should be preserved "regardless of its virtue as an original matter."[214]

Less important than choosing between the majority and dissenting positions in *Hohn* is accounting for the disagreement itself. Whether a given dispute deals with procedure or with substance has no inherent relevance to the doctrine of *stare decisis*. The distinction is illuminating only insofar as it affects reliance interests. And though it will often be the case that reliance interests are upset relatively severely by altering substantive rules but relatively mildly by altering procedural rules, that need not be true.[215] Justice Scalia viewed the decision in *Hohn* as having generated significant reliance even though it dealt with a procedural rule.[216] For a starker example, consider the attorney-client privilege: While privilege rules are evidentiary in nature and do not affect the legality of primary conduct, the standards governing the scope of the attorney-client privilege engender enormous reliance every day as individuals and organizations structure their communications with legal counsel.[217]

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211. *Hohn*, 524 U.S. at 252.

212. *Id.* at 259 (Scalia, J., dissenting) (emphasis in original).

213. *Id.* at 262 (footnote omitted).

214. *Id.* at 259.

215. *Cf.* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1087 (1997) ("Substantive rules are not inherently more important to a litigant than procedural rules; both can be outcome determinative. Procedural rules affect the degree and quality of access to the legal system and thus determine the protection afforded by substantive legal rules and remedies." (footnotes omitted)).

216. *Supra* notes 212–13 and accompanying text.

217. *Cf.* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." (citations omitted)). "[P]rivilege 'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from consequences or the apprehension of disclosure.'" *Id.* (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

The point is that the nature of a decisional rule is an imperfect proxy that must not be mistaken for the underlying reliance implications of overruling a particular precedent with its own factual backdrop. The wiser course is to resist viewing the substantive/procedural distinction as carrying some independent force, and to concentrate instead on the actual reliance interests at stake.

2. *Voting Margins and Dissents*

The number of votes a precedent commanded and the presence of a vigorous dissent can affect the degree of deference the precedent receives. The Court has described the question as whether the precedent was "decided by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings."[218]

One possible justification for this practice is that a divided Court and a vigorous dissent signal an opinion's debatable foundations on the merits.[219] Such a theory is problematic for the reasons explained above; in short, shoehorning consideration of the merits into the *stare decisis* inquiry is unhelpful in determining whether a precedent warrants preservation notwithstanding its wrongness.[220]

Nor is a sharply divided Court necessarily indicative of an opinion that is weak on the merits. When an issue divides the Court and prompts vigorous dissents, the issue probably received full vetting and extensive consideration.[221] Justice Marshall made this point in *Payne v. Tennessee*, reasoning that "[t]here is nothing new in the majority's discussion of the supposed deficiencies in [the two precedents under review]. Every one of the arguments made by the majority can be found in the dissenting opinions filed in those two cases."[222]

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218. Payne v. Tennessee, 501 U.S. 808, 828–29 (1991).

219. *See* Fisch, *supra* note 5, at 104 ("Presumably the Court views the technical deficiencies in these cases as a proxy for merit-based analysis. For example, a close decision arguably is less likely to be correct than one commanding the support of all nine Justices." (footnote omitted)).

220. *Supra* Part II.A.1.

221. *See* Citizens United v. FEC, 130 S. Ct. 876, 925 (2010) (Roberts, C.J., concurring) ("We have . . . had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues."); Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 179 (2002) ("By writing a vigorous dissent that points out all the terrible implications of the court's opinion, the record stands that the court was aware of this and was willing to go ahead anyway." (footnote omitted)).

222. *Payne*, 501 U.S. at 846 (Marshall, J., dissenting).

Indeed, one might suggest that a later Court should sometimes accord *enhanced* deference to this type of battle-tested, fully-vetted opinion. As the Court wrote in *Patterson v. McLean Credit Union*:[223]

> The arguments about whether [the relevant precedent] was decided correctly in light of the language and history of the statute were examined and discussed with great care in our decision. It was recognized at the time that a strong case could be made for the [opposing view] . . . but that view did not prevail.[224]

These examples illustrate why it is impossible to make any absolute pronouncements about the relationship between a precedent's correctness on the merits and the degree to which it divided the Court.

Alternatively, we might try to preserve the "divisiveness" factor by falling back on reliance interests. The argument would be that a five-to-four decision means the Court is only one vote away from changing its mind.[225] As a result, stakeholders will shy away from ordering their affairs based on assumptions about the decision's continuing vitality. The problem with this argument is that it depends on a lengthy string of contingencies. The issue that was before the Court must arise again in a context that provides a suitable vehicle for review. There must be four votes in favor of granting certiorari to reconsider the issue. A new Justice or a member of the former majority must overcome compunctions about *stare decisis* to vote with the former dissenters, and all the former dissenters must overcome similar compunctions to vote in favor of overruling. This pervasive uncertainty undermines the argument that stakeholders will necessarily decline to rely on a precedent because of its closely divided nature.

III. Reliance-Lite

I suggested in the previous Part that modern *stare decisis* jurisprudence is most usefully viewed as an assemblage of overgeneralized proxies for the reliance interests implicated by the overruling of a precedent.

