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ARTICLES

Methodological Pluralism and Constitutional Interpretation

Chad M. Oldfather[†]

INTRODUCTION

It is a commonplace that the Justices of the Supreme Court disagree about how to interpret the Constitution. What is less clear is whether any of us ought to be troubled by this. In a recent interview, Justice Antonin Scalia characterized it as “sort of an embarrassment” that the Justices are not “in agreement on the basic question of what we think we’re doing when we interpret the Constitution.”¹ Yet, while the Justices clearly are not in agreement, neither do their opinions reflect a collective sense of embarrassment over this. As Richard Fallon has observed, “Although methodological disputes grow heated in some cases, it is striking that in the domain of constitutional adjudication, the [J]ustices have seldom exhibited much interest in attempting to bind either themselves or each other, in advance, to the kind of general interpretive approaches that academic theorists champion.”²

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¹ Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, available at <http://nymag.com/news/features/antonin-scalia-2013-10/>.

² Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1013 (2009); see also Steven M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1757 (1994).

Given the centrality of methodological commitments to at least some of the Justices' approach to their jobs, this is puzzling. Yet the matter rarely surfaces in the Court's opinions. Majority opinions often contain language suggesting strong methodological commitments that later opinions depart from without acknowledgement.³ A brief exception appeared in Justice O'Connor's one-paragraph, partial concurrence in *Michael H. v. Gerald D.* She declined to join the due process analysis in Justice Scalia's plurality opinion, noting simply, "I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis."⁴ Her objection, in other words, was not to the result of the analysis but rather to the methodology itself and more specifically to the prospect of committing to that methodology in future cases.

Apart from stray remarks like Fallon's, academic commentators have also left the question of methodological uniformity in constitutional interpretation alone.⁵ To be sure, each theorist's argument in favor of a particular interpretive approach is nearly always, implicitly, an argument that everyone else ought to agree with, and adopt, the theorist's approach. But the prospect of interpretive uniformity as a good in its own right has gone unexamined.

The answer to all this, one might imagine, is simple and is rooted in the fact that the Supreme Court is a "they" rather than an "it."⁶ The Justices do not attempt to bind one another because

³ See, for example, the discussion of *Crawford v. Washington* and ensuing cases in Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 135, 139-41 (Christopher J. Peters, ed. 2013).

⁴ 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part). The case concerned a substantive-due-process-based challenge to a California statute creating a presumption that the husband of a woman who has a child is the father of that child if he is not impotent or sterile and the couple is living together at the time. *Id.* at 117-18. In their opinions, Justices Scalia and Brennan debated the level of generality at which to consult history in determining whether an asserted liberty interest is one that has been traditionally protected, such that it can be deemed "fundamental." *Id.* at 127 n.6 (Scalia, J.); *id.* at 139-41 (Brennan, J., dissenting). Justice Scalia advocated in favor of "consulting the most specific tradition available." *Id.* at 127 n.6 (majority opinion) (contending that to do otherwise would be to countenance arbitrary judicial decision making). "Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all." *Id.* Justice O'Connor joined all of Justice Scalia's opinion except for the footnote outlining Scalia's methodological commitments.

⁵ Michael Gerhardt has also observed that the Justices have adopted no fixed methodological framework. See MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 104-05 (2008).

⁶ See generally Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 550 (2005) (identifying "the fundamental mistake of overlooking the collective character of judicial institutions—of overlooking that the judiciary, like Congress, is a 'they,' not an 'it'").

they do not want to be bound themselves. Justice Scalia may find the Justices' lack of methodological agreement lamentable, but it is unlikely that he would sign on to a regime of uniformity that did not comport with his originalist preferences. To agree to commit to a methodology carries with it the risk that one will have to commit to someone else's methodology.

But that cannot be the entire story. There are plenty of respects in which the Court does act like an "it," adhering to past majorities' decisions even though the present majority might reach a different conclusion in the absence of the past decision. Indeed, being bound to reach a result one does not favor, whether on account of an authoritative text such as a statute or constitution or a past judicial decision, is a large part of the judicial role. The justifications for adherence to precedent, in particular, often center on the rule of law and treating like cases alike,⁷ and one might well wonder why the requirement of *treating* like cases alike does not extend to methodology. Judge Robert Bork, at least, thought it does, mocking Justice O'Connor's concurrence in *Michael H.* by opining that "[a]nother name for the prior adoption of a single mode of analysis is, of course, 'the rule of law.'"⁸

What is more, the Justices do adhere to methodological commitments in their constitutional decision making. The tiered-scrutiny framework, for example, can easily be characterized as a methodology, and one that the Court has consistently embraced.⁹ And while *Planned Parenthood v. Casey's*¹⁰ asserted loyalty to *Roe v. Wade*¹¹ involved the creation of a new framework for the assessment of abortion regulations, its "undue burden" framework has since proven to be relatively durable.¹² *Chevron* deference to administrative agency interpretations of statutes provides a third example.¹³

⁷ See *infra* Part I.A.

⁸ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 237 (1990).

⁹ See *infra* Part II.B.2.

¹⁰ 505 U.S. 833 (1992).

¹¹ 410 U.S. 113 (1973).

¹² See, e.g., Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 *YALE L.J.* 1318, 1322 (2009) (arguing that *Casey's* "standard has proven sufficiently durable as both a judicial and political precedent that there is no push to change the status quo by the states, Supreme Court Justices, or either the President or the Senate through the appointments-confirmation process").

¹³ See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1911 (2011) [hereinafter *Erie*]; Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1817 (2010) [hereinafter *Laboratories*].

If we cast our gaze more broadly we see other clear strains of what we can comfortably characterize as methodological consistency in the manner in which the Court (and courts more generally) decides cases. Methodological uncertainty does not characterize the interpretation of wills or contracts, or the application of certain canons of statutory construction.¹⁴ Yet these involve the same core task—the interpretation and application of a written text—as constitutional adjudication. At the broadest level, there is rough agreement on the types of argumentation that count as legal. The point is best appreciated by considering the wide range of methodologies that would be inappropriate. It is clear, for example, that it would be improper for a court to resort to a coin flip to decide a case or to trial by ordeal. At a more specific level, Michael Gerhardt provides an illustrative list of methodologies that are consistently employed, including not only the practice of rooting judicial decisions in past opinions “but also norms (such as avoiding ruling on constitutional issues whenever possible), historical practices (such as the opening of legislative sessions with prayer), and traditions (such as producing opinions for the Court and not *seriatim*) that the [J]ustices have deliberately chosen to follow.”¹⁵

There is one further development that makes the question of methodological uniformity in constitutional interpretation ripe for consideration. In recent years, several commentators have advocated in favor of the application of *stare decisis* to statutory interpretation methodology.¹⁶ In fact, as Abbe Gluck has revealed, many state high courts have adopted and purport to adhere to statutory interpretation methodology frameworks.¹⁷ Each of those to favor this development has suggested that the arguments favoring the imposition of methodological uniformity on statutory interpretation might transfer to constitutional interpretation, though each is also careful to note the difference between the two contexts.¹⁸

This article has a number of interrelated goals. Its primary motivation is to tackle the basic issue with which it opened—explaining the lack of methodological uniformity in constitutional interpretation. The most natural place to begin the analysis, particularly given these recent developments in

¹⁴ See *Erie*, *supra* note 13, at 1970-76 (noting and exploring the implications of the existence of relatively fixed frameworks in other textual interpretation contexts for statutory interpretation methodology).