The Court's proclivity for employing proxies does not mean it never discusses reliance interests directly. Its decisions often emphasize the

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223. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72.

224. *Id.* (citations omitted).

225. *See* Fried, *supra* note 221, at 177 (noting that a 5–4 ruling "is definitive only if the four dissenters should, or will, accept the decision from which they dissented, rather than hold on until they can pick up a fifth vote").

relationship between *stare decisis* and reliance. For example, we find the Court explaining that "[*s*]*tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."[226] It likewise has stated that "reliance interests are of particular relevance because '[a]dherence to precedent promotes stability, predictability, and respect for judicial authority.'"[227] In a more targeted fashion, the Court has invoked reliance interests to support a distinction, discussed above, between property or contract rules and procedural or evidentiary rules, reasoning that "considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved."[228]

Unfortunately, the Court's analyses usually rest on abstract conclusions about reliance considerations rather than rigorous, case-specific examinations. *Planned Parenthood of Southeastern Pennsylvania v. Casey* is instructive. In that case, which is discussed above,[229] the question was whether a Pennsylvania statute that imposed certain restrictions on abortions violated the reproductive rights articulated in *Roe v. Wade*.[230] The *Casey* Court deemed it appropriate to reconsider *Roe*'s "central holding" that the time at which a fetus becomes viable "marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[231] The Court recognized that "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context . . . where advance planning of great precision is most obviously a

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226. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991).

227. Allied-Signal, Inc. v. Director, 504 U.S. 768, 783 (1992) (quoting *Hilton*, 502 U.S. at 202); *see also, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 34 (1989) (Scalia, J., dissenting in part) ("[T]he mere venerability of an answer consistently adhered to for almost a century, and the difficulty of changing, or even clearly identifying, the intervening law that has been based on that answer, strongly argue against a change."); Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part) ("The doctrine [of *stare decisis*] exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules."); Payne v. Tennessee, 501 U.S. 808, 834–35 (1991) (Scalia, J., concurring) ("The doctrine, to the extent it rests on anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts.").

228. *Payne*, 501 U.S. at 828 (majority opinion) (citations omitted).

229. *Supra* notes 126–30 and accompanying text.

230. Roe v. Wade, 410 U.S. 113 (1973).

231. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

necessity."[232] By comparison, one might argue that "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[233] Yet the Court found that defining the scope of implicated reliance interests in such a limited fashion would disregard "the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[234] It concluded that "while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[235]

A similar theme is visible in *Dickerson v. United States*,[236] where the Court reaffirmed its prior holding in *Miranda* regarding the admissibility of statements stemming from custodial interrogations of suspected criminals. *Miranda*, of course, led to the set of police warnings for arrestees that have percolated throughout American culture and society.[237] In approaching the issue of *stare decisis*, the *Dickerson* Court acknowledged how *Miranda* had taken root in the popular consciousness.[238] Concluding that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," the Court determined that the precedent must be upheld.[239]

Both *Casey* and *Dickerson* invoke broad notions of reliance to support their applications of *stare decisis*. In *Casey*, the operative concept was the disruption of those who have "ordered their thinking" around *Roe*; in *Dickerson*, it was the difficulties inherent in revising "part of our national culture."[240] But in neither case did the Court take the next step by delving into

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232. *Id.* at 855–56 (citations omitted).

233. *Id.* at 856.

234. *Id.*

235. *Id.*

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

237. Miranda v. Arizona, 384 U.S. 436 (1966).

238. *Dickerson*, 530 U.S. at 443.

239. *Id.*; *cf.* Mitchell v. United States, 526 U.S. 314, 330 (1999) ("Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition."); *id.* at 331–32 (Scalia, J., dissenting) (noting that "wide acceptance in the legal culture" can be "adequate reason not to overrule" a precedent).

240. *See* Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 614 (2002) ("[T]he *Dickerson* opinion [uses] a form of *Casey*'s broad-ranging inquiry into reliance on civil-liberties decisions . . .

the reliance interests at stake:[241] What exactly those interests consisted of, how widely they were shared, how severe the disruption would be if the applicable precedent were overruled, and so on. Instead of spelling out how the particular reliance interests might be affected and what the likely consequences would be, the Court briefly nodded toward the importance of reliance and then forged ahead.

The extent of reliance on a Supreme Court precedent is too important, and too complex, to be resolved in such abbreviated fashion. If the doctrine of *stare decisis* is to gain predictability and theoretical coherence, we need a new framework for conducting rigorous, systematic, and consistent analysis of reliance implications.

IV. Rethinking Reliance

Developing a framework to analyze reliance interests requires identifying the discrete ways in which reliance on a precedent can manifest itself. The universe of reliance interests can be usefully (if roughly) divided into four categories: reliance by specific individuals, groups, and organizations; reliance by governments; reliance by courts; and reliance by society at large.

[suggesting] that reliance weighs against overruling a precedent to the extent that it has 'become part of our national culture,' even when members of the Court have their doubts about its constitutional underpinnings." (footnote omitted)).

241. Chief Justice Rehnquist made this point in *Casey*:

> The joint opinion . . . turns to what can only be described as an unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. . . . The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 956 (1992) (Rehnquist, J., concurring in the judgment in part and dissenting in part); *see also id.* at 957 ("[T]he joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision . . . and have 'ordered their thinking and living around it.'"). In *Dickerson*, Chief Justice Rehnquist—who authored the majority opinion—was on the other end of a similar criticism; Justice Scalia countered: "I am not convinced by petitioner's argument that *Miranda* should be preserved because the decision occupies a special place in the 'public's consciousness.' . . . As far as I am aware, the public is not under the illusion that we are infallible." *Dickerson*, 530 U.S. at 464 (Scalia, J., dissenting).

A. Specific Reliance

The most evident way that a Supreme Court precedent engenders reliance is by encouraging individuals or groups to behave in a certain manner on the understanding that the precedent is, and will remain, the law of the land.

Return to *Quill Corp. v. North Dakota*.[242] That case involved an attempt by North Dakota to impose tax-collection obligations on mail-order retailers who were located outside the state. One of the issues before the Court was whether the law was permissible under the Commerce Clause.[243] At the center of the dispute was *Bellas Hess*, a precedent that created a safe harbor by insulating from such laws all vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail."[244] The *Quill* Court conceded that *Bellas Hess* was something of a relic, noting that "our cases subsequent to *Bellas Hess* and concerning other types of taxes . . . have not adopted a similar bright-line, physical-presence requirement."[245]

Still, the Court reaffirmed *Bellas Hess* on the Commerce Clause issue.[246] It based its decision in part on the reliance interests at stake.[247] The Court noted that "the *Bellas Hess* rule has engendered substantial reliance and become part of the basic framework of a sizeable industry."[248] Whatever the doctrinal nuances and factual niceties at stake in a given case, *Bellas Hess* taught vendors that if they limited their contacts with a state to the shipment of goods for delivery to in-state customers, they were safe from tax-collection obligations.[249] *Quill* accordingly provides a good example of what we might think of as specific reliance: Reliance upon a precedent by a discrete group of private citizens or entities (such as mail-order vendors).[250]

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242. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

243. *Id.* at 298.

244. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 758 (1967).

245. *Quill*, 504 U.S. at 317. For more on *Quill*, see *supra* notes 139–59 and accompanying text.

246. *Quill*, 504 U.S. at 317.

247. *Id.*

248. *Id.*

249. *Bellas Hess*, 386 U.S. at 758. Justice White was not persuaded by the majority's treatment of reliance. *See Quill*, 504 U.S. at 331–32 (White, J., dissenting in part) ("Neither Quill nor any of its *amici* point to any investment decisions or reliance interests that suggest any unfairness in overturning *Bellas Hess*.").

250. *Id.* at 317; *see also, e.g.*, United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924) ("The [precedent was issued] twenty-three years ago and affected many tracts of land. . . . In the meantime there has been . . . continuous growth and development [and] . . . reliance on the decision. It has become a rule of property, and to disturb it now would be fraught with many injurious results.").

By respecting individuals' and groups' reliance on heretofore-settled precedents, the Court promotes something simple and elemental: Fairness.[251] Citizens who do their best to comply with the law only to find that the rules have changed may feel forsaken by the very government whose edicts they endeavored to respect. For similar reasons, protecting specific reliance interests through the mechanism of *stare decisis* has critical importance to the rule of law.[252] When conscientious citizens act in good faith based on the Supreme Court's past pronouncements but end up on the wrong side of the law, their confidence in the Court and the overarching legal structure might well be shaken.[253] These consequences should weigh on the Court's collective mind when it is deciding whether a precedent warrants overruling.

B. Governmental Reliance

Like private citizens, our legislative and executive branches of government rely on the Supreme Court's rulings as setting the rules of the road. Sometimes this reliance is apparent, as when Congress enacts campaign-finance legislation designed to comply with the dictates of the First Amendment as articulated in cases like *Buckley v. Valeo*.[254] Other times the link is less obvious but just as important. Take, for example, *The Legal Tender Cases*,[255] which held that the Constitution permits Congress to issue paper money.[256] Congress has relied on

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251. *Cf.* Landsgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). Writing for the majority, Justice Stevens explained: "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 270.

252. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring) (stating that *stare decisis*'s "greatest purpose is to serve a constitutional ideal—the rule of law"); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("[*S*]*tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" (quoting THE FEDERALIST NO. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888))).

253. *See, e.g.*, Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123, 1132 (2000) (noting that the upsetting of settled expectations "is inconsistent with a central purpose of law in a civilized society, which is to preserve the expectations of individuals that are formed in light of existing laws, as well as actions taken in reliance on those laws").

254. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

255. The Legal Tender Cases, 79 U.S. 457, 547 (1870).

256. *Id.*

this power in setting up a complex financial system of enormous breadth and complexity.