¹⁵ GERHARDT, *supra* note 5, at 3.

¹⁶ See *infra* Part II.A.

¹⁷ See generally *Laboratories*, *supra* note 13.

¹⁸ *E.g.*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872 n.44 (2008).

the statutory interpretation literature, is with the potential application of stare decisis. Thus, the analysis begins by taking the matter up in some detail: first unpacking the justifications for and mechanisms of stare decisis and then asking why the same principles of precedent that govern the Court's substantive decisions, and that appear to govern some of its methodological frameworks, do not extend to interpretive methodology. It then undertakes a more general inquiry into the question of when courts will consistently adhere to a given methodology, as they sometimes do, and when they will not. This, in turn, leads to an effort to provide some conceptual clarity with respect to the distinction between the application of stare decisis, on the one hand, and the attainment of methodological consensus on the other. Finally, it broadens its focus to assess at a more general level why the Court's decision making exhibits the pluralism that it does.

Briefly stated, my conclusions are these. First, stare decisis and constitutional interpretive methodology are an uneasy, unstable, and unsustainable combination. Stare decisis requires a mechanism for assessing the likeness of cases, and when the meaning of a constitution is at stake its application to interpretive methodology would require performing this assessment at a very broad level. Methodologies are applied to types of documents—contracts, statutes, constitutions—and thus the most natural measure of likeness in a regime of methodological stare decisis is the nature of the text being interpreted. Similarity measured at this level would require that all documents of a certain type be treated in the same way and would thereby swamp the lower-level criteria by which likeness is normally measured. In other words, commitment to interpretive consistency would require application of the same methodology to the entire Constitution, or at least to unacceptably broad swaths of it. Notably, this concern does not arise for less-general methodological commitments, the kind embodied in what Mitch Berman has called “constitutional decision rules,”¹⁹ such as the tiered-scrutiny framework.

Second, the inquiry into methodological uniformity is more properly focused on consensus rather than stare decisis. Stare decisis, it turns out, is a doctrine that operates in the law's transitional zones and with respect to ideas as to which consensus appears to be developing or dissolving. The court in Case *B*, in deciding whether to give stare decisis effect to some

¹⁹ See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). For a more complete discussion, see *infra* Part II.B.2.

proposition from Case *A*, will take into account, among other things, its sense of whether that proposition is likely to garner sufficiently broad acceptance. Propositions that have reached the point of wide acceptance or rejection—for instance, deciding cases by taking into account the reasoning of past decisions rather than by a coin flip—do not depend on *stare decisis* to stay accepted or rejected. By the same token, propositions that are openly contested, such that the court in Case *B* will not feel itself to be bucking an emerging consensus by deciding contrary to Case *A*, are beyond the reach of *stare decisis*. Interpretive methodology, by and large, remains this sort of battleground.

Third, a broader exploration of the explanations for and potential justifications of methodological pluralism in constitutional interpretation reveals three explanations beyond the sheer impotence of *stare decisis*. Pluralism might exist because of a conclusion that it is normatively desirable. It may be, in other words, that we have achieved consensus on pluralism as our preferred methodology. Alternatively, pluralism might simply exist as a default position, the natural result of a world in which the Justices and other actors in the system disagree about methodology and have no resort to a mechanism to force their choices on one another. Finally, the external constraints on the Court—its inability to force rulings on a sufficiently recalcitrant public, for example—are also likely to play a role.

The remainder of this article proceeds as follows: Part I takes up in some detail the question of whether *stare decisis* can or ought to be applied to interpretive methodology in the constitutional context. It begins with a general exploration of the justifications for and mechanisms of *stare decisis* and moves to consideration of its application in the context of constitutional law. Part II takes up the prospect of methodological *stare decisis*. It examines the idea in general, and then in the specific contexts of statutory and constitutional interpretive methodology. Part III broadens the inquiry, exploring three categories of explanations for the methodological pluralism that characterizes the Court's interpretive practice.

I. STARE DECISIS AND THE CONSTITUTION

Imagine that, a decade from now, the Supreme Court takes a Second Amendment case. Imagine further that the Court has not decided any Second Amendment cases in the intervening time. The Court that confronts this new Second Amendment case is not the same Court, in terms of its personnel, as the one

that decided *District of Columbia v. Heller*.²⁰ The Justices who were in *Heller*'s majority, and the new Justices with similar jurisprudential inclinations, now constitute a minority of the Court. The Court's new majority, were it confronted with *Heller* anew, would come out the other way.

But because it would not be confronting *Heller* anew, the majority that I have described would have to grapple with the matter of stare decisis. Its view is that *Heller* was wrongly decided, most likely in the sense that the case incorrectly recognized or characterized an individual right to bear arms. That belief, standing alone, is not enough to justify an overruling. Stare decisis, or precedent (the terms are, for most purposes, synonymous), creates a presumption in favor of adherence to past cases, even if the current court regards them as wrongly decided.²¹ At the same time, however, "*stare decisis* is not . . . [an] inexorable command."²² Instead, its application entails consideration of a cluster of prudential factors including the workability of the rule of law created in the past case(s), the nature and extent of the reliance interests that have grown up around it, and whether understandings of related areas of law or facts in the world have developed in such a way as to undercut the past case's foundations.²³ The Court would accordingly not be required to adhere to *Heller*, but stare decisis operates to tip the balance in favor of adherence rather than departure.²⁴

If the Court finds it necessary to address stare decisis in its opinion, a discussion concerning the matters just identified is likely to constitute the entirety of its analysis. Yet we might ask another question. Assuming that the Court concludes that it should adhere to *Heller*'s substantive holding, must it also continue to adhere to its methodology?²⁵ Justice Scalia's opinion for the Court in *Heller*, you will recall, offered a thoroughly originalist analysis. Is that methodological choice entitled to

²⁰ 554 U.S. 570 (2008).

²¹ Indeed, stare decisis does work only in those cases in which the current court regards a past decision as wrong. If the current court regards the past decision as correct, then it does not need the extra reason to adhere to it provided by stare decisis. See *infra* Part I.B.1.

²² *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

²³ See *infra* Part I.C.

²⁴ This depiction is, of course, artificially binary, for there are all sorts of ways in which the new majority could claim to follow *Heller* while implementing it in a way that is considerably narrower than what the original majority would have done.

²⁵ The discussion in the article assumes a distinction between methodology and substance. The usefulness of the distinction seems self-evident, though the line between the two categories is undoubtedly blurry. Cf. Mark Tushnet, "Meet the New Boss": *The New Judicial Center*, 82 N.C. L. REV. 1205, 1207 (2005) (analyzing the Court's treatment of "two not entirely distinct classes: method and substance").

precedential effect? Did the *Heller* Court, in other words, decide not merely *what* the Second Amendment means, but also *how* it will analyze questions that arise under the Second Amendment?