When the Court overrules a precedent upon which Congress has relied, it does more than render (retroactively) that use of congressional time to have been wasteful. It also forces Congress to expend energy and resources looking for new ways to achieve legislative goals that previously were thought to be accomplished. In some cases, the Court's change of heart may disrupt a legislative regime that sends ripples throughout society. For example, some scholars believe *The Legal Tender Cases* are inconsistent with the original understanding of the Constitution.[257] Any thoughts the Court might entertain of reconsidering those cases would need to account for the potentially significant disruption of reliance interests that such a reversal could cause.[258]

Or recall *Pennsylvania v. Union Gas Co.*, dealing with the power of citizens to sue nonconsenting states.[259] Justice Scalia wrote separately to highlight the importance of preserving *Hans v. Louisiana*,[260] a precedent from 1890 holding that "the Eleventh Amendment precludes individuals from bringing damages suits against States in federal court even where the asserted basis of jurisdiction is not diversity of citizenship but the existence of a federal question."[261] In defending his position, Justice Scalia emphasized the degree to which Congress may have relied upon *Hans* in choosing *not* to take certain actions:

> *Hans* has had a pervasive effect upon statutory law, automatically assuring that private damages actions created by federal law do not extend against the States. Forty-nine Congresses since *Hans* have legislated under that assurance. It is impossible to say how many extant statutes would have

257. *See, e.g.*, Monaghan, *supra* note 38, at 744 ("[I]t seems clear that under the 1789 Constitution only metal could constitute legal tender. . . . In fact, until driven to do so by the exigencies of the Civil War, the national government never attempted to impart that quality to paper.").

258. *See, e.g., id.* ("[I]n our age of checks, credit cards, and electronic banking, the issue is off the agenda: no Supreme Court would now reexamine the merits."); Richard J. Pierce, Jr., *Reconciling* Chevron *and* Stare Decisis, 85 GEO. L.J. 2225, 2244 (1997) ("[I]t is unimaginable that the Court would overrule [*The Legal Tender Cases*]. . . . The Court would be behaving in an extraordinarily irresponsible manner if it overruled a precedent in circumstances in which its decision destroyed trillions of dollars of investments made in reliance on that precedent."). *Contra* Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super-Precedent: A Response to* Farber *and* Gerhardt, 90 MINN. L. REV. 1232, 1246 (2006) (arguing that the likely consequences of overruling *The Legal Tender Cases* have been overstated).

259. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

260. Hans v. Louisiana, 134 U.S. 1 (1890).

261. *Union Gas*, 491 U.S. at 30 (Scalia, J., dissenting in part).

> included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred.[262]

A comparable illustration comes from *Arizona v. Gant*,[263] which dealt with the authority of police officers to search the passenger compartment of an automobile after arresting one of the vehicle's occupants.[264] As relevant here, the Court rejected the argument that an arrest empowers officers to search a vehicle even where "the arrestee has been secured and cannot access the interior of the vehicle."[265]

Justice Alito dissented, agreeing with the State of Arizona that the rule embraced by the majority was at odds with Supreme Court precedent.[266] He focused on the reliance interests of police departments that had integrated the applicable precedent—a case called *New York v. Belton*[267]—into their training and operating procedures.[268] As Justice Alito saw it, "[t]he *Belton* rule has been taught to police officers for more than a quarter century," and "reliance by law enforcement officers is . . . entitled to weight."[269] For its part, the majority acknowledged that the interpretation of *Belton* urged by Justice Alito and the State of Arizona "has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years."[270] Nevertheless, it reasoned that "[t]he fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."[271]

For one final perspective on governmental reliance, consider the universe of campaign-finance regulation. As suggested above, the modern law is founded upon *Buckley v. Valeo* and its progeny, which define the First

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262. *Id.* at 35. *Contra* TRIBE, *supra* note 87, at 241 n.139 ("These justifications are plausible, but not compelling, reasons for adhering to *Hans*. Why, for example, would it be impractical, if *Hans* were overruled today, for Congress to review the United States Code and add explicit limitations on private damages actions against states where Congress thought appropriate?").

263. Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009).

264. *Id.*

265. *Id.* at 1714.

266. *Id.* at 1726–32 (Alito, J., dissenting).

267. New York v. Belton, 453 U.S. 454, 462–63 (1981).

268. *Gant*, 129 S. Ct. at 1728 (Alito, J., dissenting).

269. *Id.*

270. *Id.* at 1722 (majority opinion).

271. *Id.* at 1723.

Amendment limits on legislators' authority to restrict political contributions and expenditures.[272] The Court previously has acknowledged the degree of legislative reliance in deciding whether to revisit the governing precedents. Thus, in considering (and, eventually, rebuffing) a recent request to overhaul its campaign-finance jurisprudence, Justice Breyer noted that "*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws."[273]

But during its latest foray the Court took a markedly different approach. In *Citizens United v. Federal Election Commission*,[274] the Court overruled *Austin v. Michigan Chamber of Commerce*,[275] a precedent from 1990 bearing on the First Amendment protections afforded to corporate political speech. The Court acknowledged the argument that *Austin* had prompted considerable legislative reliance, but its response was curt: "Legislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*."[276] Elaborating, the Court invoked no less an authority than *Marbury v. Madison*, reasoning that if *stare decisis* were deemed to be a "compelling interest" for *stare decisis* purposes, "legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.'"[277] In dissent, Justice Stevens emphasized that "[s]tate legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin*, for more than a century," and that "[t]he Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating [the Bipartisan Campaign Reform Act of 2002]."[278]

Given the majority's muscular language, one might surmise that *Citizens United* renders legislative reliance irrelevant. Yet that interpretation would

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272. Buckley v. Valeo, 424 U.S. 1, 4 (1976) (per curiam).

273. Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.); *see also, e.g.*, Harris v. United States, 536 U.S. 545, 567–68 (2002) (plurality opinion) ("Legislatures and their constituents have relied upon [the relevant precedent] to exercise control over sentencing through dozens of statutes like the one the Court approved in that case. . . . We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them."); Bush v. Vera, 517 U.S. 952, 982 (1996) (plurality opinion) ("Legislators and district courts nationwide have modified their practices—or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census—in response to *Shaw I*." (citing Shaw v. Reno, 509 U.S. 630, 657 (1993))).

274. Citizens United v. FEC, 130 S. Ct. 876 (2010).

275. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668 (1990).

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

277. *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

278. *Id.* at 940 (Stevens, J., dissenting in part).

portray the majority as having renounced, with little explanation and in one fell swoop, every previous reference to legislative reliance in the Court's annals.[279] Such an interpretation would also excise from the *stare decisis* analysis a consideration that carries broad pragmatic significance and that plugs into the fundamental, critical, and nuanced relationship between coequal branches of government. For these reasons, I am inclined to read the majority's discussion as standing for the more moderate proposition that legislative reliance was insufficient—or, in the majority's parlance, "not . . . compelling"[280]—to save *Austin* given the wrongness (in the majority's view) of that precedent combined with the deleterious effects of leaving it on the books.

Whatever the majority's intentions in *Citizens United*, I do not see much to be gained by preemptively resolving to ignore the legislators who attempt to put the Court's decisions into practice. Nor is there reason to fear that acknowledging the potential legitimacy of legislative reliance would somehow intrude upon the judicial province of declaring "what the law is." Where circumstances warrant, the Court can and should feel empowered to overrule even those precedents which have commanded substantial legislative reliance. That freedom, however, does not foreclose the Court from at least *considering* the impact of legislative reliance as one component of its *stare decisis* calculus.

Put differently, none of this is to imply that governmental reliance precludes the overruling of precedent. It will sometimes be the case that the importance of reaching the right result on the merits outweighs the costs of upsetting governmental reliance interests—just as, to return to the previous section, it will sometimes be appropriate to overrule a precedent despite its disruptiveness for various individuals and groups. In other instances, particularly where an extensive and entrenched legal apparatus (for example, the modern administrative state[281]) is concerned, governmental reliance might present a more persuasive reason for upholding a precedent. The key takeaway is simply that whenever the machinery of *stare decisis* is engaged, governmental reliance interests should receive direct and detailed consideration.

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279. *E.g.*, Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.); Harris v. United States, 536 U.S. 545, 567-68 (2002) (plurality opinion); Bush v. Vera, 517 U.S. 952, 982 (1996) (plurality opinion); Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., dissenting in part).

280. Citizens United v. FEC, 130 S. Ct. 876, 913 (2010).

281. *See* Monaghan, *supra* note 38, at 745 ("Is it conceivable that the Court would outlaw the administrative state? Certainly administrative legislation, in some substantial form, is a permanent feature of our constitutional order.").

C. Doctrinal Reliance

It is not just the legislative and executive branches that rely on Supreme Court precedent. It is also the judiciary, including the Supreme Court itself. This reliance leads to the creation of doctrinal structures in which one precedent builds on another that builds on another. If a foundational precedent—one on which many others depend—were to be overruled, an entire structure could waver or topple, upsetting settled expectations and creating widespread uncertainty about the state of the law.

A ready example is the Court's incorporation of (most of) the Bill of Rights as enforceable against the states via the Fourteenth Amendment's Due Process Clause.[282] If the Court were to conclude that, upon further reflection, the Fourteenth Amendment actually does *not* apply the Bill of Rights to the states, but rather creates some other set of individual liberties that must be divined from a different source using a different method of analysis, an important facet of modern constitutional law would disintegrate. Among the potential casualties would be the numerous Supreme Court precedents that have clarified how specific constitutional rights constrain various actions by states. The very relationship between states and their citizens could take on, at least temporarily, a feeling of ambiguity and uncertainty. In short, the day that such an opinion was issued might well be a day of doctrinal disarray. That does not necessarily mean the Court should deem itself barred from ever reconsidering the root incorporation issue. It simply means the reliance implications should matter.