Descriptively, of course, the answer to those questions is “no.”²⁶ The Justices have never acted as though they are bound by the methodological choices of the Court’s past decisions—witness *Griswold v. Connecticut*’s lonely embrace of penumbral reasoning²⁷—and consequently it would not be surprising were the majority in our hypothetical case to claim fealty to *Heller* while engaging in an originalism-free analysis.

The question then becomes, why? The answer requires a return to first principles. Stare decisis is, of course, the characteristic method of the common law. Indeed, the common law can exist only because of an expectation that courts will be bound by their prior decisions. Only in this way can a collection of past decisions coalesce into a body of law. As Gerhardt puts it, “Precedent is the only medium of exchange in the common law.”²⁸ Stare decisis is also a feature of constitutional adjudication, and while it is of course not the sole source of authority in that context, much of constitutional law has a common-law feel.²⁹ Thus, the case for its application to methodology seems intuitive. Intuition often misleads, however, and our analysis must accordingly begin with consideration of the underpinnings and nature of stare decisis in its traditional, substantive sense. We thus start by considering stare decisis as a general matter, both in terms of its justifications and the mechanisms by which it works, before turning to the workings of the doctrine in constitutional law.

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Depending on the context, the Court will sometimes favor one form of argument, but at other times favor others. As a consequence, any metaprinciple [that mediates among conflicting arguments] likely will be descriptively inaccurate. Putting the matter somewhat differently, adherence to any *a priori* sensible metaprinciple will require the overruling of a good deal of existing case law.

Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1787 (1997).

²⁷ It may be more appropriate to say that *Griswold* is the only opinion in which the Court has openly embraced penumbral reasoning. As Brannon Denning and Glenn Reynolds have suggested, that style of analysis has appeared elsewhere in the Court’s cases. See generally Brannon P. Denning & Glenn H. Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089 (1998).

²⁸ GERHARDT, *supra* note 5, at 97.

²⁹ See *infra* Part I.C.

A. *The Justifications for Stare Decisis*

In order to determine whether stare decisis ought to apply to interpretive methodology, we must first pin down the purposes that stare decisis serves. There are four primary justifications for the doctrine: (1) treating like cases alike, (2) enhancing the predictability of law, (3) strengthening judicial decision making, and (4) furthering stability. There is a vast jurisprudential literature exploring the nature and implications of these justifications.³⁰ For our purposes, a brief overview will suffice.

1. Treating Like Cases Alike

It is easy to see how adherence to a regime of precedent facilitates the like treatment of like cases. Indeed, one could argue that stare decisis is necessary to the treatment of like cases. If Case *A*, involving facts *X*, *Y*, and *Z*, is resolved in one manner, then that alone is a reason to resolve Case *B*, also involving facts *X*, *Y*, and *Z*, in the same manner. This may be desirable for deontological reasons, on the ground that such equivalent treatment is “a good in its own right.”³¹ There are also consequentialist versions of this justification, which draw their strength from values such as impartiality, consistency, and the satisfaction of parties’ reliance interests.³² With respect to the latter, consistent treatment of cases enables those who must comply with the law to structure their affairs to do so with confidence that their situation will be treated the same as similar situations that arose in the past. An important presupposition here is that there is an appropriate metric for assessing likeness. Cases *A* and *B* might share facts *X*, *Y*, and *Z*, but that overlap does not necessarily mean they are alike, depending on the perceived significance of other facts they do not share. As we will see, this becomes an important factor in considering the workability and appropriateness of methodological stare decisis.³³

³⁰ In addition to the authorities cited below, see, e.g., BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 156-57 (5th ed. 2009) (providing suggested additional reading).

³¹ NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 170-71 (2008). For a critique of deontological justifications of precedent, see Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 *YALE L.J.* 2031 (1996).

³² DUXBURY, *supra* note 31, at 156-67; Peters, *supra* note 31, at 2039-40.

³³ See *infra* Part II.B.

2. Predictability

Predictability interests are related to, but distinct from, reliance interests and are similarly focused on the interests of the parties to which the law applies, as well as to other actors within the system with an interest in having confident knowledge of what the courts will do. Parties structuring transactions, lawyers in litigation, lower-court judges deciding cases, and legislatures crafting statutes all have an interest in being able to predict what a future court is likely to do.³⁴ Stare decisis facilitates this by legitimizing an expectation of continuity between past and future decisions.

3. Strengthened Decision Making

Stare decisis can strengthen the decision-making process in two ways. First, an express mechanism for reliance on past cases makes the process of deciding more efficient. Rather than having to rethink each aspect of its decision from first principles, the deciding court can use the results of past decisions as a starting point and undertake its analysis from there. Not only does this save time but it helps minimize error, in the sense that the collective wisdom of past courts embodied in their decisions is more likely to be right than would be a single, present court's reasoning from scratch.³⁵ Second, this may in turn affect perceptions of the decision-making institution, creating the appearance of similarity amongst courts over time even where that similarity may be illusory. The effect is to portray judicial institutions as standardized, which furthers the perception that courts decide cases according to external legal standards rather than as a product of personal preference.³⁶

4. Stability

A regime of stare decisis necessarily facilitates some amount of stability. An expectation that courts will regard themselves as bound by their, or their predecessors', past decisions is also an expectation that courts will not radically change course. That sort of stability is likely (though not

³⁴ DUXBURY, *supra* note 31, at 162.

³⁵ See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987).

³⁶ See *id.* at 600.

necessarily in all contexts) a social good in its own right, and it also contributes to the mechanisms identified above.³⁷

B. *The Mechanisms of Stare Decisis*

Several features of the operation of stare decisis bear on the consideration of its application to interpretive methodology. As we will see, it matters that stare decisis has its true effect only in cases in which a court believes (or at least suspects) that a prior decision was incorrect. The doctrine requires resort to some mechanism for assessing similarity between cases for its application, and when it does, applies in a scalar rather than an absolute fashion. In combination, these aspects of how stare decisis works reveal another feature of its operation, namely that it applies only in transitional zones. Put differently, much of what we regard as settled law is that way not because of stare decisis, but because of the breadth of our underlying agreement. This will turn out to be significant, for the simple reason that we lack the necessary underlying agreement concerning the appropriateness of various interpretive methods.

1. The Necessary Connection to Wrongly Decided Cases

Common usage of the term “precedent” obscures an important feature of its application, which is that it does most, if not all, of its work in cases where the deciding court believes that the decision on which it is being asked to rely was wrongly decided, or at least entertains some uncertainty concerning whether the prior decision was correct.³⁸ To be sure, the word is often used to refer to a body of clearly established doctrine, as in “there is ample precedent in support of” some doctrinal proposition. Used in that sense, however, the assertion is that the proposition at issue is not one that can reasonably be questioned. The reference is accordingly not to a situation in

³⁷ See *id.* at 602; see also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 744-46 (1988) (discussing the agenda-limiting function of stare decisis).