We can afford to be relatively brief in our discussion of doctrinal reliance because the Court generally does a good job of highlighting it. For instance, in *Welch v. Texas Department of Highways and Public Transportation*[283]—one of the predecessors of *Union Gas*, discussed above[284]—a plurality noted that rejecting *Hans v. Louisiana* would mean "overrul[ing] at least 17 cases, in addition to *Hans* itself," while also undercutting a "variety of other cases that were concerned with this Court's traditional treatment of sovereign immunity."[285] More recently, the Court rebuffed an attempt to revisit *Buckley*

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282. *See, e.g.*, Fallon, *supra* note 27, at 584 ("[N]umerous pillars of contemporary law would be thrown into doubt if the underlying issues needed to be reviewed afresh without a presumption of stability. These include holdings that the Bill of Rights applies to the states . . . ." (footnote omitted)).

283. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 475–76 (1987) (plurality opinion).

284. *Supra* Part II.B.4.

285. *Welch*, 483 U.S. at 494 n.27.

v. Valeo, with Justice Breyer noting that the Court "has followed *Buckley*, upholding and applying its reasoning in later cases."[286]

Statements like these reflect entrenched norms of Supreme Court discourse. Fealty to precedent is such a well-accepted virtue that there are few surer ways for a dissent to score rhetorical points against the majority (or vice versa) than by charging it with eschewing a slew of controlling precedents.[287] That explains why the Court tends to be solicitous of doctrinal reliance. Still, there is much room for improvement. As with specific reliance and governmental reliance, the Court could enhance its analysis by asking targeted questions such as how much judicial work would need to be redone and what consequences would occur in the interim while lower courts were reacting to the overruling of an important precedent. The absence of inquiries like these leaves the modern jurisprudence abstract and underdeveloped.

D. Societal Reliance

Sometimes the reliance a precedent has generated is unrelated to specific behaviors. It owes instead to the effect of the precedent on shaping societal perceptions about our country, our government, and our rights.[288] Though this societal reliance can be a complex and daunting concept, it is a necessary component of any *stare decisis* jurisprudence that aims to be complete.

Begin with *Dickerson v. United States*. The issue in that case was whether the Court should reverse *Miranda* and adopt a different test, this one dictated by federal statute, for determining the admissibility of statements by suspected criminals.[289] In the course of reaffirming *Miranda*, the *Dickerson* Court drew

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286. Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.).

287. *See* John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 4 (1983) ("The decisional process invariably involves a study and analysis of relevant precedents. In conference deliberation precedents regularly provide the basis for analysis and discussion. The framework for most Court opinions is created by previously decided cases."); Barrett, *supra* note 33, at 1031–32 ("That judges feel stare decisis operating directly upon them in a personal way, rather than upon litigants, is made evident simply by the number of times phrases like 'we are constrained by' and 'we are bound by' appear in judicial opinions."); Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1107, 1279, 1283 (2008) ("[T]here is strong evidence of the Court's adherence to precedent as a modality of constitutional argumentation."); *cf.* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 373 (1996) ("Although there have been many overrulings in American law, they are rare in the day-to-day work of any appellate court, even the Supreme Court. Distinguishing a precedent to death is much more common.").

288. *See, e.g.*, Hardy, *supra* note 56, at 592 (describing societal reliance as "how much the public or culture-at-large has come to rely on a particular precedent").

289. Dickerson v. United States, 530 U.S. 428, 431–32 (2000).

on notions of societal reliance. While it might be true that no identifiable arrestees could be said to have relied on *Miranda* in deciding how to behave, the Court took a broader view, explaining that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[290] As the Court clarified during a recent discussion of *Dickerson*, the opinion in that case "was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right."[291]

A conceptual converse of *Dickerson* is *Lawrence v. Texas*, which dealt with the constitutionality of a state law that criminalized sexual contact between persons of the same gender.[292] The *Lawrence* Court overruled *Bowers v. Hardwick*,[293] which held that the Constitution did not prohibit such laws.[294] In articulating its rationale, the *Lawrence* majority found that "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."[295]

The dissenters in *Lawrence* objected to the majority's handling of the reliance question. Justice Scalia described the degree of societal reliance on *Bowers*'s underlying principles as "overwhelming."[296] He elaborated: "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[297]

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290. *Id.* at 443; *cf.* CARDOZO, *supra* note 4, at 150 (*stare decisis* has less force where a precedent "has been found to be inconsistent with the sense of justice or with the social welfare").

291. Arizona v. Gant, 129 S. Ct. 1710, 1723 (2009). *But see id.* at 1728–29 (Alito, J., dissenting) ("The *Dickerson* opinion makes no reference to 'societal reliance,' . . . .").

292. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

293. Bowers v. Hardwick, 478 U.S. 186 (1986).

294. *Lawrence*, 539 U.S. at 578.

295. *Id.* at 577.

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

297. *Id.* For an interesting discussion of societal reliance from the Court's October 2008 Term, see *Montejo v. Louisiana*, 129 S. Ct. 2079, 2098 (2009) (Stevens, J., dissenting). Justice Stevens argued:

> [T]he Court fails to identify the real reliance interest at issue in this case: the public's interest in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State. That interest lies at the heart of the Sixth Amendment's guarantee, and is surely worthy of greater consideration than it is given by today's decision.