³⁸ See BIX, *supra* note 30, at 153 (“precedent is only of crucial importance when the prior case was *wrongly decided* (or at least could have been decided in a different way with equal legitimacy)"); Larry Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1, 4 (1989); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 909 n.108 (2006) (“Precedents that exert decisional force only when they are perceived to be correct have no weight *qua* precedents. Only if the essence of precedential constraint is understood to be content independent, and thus only if precedents constrain (even if only presumptively) even when they are perceived as mistaken by the subsequently deciding court, does the force of precedent have genuine bite.”).

which the notion of precedent, as a doctrinal or less tangible jurisprudential matter, has any constraining effect on the court. Consider a court faced with Case *B*, which it regards as falling within the precedential scope of existing Case *A*. If the court believes that Case *A* was correctly decided, such that it would also decide Case *A* in the same way, which is in turn consistent with its belief concerning how Case *B* should be decided, then its decision in Case *B* would be the same regardless of whether Case *A* existed. The court would likely cite Case *A* in support of its decision. But because the existence of Case *A* would not affect the substance of the decision, its citation would, in essence, serve as window dressing.

The same holds true if the existing authority consists not merely of Case *A*, but of a large number of past cases standing for the same proposition. In this scenario it is less likely that the court will give much thought to the question of whether the past cases were correctly decided. In that sense the court could perhaps be described as regarding itself as bound to follow those cases even if they were wrongly decided, while not itself having a considered view of whether they were in fact wrongly decided. As this suggests, there is no sharp break involved, no point past which a proposition goes from fixed in place because of stare decisis to so widely accepted that it is beyond dispute. Nor are the processes completely distinct. The factors that contribute to general acceptance may include the sorts of considerations that drive stare decisis. But at some point a proposition stands on a sufficiently deep consensus understanding of law and the various social and cultural factors on which it rests that it could not be otherwise. At that point a court's adherence to that proposition is not a product of stare decisis.

This in turn means that a necessary consequence of stare decisis is that it will generate some bad decisions. Because the doctrine does work only in cases where the deciding court disagrees with precedent, some of the decisions that result are likely to be "bad" as assessed from a current vantage point. This is because reliance on precedent is a way of invoking a legal rule and therefore presents the same problems of over- and underinclusiveness that inhere in any use of a legal rule.³⁹ Simply put, because all legal rules depend for their application on the presence or absence of a few specified factors and foreclose consideration of the rest of the universe of pertinent facts, they will sometimes generate results that differ

³⁹ See e.g., Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645, 646 (1991).

from those that would be reached by a fully informed decision maker. Case *B* may come within the precedential scope of Case *A*, but only because the proposition for which Case *A* stands does not take into account the presence or absence of Fact *X*, which in a perfect world might be grounds for a distinction.

2. The Need to Assess Similarity

Implementation of *stare decisis* requires some mechanism for knowing when a given present case falls within the precedential scope of a prior case.⁴⁰ *Stare decisis* is an essentially analogical form of reasoning, requiring courts to determine when a present case is sufficiently similar to a past case to create the presumption that the past case serves as authority governing the present one.⁴¹ Put differently, an obligation to treat like cases alike requires some mechanism by which to determine what “like cases” are.

The problem arises because no two cases are identical. Some of their differences or similarities will be consequential, others will not. Moreover, these differences and similarities can be assessed at varying levels of generality. Karl Llewellyn suggested that there are two doctrines of precedent, a narrow view by which those seeking to limit the reach of a past case will regard it as involving “redheaded Walpoles in pale magenta Buick cars,” and a broad view that accepts all statements in a past opinion as authoritative “[n]o matter how broad the statement, no matter how unnecessary on the facts, or the procedural issues.”⁴² But these are merely points on a spectrum. A court might regard the appropriate scope of the case as encompassing, toward the broad end, “cars” or “unusually colored cars” or “American cars.”

The determinations are consequential. Llewellyn meant “redheaded Walpoles . . .” as an example of a court distinguishing a precedent away. The case would continue to have precedential effect in the formal sense that it had not been overruled, but the scope of its applicability would have been so reduced as to render it toothless. The more general the basis on which a past case’s precedential effect is grounded, the greater the range of future cases in which it will provide restraint. “Cars” is a larger category than “Buicks,” and a court’s choice of which of these concepts a past case was about

⁴⁰ Schauer, *supra* note 35, at 578.

⁴¹ DUXBURY, *supra* note 31, at 2.

⁴² K. N. LLEWELLYN, *THE BRAMBLE BUSH* 63-65 (1930).

will be a choice about how many future cases it wishes to attempt to influence.

The criteria that courts use to assess similarity are not self-generating, nor are they products of reasoning that is internal to law. As Frederick Schauer has demonstrated, these criteria—the “rules of relevance” for assessing similarity and the “categories of assimilation” they produce—are contingent.⁴³ The fact that both Case *A* and Case *B* involve cars, for example, might matter or it might not and whether it does will depend not only on the contours of the relevant legal standards but also on linguistic and cultural factors that are external to the law. It is a complex process that requires consideration of the nature of the legal right or responsibility at issue and its relation to the various categories into which we divide the world. “Cars” versus “American cars” might matter if the legal rule concerns jurisdiction over a manufacturer, for example, in a way that it probably would not were the case about liability for traffic accidents.

3. The Scalar Nature of Stare Decisis

Precedent’s authority is not binary, but rather scalar—it exerts an incremental rather than all-or-nothing force.⁴⁴ As we have seen, stare decisis does work only in cases where the deciding court regards an applicable past case as having been wrongly decided, or at least harbors suspicions that it was wrongly decided. But the mere fact that the court in Case *B* concludes that it falls within the precedential scope of Case *A* does not mean that the court will feel compelled to follow Case *A* if it believes that Case *A* was wrongly decided. The court has the option, in appropriate cases, to overrule itself. As Neil Duxbury puts the point, “the reality is that precedents, unlike statutes, do not bind judges in an all-or-nothing fashion, that the binding force of a precedent is best explained not in terms of its validity (this being a non-scalar concept) but in terms of its authority (of which there can be degrees).”⁴⁵ The doctrine’s ability to constrain is therefore both limited and provisional. Courts are restrained, but they are not irrevocably bound, and the restraints exist subject to conditions. So, it is that one often sees references to a court’s ability to depart from precedent being conditioned not merely on a determination that a past

⁴³ Schauer, *supra* note 35, at 578, 582 (emphasis omitted).

⁴⁴ DUXBURY, *supra* note 31, at 23-24.

⁴⁵ *Id.* at 23.

case was wrongly decided, but on such a conclusion reached with a reasonable degree of confidence and coupled with the further conclusion that more harm would result from continued adherence to the past decision than from a change.⁴⁶

Significantly, the strength of precedent's force varies by context. The Supreme Court, for example, is quite open about the fact that it gives greater stare decisis effect to its statutory construction decisions than its constitutional decisions.⁴⁷ The reason, of course, is the comparative difficulty of amending the Constitution as compared to statutes. Because it is more difficult for an "erroneous" constitutional ruling, the Court must regard itself as more open to reconsidering its decisions.⁴⁸

4. Stare Decisis as a Transitional Doctrine

Taken together, these mechanisms reveal an aspect of stare decisis that is not typically highlighted, namely that it is a doctrine that comes into play only in the law's transitional areas. The interests advanced by stare decisis are considerable and its prescription of consistency in the face of uncertainty about the merits of a doctrine has wide application. But at a certain point the stare decisis-based rules for adherence are outweighed by larger forces of social consensus. This may lead to our regarding the proposition in question as clearly correct and thus something to honor apart from stare decisis, or clearly wrong and thus to be rejected despite stare decisis.⁴⁹

⁴⁶ See, e.g., Larry Alexander, *Precedent*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 503, 512 (Dennis Patterson ed., 1999) ("[I]n order for a constrained court to overrule a horizontal precedent, the precedent must be more than wrong: it must be both wrong and also mischievous to a certain degree of gravity."); HENRY CAMPBELL BLACK, M.A., *HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS* 10 (1912) ("It is the duty of a court of last resort to abide by its own former decisions, and not to depart from or vary them unless entirely satisfied, in the first place, that they were wrongly decided, and, in the second place, that less mischief will result from their overthrow than from their perpetuation."); John Hanna, *The Role of Precedent in Judicial Decision*, 2 *VILL. L. REV.* 367, 368 (1957) ("The general American doctrine as applied to courts of last resort is that a court is not inexorably bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.").

⁴⁷ See *infra* note 59 and accompanying text.

⁴⁸ See *infra* note 59 and accompanying text.

⁴⁹ Justice Cardozo made a similar observation:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing

To expand on the point, if a proposition of law is so widely accepted that a court would not think to question it, then the court would not regard a past decision based on that proposition as wrong. Thus it is acceptance, rather than stare decisis, that leads courts to consistently apply that proposition. For example, it is not *Marbury v. Madison*⁵⁰ that compels our continued acceptance of judicial review, but rather it is our continued acceptance of judicial review as an established feature of our government that enables the continuation of the practice.⁵¹ Were judicial review to fall out of favor, so would *Marbury*. Legal propositions that are so widely rejected that no court would even think to adopt them are likewise beyond the reach of stare decisis.

It is only where there is, or has been, some question as to the appropriateness—and thus acceptance—of a legal rule that precedent comes into play.⁵² Propositions that are widely contested will also remain outside the pull of stare decisis. If a majority of a subsequent court disagrees with a proposition of law and feels sufficiently strongly about it, the doctrine is not strong enough to forestall an overruling. Stare decisis will, however, preserve the existence of those propositions where the subsequent court senses that either the breadth or strength of

in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (1921).

⁵⁰ 5 U.S. (1 Cranch) 137 (1803).

⁵¹ This is merely an example of the broader notion that it is some version of acceptance that legitimates the Constitution in its entirety. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792, 1803-04 (2005) [hereinafter *Legitimacy*]; Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 585-87 (2001) [hereinafter *Stare Decisis*]; Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57, 57 (1987); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J. L. & PUB. POL'Y 45, 55 (1994).

⁵²

The common law in its ultimate origin was merely the custom of the King's courts; the regular routine which they developed in the administration of justice became settled and known, and therefore served as the basis upon which people could forecast with some certainty the future decisions of the courts.

THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 342 (5th ed. 1956).

disagreement does not reach the threshold for overruling. The endeavor is, for the most part, tentative and incremental in nature.⁵³ Sometimes the court in Case *A* will simply have gotten it wrong, perhaps through simple miscalculation, perhaps through a failure to appreciate that Case *A* was in some meaningful way not representative of the class of cases of which it is a part, such that the rule appropriate for its resolution is not the right rule for the class as a whole.⁵⁴ Sometimes the world will have changed in the interim, such that Case *A* reached the right result for its time, but the wrong result for Case *B*. Stare decisis is designed to allow for changes of course in such situations. A decision might be narrowed, extended, overturned, or ignored, and there is no reliable way to tell *ex ante* which will be the case. Over time, the process enables a series of courts to test and refine rules and principles over a large number of cases. Individual decisions coalesce into general rules, which over time may coalesce into principles.⁵⁵

The scalar nature of precedent allows it to accommodate these shifts. This is, of course, a necessary feature of common-law adjudication, for without it, the law could not evolve. In the common law, there is a connection between the application of a potentially precedential rule and the social consensus that underlies the rule, and doctrinal propositions are only as good as their congruence with broader social propositions.⁵⁶ A court confronted with a recent decision that it does not agree with, but that it does not regard as so wrong as to have been generally rejected, is more likely to adhere to it. A court faced with a longstanding—and previously unquestioned—legal rule that it believes is falling (or has fallen) out of favor is more likely to let it stand for a bit longer. Categories of assimilation,

⁵³ BIX, *supra* note 30, at 154-55.

⁵⁴ See Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 339-50 (2009); Schauer, *supra* note 38, at 884.

⁵⁵ See BIX, *supra* note 30, at 155.

⁵⁶

The announced rule of a precedent should be applied and extended to new cases if the rule substantially satisfies the standard of social congruence and a failure to apply or extend the rule to a new case would not be justified by applicable social propositions, given the social propositions that support the rule.

MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 75 (1991); Cf. Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 588, 590 (Jules Coleman & Scott Shapiro eds., 2002) (describing the classical, common-law view, in which “[l]aw was regarded not as a structured set of authoritatively posited, explicit norms, but as rules and ways implicit in a body of practices and patterns of practical thinking all ‘handed down by tradition, use, [and] experience.’ These rules were the product of a process of a common practice of deliberative reasoning, and constituted the basic raw materials used in it”) (citation omitted).

too, will change with time and culture, and their evolution will help to move certain ideas into and out of the transitional zone in which *stare decisis* applies. Thus, the doctrinal terrain covered by *stare decisis* will shift as the principles and social propositions underlying law shift, such that various legal propositions will go from established-beyond-question to established-but-questionable (and thus subject to the doctrine of precedent) to out-of-favor and vice-versa.⁵⁷ At times the effect is mediated somewhat by the existence of a higher source of authority, such as a statute or constitution, but the dynamic can still play out within the narrower range of play allowed in those contexts.

The consequence is that the zones I have described—generally accepted, generally rejected, openly contested, and the transitional realm of *stare decisis*—are not fixed but are in a constant state of flux. Propositions that were once widely rejected, such as claims against discrimination on the basis of sexual orientation, are questioned first in society and then in law. Case-by-case adjudication allows the transition to occur (its role is often less significant than that of legislation, but it is real nonetheless) but in a way that lets the courts take small steps as they grapple with how to fit the change into existing frameworks. And while often referred to as a “ratchet,”⁵⁸ the noncategorical nature in which it binds allows for movement in the other direction as well. Propositions that were once widely accepted—the inequality of women or African-Americans, for example—fall under question. When the initial questions arise, *stare decisis* holds the decisions based on the propositions in place until such time as it becomes sufficiently clear that the propositions have been rejected, at which point the decisions embodying those ideas are overturned. The issues are rarely so monumental, of course, but even so, *stare decisis* provides a vehicle for the orderly evolution of the law by adjudication.

⁵⁷ Cf. Roscoe Pound, Address, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324 (1940). Among other relevant observations, Pound referred to a study he performed that revealed:

that the general run of rules of law had a life of simply one generation. Fifty years is a long life for a rule, that is, a legal precept that attaches a definite legal consequence to a definite detailed state of facts. And it is with rules, very largely, that this doctrine of *stare decisis* has it [sic] immediate application.