Id.

Cases like *Dickerson* and *Lawrence* signal the rightful role of societal reliance in *stare decisis* debates. If a Supreme Court precedent has become ingrained in the American consciousness, it makes sense for the Court to consider the societal effects of overruling that precedent. Our foundational legal norms are part of what we use to understand the relationships between and among citizens and governments. When those norms are revised in important ways, our belief system can be affected.[298] This is true even if no individual citizen can point to specific behaviors he undertook on the assumption that a precedent would remain in force. Of course, evaluating diffuse societal reliance interests can be a difficult and uncertain enterprise. But that is not a justification for ignoring those interests or for dismissing them with vague, conclusory statements.

One caveat is in order. In thinking about societal reliance, we should be careful not to conflate it with another concept that sometimes appears in *stare decisis* analyses: Societal approval of the Court's decision to overrule a precedent. To illustrate, consider *Vasquez v. Hillery*,[299] a 1986 opinion holding that when a grand jury is selected through racially discriminatory means, any conviction flowing from the grand jury's indictment must be invalidated as violating the Equal Protection Clause.[300] Explaining that its decision in *Vasquez* was based on "more than a century of consistent precedent," the Court noted the importance not just of being principled, but also *appearing* to be: *Stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."[301]

A more widely debated example comes from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the Court rejected the argument that *Roe v. Wade*'s central holding should be overruled.[302] The majority was frank in its desire to protect the Court's "capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[303] It explained that the Court's "power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the

298. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

299. Vasquez v. Hillery, 474 U.S. 254, 260–64 (1986).

300. *Id.* at 264.

301. *Id.* at 260, 265–66.

302. *Casey*, 505 U.S. at 854–61.

303. *Id.* at 865.

Judiciary as fit to determine what the Nation's law means and to declare what it demands."[304] That legitimacy, in turn, "depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[305] And while the country ordinarily tolerates the Court's occasional need to revisit precedents, where a decision "resolve[s] the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," that decision must receive "equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation."[306] *Casey* thus made clear that at least in "rare" situations of acute "national controversies," the Court will be extraordinarily reluctant to overrule its precedents based on concerns over perceived legitimacy.[307]

Justice Scalia criticized this rationale, asserting that "[t]he only principle the Court 'adheres' to . . . is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law . . . but a principle of *Realpolitik*—and a wrong one at that."[308] Making himself even plainer, Justice Scalia noted that "I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated."[309]

Ultimately, the Court is quite right to describe acceptance by the citizenry as an important value. But the perceived legitimacy of the Court's actions should be understood as an *effect*, not an *objective*. When the Court makes reasoned decisions backed up by rational explanations,[310] it must have faith that

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304. *Id.*

305. *Id.* at 866.

306. *Id.* at 866–67. *Contra id.* at 958–59 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist noted:

> The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not. The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court.

Id.

307. *Id.* at 867 (majority opinion).

308. *Id.* at 997–98 (Scalia, J., concurring in the judgment in part and dissenting in part).

309. *Id.* at 998.

310. *Cf.* Vasquez v. Hillery, 474 U.S. 254, 266 (1986) ("While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for *articulable reasons* . . . ." (emphasis added)); Nelson, *supra* note 29, at 69. Professor Nelson notes:

> [T]he legitimacy argument is premised on the idea that the Court cannot adequately explain why it considers a particular precedent erroneous. If the Court could

the citizenry will accept those decisions even where widespread disagreement exists. That faith in the citizenry is an essential component of the rule of law in a democracy. Thus, when the Court is deciding whether to uphold a precedent, the perceived legitimacy of its actions should be inapposite to the evaluation process.[311] The Court should focus instead on the considerations described above: It should weigh the effects of upholding a flawed precedent against the reliance implications of reversing course. By pushing aside political concerns in order to focus on its proper, and limited, judicial role, the Court will foster the very legitimacy it has properly described as integral.[312]

E. A Word on Additional Stare Decisis *Values*

This Article has focused on the reliance implications of *stare decisis* because those implications are what should drive the doctrine in its application to specific cases. That does not mean, however, that *stare decisis* serves no values other than reliance.

Perhaps most notably, *stare decisis* promotes predictability and the rule of law by making the legal backdrop relatively stable—at very least, more stable than it would be if the doctrine did not exist. *Stare decisis* also carries benefits in terms of institutional stability and efficiency. To borrow Cardozo's famous

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> demonstrate that the precedent misinterpreted the provision it purported to construe, then the Justices who voted to overrule the precedent would not be jeopardizing the Court's legitimacy; instead of accusing them of imposing their personal preferences on the country, people would understand that they were following the law (correctly understood).

Id.; *see also* Monaghan, *supra* note 38, at 763 ("[I]f institutional self-protection is to play some significant role in legitimation theory . . . [t]he general belief has been that decisions on the merits are not to be avoided simply because in the long run the Court would be better off if it could wash its hands of the controversy.").

311. *See, e.g.*, Paulsen, *supra* note 136, at 1565 ("The judiciary has no power to enhance public perceptions of its integrity by adopting rules of decision at variance with the Constitution, treaties, and laws of the United States." (emphasis omitted)).

312. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("The Judicial Branch derives its legitimacy . . . from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* . . . should be no more subject to the vagaries of public opinion than is the basic judicial task."); Farber, *supra* note 4, at 1197 ("Understandably, individual Justices may be troubled by the perception that they are acting in response to political pressure . . . . The proper response, however, is for those Justices to consider the merits of the case with particular care . . . and then to explain their reasoning with clarity to the public.").

phrase, the work of courts could be "increased almost to the breaking point if every past decision could be reopened in every case."[313]

These values serve as additional reasons why *stare decisis* is meaningful in the aggregate, across cases. The fact that the Supreme Court chooses to overrule any single opinion will not cast the rule of law into serious doubt. But if the Court were to overrule fifty opinions in the course of a single Term, things might be different.[314] Similarly, the Court's institutional efficiency is served by the very existence of *stare decisis*. That is what saves the Court from, for example, having to revisit the incorporation debate in every challenge to a state law that arguably violates some guarantee of the Bill of Rights.[315]

My focus on reliance interests should not be viewed as minimizing the importance of these values. It simply reflects the fact that, significant though they may be as overarching concepts, the values lack predictive force within the context of a given case—meaning they provide little help in fashioning a functional doctrine of *stare decisis*.

V. Conclusion: Stare Decisis *and Reliance*

The foregoing analysis leaves us with two guiding principles for rethinking *stare decisis*.

First, the Supreme Court should avoid most of the considerations that currently dominate its discussions of *stare decisis*. At best, those considerations serve as imperfect proxies for reliance interests that are more fruitful to talk about directly; at worst, the considerations are indeterminate distractions.

Second, to frame its inquiry into reliance, the Court should proceed through four categories of relevant interests: specific reliance, governmental reliance, doctrinal reliance, and societal reliance. The Court should work

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313. CARDOZO, *supra* note 4, at 149; *see also* Fallon, *supra* note 27, at 573 ("[A]mong the greatest effects of stare decisis is to justify the Court in treating some questions as settled . . . . The doctrine liberates the Justices from what otherwise would be a constitutional obligation to reconsider every potential disputable issue as if it were being raised for the first time . . . ." (footnote omitted)).

314. *Cf.* Fallon, *supra* note 6, at 1156 ("[T]he Justices feel constrained from overturning too many past decisions—however loose the notion of 'too many' might be—by an apprehension that the public would find too much instability in constitutional law to be unacceptable." (footnote omitted)).

315. *Supra* Part IV.C; Farber, *supra* note 4, at 1177 ("Imagine if, in every First Amendment case, the lawyers had to reargue basic questions such as whether the First Amendment applies to the states or whether it covers nonpolitical speech (both of which have been debated by scholars).").

through these categories systematically to decide which ones are implicated in a given case. It should then delve into the relevant reliance interests, avoiding abstraction and focusing instead on being as rigorous as possible in its analysis. That entails asking questions such as how many stakeholders would be affected by the overruling of a given precedent; how severely they would suffer; how much legislative and judicial work would need to be redone; and whether widely held understandings about fundamental legal norms might be shaken.

This is, it must be conceded, easier said than done. So, too, is answering the final question that arises once the reliance assessment is complete: Does the importance of reaching the correct result on the merits outweigh the basket of aggregated reliance interests that would be upset? These are difficult, slippery, and intimidating inquiries. *Stare decisis*, like multitudes of other doctrines, will always remain part art and part science. We should not expect it to become the stuff of algorithm.[316]

Over time, though, a doctrine of *stare decisis* revamped along the lines suggested here has the potential to develop into something far more coherent, predictable, and consistent than the current version. As the Court began to conduct rigorous analyses of reliance interests, and as attorneys tailored their arguments to reflect the Court's practice, we would expect vast improvements in the degree to which reliance interests are understood and accounted for. And by clearing away the distracting litany of flawed proxies that dominate the existing jurisprudence, the Court could position the doctrine of *stare decisis* to become more and more refined through the familiar process of common-law adjudication.[317]

Notwithstanding the serious challenges, the payoff—an enhanced doctrine of *stare decisis* that delivers on the fundamental values it is designed to promote—is well worth it. The initial step toward a solution is straightforward. It is simply to recognize that the doctrine has veered off course, and that the jurisprudence should be reconstituted around rigorous examination of the critical reliance interests at the core of *stare decisis*.

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316. *See, e.g.*, CARDOZO, *supra* note 4, at 160 ("Somewhere between worship of the past and exaltation of the present, the path of safety will be found."); Fisch, *supra* note 5, at 108 ("The Court is being asked to weigh competing yet incommensurate values—the value of an identified legal improvement against the process values sacrificed by overruling.").

317. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 408 (1932) (Brandeis, J., dissenting) ("[T]he process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.").