Id. at 329.

⁵⁸ For a discussion of the “ratchet” effect of *stare decisis*, see Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 193-94 (2006).

C. *Stare Decisis and Constitutional Law*

There is one significant sense in which *stare decisis* in constitutional adjudication differs in its application from other contexts, and that is its force. Because the Constitution is so difficult to amend, the Court has acknowledged that it feels more freedom to overrule its constitutional precedents than their statutory counterparts.⁵⁹ Apart from this crucial distinction, operation of *stare decisis* in constitutional law largely parallels its operation elsewhere. Indeed, despite the theoretical centrality of the text of the Constitution to the endeavor, constitutional law is to a much greater degree about past cases than it is about the document.⁶⁰ Justice Scalia has lamented the fact that, for most any question of constitutional law, “[t]he starting point of the analysis will be Supreme Court cases, and the . . . issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding.”⁶¹ This situation was not inevitable. The Constitution was itself a document without

⁵⁹ See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (“We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.” (emphasis omitted)). As one authority puts it:

It is easy to state some highly general normative propositions about the role of *stare decisis* in constitutional adjudication that would probably draw wide agreement. First, the Court should ordinarily afford its constitutional precedents some weight, not treating them *ab initio* as if the issues they decided were matters of first impression. Second, however, precedents rarely, if ever, foreclose the possibility of their own reconsideration and possible overruling, limitation, or extension. Third, because it is far harder to amend the Constitution than to amend a statute, the Court should be readier to correct what it sees as an erroneous constitutional ruling than to overrule a statutory interpretation.

MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 383 (3d ed. 2007).

⁶⁰ Three decades ago Harry Jones observed that “American constitutional law is essentially *case law*, a system in which the decisions of the Supreme Court and other courts are guided and structured by precedent.” Harry W. Jones, *Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law*, 4 PACE L. REV. 11, 13 (1983). More recently, Andrew Wistrich remarked, “In the realm of constitutional law, common law precedents are more dog than tail.” Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 760 (2012). David Strauss has, of course, suggested that common-law methodology provides the best methodological alternative to originalism and textualism. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

⁶¹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 39 (1997).

precedent, and thus the Framers may not have had a clear sense of whether judicial applications of it would have precedential effect.⁶² Consistent with this, the document makes no express mention of the concept of precedent, and its textual hook, if there is one, must be extracted from Article III's references to "the judicial power."⁶³ Even so, the Supreme Court has engaged in precedential reasoning from the beginning,⁶⁴ and citation to and reliance upon past decisions is a feature of nearly all of the Court's opinions.

At this point in the analysis it is useful to recall that the Court is ultimately a collection of individual Justices—a "they" rather than an "it."⁶⁵ While it is possible in some instances to speak of "the Court" as having accepted certain doctrines or practices, it is often the case that the positions of the individual Justices have not coalesced around a single point of view. So it is with *stare decisis*. Invocation of the concept has occurred consistently enough through the Court's history that we can legitimately speak of "the Court" having consistently relied on it. At the same time, as we will see, the Justices have debated particulars amongst themselves, articulating differing views concerning how *stare decisis* is to be conceived and implemented.

In this sense, the evolution of *stare decisis* parallels the development of substantive doctrines. *Stare decisis*, as applied to constitutional decision making, is widely accepted. Even so, although resort to precedent is longstanding, the practice of precedential reasoning has changed. Over the first century-and-a-quarter of its existence, the Supreme Court's reliance on *stare decisis* took the form of abstract references, as contrasted with the relatively developed caselaw that it invokes today.⁶⁶ As a matter of doctrine, Colin Starger has traced the Court's modern pronouncements on *stare decisis* back to Justice Brandeis's

⁶² "Prior to the drafting and ratification of the Constitution, Americans had little, if any, meaningful experience with constitutional adjudication. The Framers and Ratifiers had firsthand experience with common law precedents, but not with constitutional ones; they had no precedent for handling constitutional precedents." GERHARDT, *supra* note 5, at 48.

⁶³ U.S. CONST. art. III, §§ 1-2. For articulations of this position, see, e.g., Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651 (2011); Fallon, *Stare Decisis*, *supra* note 51, at 577 ("Article III's grant of 'the judicial Power' authorizes the Supreme Court to elaborate and rely on a principle of *stare decisis* and, more generally, to treat precedent as a constituent element of constitutional adjudication."). This was, at base, the argument underlying the Eighth Circuit's short-lived holding that unpublished opinions are unconstitutional. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (2000) (en banc).

⁶⁴ See Colin Starger, *The Dialectic of Stare Decisis Doctrine*, in PRECEDENT IN THE UNITED STATES SUPREME COURT, *supra* note 3.

⁶⁵ See Vermeule, *supra* note 6 and accompanying text.

⁶⁶ *Id.*

dissent in *Burnet v. Coronado Oil & Gas Co.*⁶⁷ *Burnet* is best known as the source of Brandeis's famous remark justifying stare decisis on the ground that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."⁶⁸ Brandeis also described a doctrine that is not "a universal, inexorable command" and one that ought to apply with less force to constitutional rulings for the simple reason that they are "practically impossible" to correct through amendment.⁶⁹

The Court's most prominent articulation of the role of stare decisis in constitutional decision making came in the joint opinion of Justices Kennedy, O'Connor, and Souter in *Planned Parenthood of Southeastern Pa. v. Casey*.⁷⁰ The joint opinion opened its discussion of stare decisis by describing the doctrine as "indispensable"⁷¹ to the rule of law under the Constitution. But it then immediately offered Brandeis's qualification and noted that, in reviewing its past holdings, the Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."⁷² Consistent with that, the joint opinion analyzed the question of whether to overturn *Roe v. Wade* in terms of *Roe*'s workability, the extent to which reliance interests had developed around it, the existence of inconsistent developments in related areas of the law, and changes in either the underlying factual setting or our understanding of it.⁷³ Having concluded that this "normal *stare decisis* analysis" supported continued adherence to *Roe*, the joint opinion noted that that would normally end the matter. "But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed."⁷⁴ The two cases it had in mind were *West Coast Hotel v. Parrish*,⁷⁵ which, in

⁶⁷ 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). For a detailed and insightful history of the development of stare decisis doctrine in the Supreme Court, see Starger, *supra* note 64.

⁶⁸ *Burnet*, 285 U.S. at 406.

⁶⁹ *Id.* at 405-07.

⁷⁰ 505 U.S. 833 (1992).

⁷¹ "Indeed, the 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." *Id.* at 854.

⁷² *Id.*

⁷³ *Id.* at 854-55.

⁷⁴ *Id.* at 861.

⁷⁵ 300 U.S. 379 (1937).

overruling *Adkins v. Children's Hospital*,⁷⁶ signaled the end of the *Lochner* era, and *Brown v. Board of Education*,⁷⁷ which, of course, overruled *Plessy v. Ferguson*.⁷⁸ In these two cases, overruling was appropriate:

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.⁷⁹

Such a change was not present, the joint opinion concluded, with respect to *Roe*. Because "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided,"⁸⁰ the joint opinion concluded that *Roe* should survive.

More recently, the Court's opinions in *Citizens United v. Federal Election Commission*⁸¹ included a dispute over the proper contours of stare decisis doctrine. Justice Kennedy's majority opinion articulated an approach that overlapped but was not coextensive with *Casey*. In addition to workability, reliance, and the lessons of experience, the opinion's standard required inquiry into "the antiquity of the precedent . . . and of course whether the decision was well reasoned."⁸² Justice Stevens took issue with this last part of the formulation or at least with its application in *Citizens United*.⁸³ The two opinions thus reflect differing positions in a doctrinal debate over the nature of stare decisis as applied to constitutional law.⁸⁴

⁷⁶ 261 U.S. 525 (1923), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁷⁷ 347 U.S. 483 (1954).

⁷⁸ 163 U.S. 537 (1896), abrogated by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷⁹ *Casey*, 505 U.S. at 863-64.

⁸⁰ *Id.* at 864.

⁸¹ 558 U.S. 310 (2010).

⁸² *Citizens United*, 558 U.S. at 363 (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009)).

⁸³ 558 U.S. at 409 (Stevens, J., concurring in part and dissenting in part).

⁸⁴ See Starger, *supra* note 64, at 19-21, 29.

Although the Justices quarrel over the particulars of the application of *stare decisis*—that is, at the margins of the doctrine “they” have different views—it seems fair to say that “the Court,” as an “it,” accepts the existence of *stare decisis* as a doctrinal matter, and consequently the common-law character of constitutional law.⁸⁵ The only quarrel with the view that the Court ought to regard itself as bound (in the non-absolute, scalar sense noted above) by its past decisions comes from those who espouse a certain strand of originalism. Briefly, and somewhat simplistically stated, that view holds that it is the Constitution as originally enacted and duly amended that is the supreme law of the land, and not judicial interpretations of the Constitution.⁸⁶ Because the Constitution can be amended only in accordance with the provisions of Article V, a Court that followed a prior case that departed from original understanding would be elevating a judicial decision over the Constitution and thereby countenancing what is in effect an improper amendment by judicial fiat.⁸⁷ On the Court, only Justice Thomas has expressed sympathy with this view.⁸⁸

Underlying these two visions of precedent are differing conceptions of constitutional legitimacy. The view that would deny the legitimacy of *stare decisis* is rooted in a contractual

⁸⁵ The analogy between the common law and the use of precedent in constitutional adjudication can be overdrawn. Michael Gerhardt argues that these two types of adjudication employ precedent in different ways, owing to the fact that precedent constitutes the entire universe of legal authority in a common law case, whereas in constitutional cases “arguments may be based not only on precedent, but also on other conventional modes of constitutional discourse—text, original meaning, structure, moral reasoning, and consequences.” GERHARDT, *supra* note 5, at 96-97.

⁸⁶ See Dorf, *supra* note 26, at 1766 (describing originalism as resting on an underlying social contract theory of the Constitution pursuant to which “unelected judges may displace legislative decisions in the name of the Constitution, but *only* because the Constitution is a social contract to which consent was validly given through ratification”).

⁸⁷ See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 25, 27-28 (1994) (“If the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution.”); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (“If one is an originalist—that is, if one believes that the Constitution should be understood and applied in accordance with the objective meaning that the words and phrases would have had to an informed general public at the time of their adoption—then *stare decisis*, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism.” (internal citation omitted)).

⁸⁸ For example: “I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.” *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). This has not been Justice Scalia’s position. See Randy Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13-16 (2006).

conception of the Constitution.⁸⁹ On this view the document's status as supreme law stems from the procedures of its ratification.⁹⁰ The Constitution is legitimate because it was enacted pursuant to those procedures, and interpretations of the Constitution are legitimate only insofar as they are consistent with the document as it was enacted or modified in accordance with its terms. On one version of this view, it entails not only an originalist approach to judging—any other approach would involve application of something other than the duly enacted Constitution—but also the rejection of *stare decisis*.⁹¹ Because *stare decisis* applies only where a court concludes that a past decision was wrong,⁹² the Court would not need the doctrine to “follow” those past decisions that are correct. And because adherence to past decisions that are incorrect, as assessed by the originalist yardstick, would require allegiance to something other than the duly enacted Constitution, *stare decisis* is illegitimate as applied to them (and thus in any context in which it would be doing any work).

The alternative conception of constitutional legitimacy places its bases, not in 1787's social contract, but rather in acceptance. There are various strands and permutations of the underlying ideas,⁹³ with two being significant for present purposes. One is the assertion that the Constitution does not, and indeed cannot, legitimate itself. Its legitimacy instead requires resort to a pre-constitutional rule. To distill the essence of an example Frederick Schauer uses to make the point, any group of us might draft and ratify according to its

⁸⁹ See Dorf, *supra* note 26, at 1766-67. As Dorf characterizes originalism, “unelected judges may displace legislative decisions in the name of the Constitution, but *only* because the Constitution is a social contract to which consent was validly given through ratification.” *Id.* at 1766. There are, he acknowledges, other bases on which originalism might be grounded. Justice Scalia, for example, justifies his admittedly “faint-hearted” originalism on consequentialist grounds, arguing that while it is not perfect, it is the best available alternative for achieving judicial restraint. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). But, as Dorf points out, once one rejects a social contract theory, all that remains as a basis for legitimacy is some sort of acceptance. While it is quite possible to make normative arguments in favor of a non-contract-theory based originalism, and to couple them with arguments against adherence to precedent, it is implausible (given the history and general acceptance of precedent-based arguments in constitutional law) to back a descriptive claim that the nature of the acceptance by which our current polity legitimates the Constitution is inconsistent with reliance on precedent.

⁹⁰ On this view, “unelected judges may displace legislative decisions in the name of the Constitution, but *only* because the Constitution is a social contract to which consent was validly given through ratification.” Dorf, *supra* note 26, at 1766.

⁹¹ One could, of course, hold a contractual view of the Constitution in which the terms of the contract legitimate non-originalist interpretive methods, including the use of *stare decisis*.

⁹² See *supra* Part I.B.1.

⁹³ See Dorf, *supra* note 26, at 1772.

own terms a document entitled “The Constitution of the United States” that purports to give to us all the powers presently possessed by the federal government.⁹⁴ Such a document would not, of course, vest us with the powers it asserts and the reason has nothing to do with the terms of the document and everything to do with the fact that no one would accept our constitution as *the* Constitution. Another way to illustrate the point is to note that the Constitution itself was adopted in a manner contrary to the Articles of Confederation and was, in that sense, illegal.⁹⁵ That we regard the Constitution, and not the Articles, as the authoritative charter of our government is ultimately a product of social consensus rather than the satisfaction of formal, legal criteria.⁹⁶

The second idea stems from “dead hand” critiques of the social contract theory that question whether there is any reason for our current polity to regard itself as bound by consent given over two centuries ago by less than half the population.⁹⁷ As Noah Webster put the point in arguing against the Bill of Rights, “The very attempt to make *perpetual* constitutions, is the assumption of the right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.”⁹⁸ And as David Strauss memorably updates the point, U.S. citizens would not for a moment regard themselves as bound by decisions made by the current government of Canada, yet we have considerably more in common with the people who make up that government than we do with our founding generation.⁹⁹

Thus our Constitution is legitimated, on either approach, not because of the consent of the Framers’

⁹⁴ Schauer, *supra* note 51, at 50-55.

⁹⁵ See Kay, *supra* note 51, at 57, 62-64.

⁹⁶ Schauer, *supra* note 51, at 50-55.

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The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago. The Framers and Ratifiers did not represent us, and in many cases did not even represent people *like* us, if we happen to be Catholic or Jewish, or female or black or poor. What is most devastating to any claim of authority on their part is that the Framers and Ratifiers are long dead. Why should their decisions prevent the people of today from governing ourselves as we see fit? This is commonly known as the “dead hand problem.”

Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998) (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 11 (1980)).

⁹⁸ Giles Hickory [Noah Webster], *On Bills of Rights*, 1 AM. MAG., Dec. 1787, at 13-14.

⁹⁹ David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880 (1996).

generation, but through our contemporary acceptance of, or at least acquiescence in, its binding nature.¹⁰⁰ In contrast to a contractually based theory of legitimacy, however, acceptance-based theories do not lead so directly to specific interpretive methods. The nature of our legitimating acceptance might be such as to privilege or perhaps even require originalist interpretation, but it certainly extends farther than that to embrace, at least potentially, nearly any methodology. Moreover, as Dorf observes, legitimacy, much like *stare decisis*, is a scalar rather than a binary concept:

Many different approaches to interpretation are legitimate in the sense that decisions rendered according to these approaches ought to and will be accepted as binding law [L]egitimacy should be viewed as a matter of degree: That one interpretive technique is, in some cases, *more* legitimate than another does not render the less legitimate approach *illegitimate*.¹⁰¹

We will return to these ideas below. For now, the significant point is that among the interpretive techniques that have garnered widespread acceptance is reliance on *stare decisis*.¹⁰²

Significantly, acceptance as the ground for constitutional legitimacy extends to substantive doctrine as well as to methodology. As the block quote from *Casey* suggests, “changed circumstances may impose new obligations.”¹⁰³ Though theorists debate the mechanisms,¹⁰⁴ most commentators accept the idea that the meaning of the Constitution changes as our polity

¹⁰⁰ See *supra* note 51.

¹⁰¹ Dorf, *supra* note 26, at 1772.

¹⁰² Richard Fallon argues that the legitimacy of *stare decisis* in the constitutional context is rooted, as is the case with constitutional legitimacy more generally, in acceptance rather than the written Constitution. “[T]he practice of judges in embracing precedent as deserving of enforcement and sometimes extension, when conjoined with the public’s acceptance of precedent-based decisions as legally authoritative, suffices to confer legal legitimacy on adherence to and reasonable extension of non-originalist precedent.” *Legitimacy*, *supra* note 51, at 1824; see also *Stare Decisis*, *supra* note 51, at 572 (arguing that *stare decisis* “is a doctrine of constitutional magnitude, but one that is rooted as much in unwritten norms of constitutional practice as in the written Constitution itself” and one that involves “unwritten norms that are validated by a mixture of acceptance and reasonable justice”).

¹⁰³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863-64 (1992).

¹⁰⁴ Perhaps the most prominent example is Bruce Ackerman’s notion of “constitutional moments.” See generally BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). Jack Balkin and Sanford Levinson offer up the less dramatic notion of “partisan entrenchment:” “When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly. Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties.” Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067-68 (2001).

changes. The Court's decision striking down the Defense of Marriage Act (DOMA) in *United States v. Windsor*¹⁰⁵ provides the most high profile recent example. The notion that legislation such as DOMA is unconstitutional would have been unthinkable a decade ago, and the Court's conclusion seems necessarily to be the product of general attitudinal shifts regarding same-sex marriage.¹⁰⁶ Larry Solum has recently developed the notion of the "constitutional gestalt" to describe this phenomenon.¹⁰⁷ Just as the common law features zones of acceptance, rejection, and flux, constitutional law features a canon and an anticanon, as well as a transitional zone in which some norms may linger while others pass through on their way to acceptance or rejection.¹⁰⁸ "The norms that govern the complex practice of constitutional argument are dynamic, changing over time in response to both politics and developments within the practice itself."¹⁰⁹

Stare decisis is critical to this evolution. Because precedent's authority in constitutional cases is scalar, just as it is in the common law, and weaker than in the common law,¹¹⁰ it serves as a moderating force, a device for provisionally fixing in place the law that applies in certain contexts.¹¹¹ It is a doctrine that comes into play only in the gray area between propositions

¹⁰⁵ 133 S. Ct. 2675 (2013).

¹⁰⁶ Even Justice (then Judge) Scalia has recognized the connection between popular acceptance and the Court's ability to reach certain constitutional conclusions. Antonin Scalia, *Economic Affairs as Human Affairs*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 31-37 (James A. Dorn & Henry G. Manne eds., 1987) ("Unless I have been on the bench so long that I no longer have any feel for popular sentiment, I do not detect the sort of national commitment to most of the economic liberties generally discussed that would enable even an activist court to constitutionalize them.").

¹⁰⁷ See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 1 (2013).

¹⁰⁸ *Id.* at 41.

[T]he constitutional gestalt does not settle all constitutional questions. Given the dominant constitutional gestalt, some territory may be mapped as disputed—subject to contestation in constitutional litigation and in interactions between the various branches of government. Given the same dominant constitutional gestalt, other territory may be mapped as beyond dispute—outside the bounds of constitutional contestation because of settled constitutional norms.

Id.

¹⁰⁹ *Id.* at 38.

¹¹⁰ See *supra* note 59.

¹¹¹ Cf. Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 132 (1991) ("Precedents perform various roles in the Court's decisionmaking and for society, virtually all of which are ignored by a unitary theory. Perhaps most important, the Court's review of its decisions comprises a dialogue among the Justices on the need to decide cases narrowly and move incrementally to avoid constitutional error and on whether to perpetuate certain values the Court previously has approved for guiding the operation of government.").

that are clearly established as law and those that are clearly not law. A decision may reach a controversial holding—regarding, say, the nature of the right protected by an amendment, the scope of executive power, or a question of federalism. At first, stare decisis will hold the decision in place, whether in the context of a subsequent case raising the same issue or, more likely, via the reluctance of parties to seek review of the issue or the refusal of the Court to grant certiorari.¹¹² After some amount of time, the case’s holding will likely either become so widely accepted that it is clearly part of the legal fabric, in which case it is no longer reliant on stare decisis for its perpetuation,¹¹³ or it will be revealed as mistaken, in which case it will be overturned. The boundaries of all of these categories shift over time. The once unthinkable—women as the equals of men, constitutional protection of same-sex marriage, and so on—are now accepted, and the same will hold with respect to many of our generally accepted views. But these sorts of transformations do not occur instantaneously, and there is always the possibility that the Court will guess wrong.¹¹⁴ Stare decisis acts as an agent of acceptance, ushering propositions into and out of the Constitution. It also acts as an agent of stability, though not in the way it is typically understood to do so. Most accounts of the contribution of stare decisis to stability envision it as preserving the core of the law.¹¹⁵ Unless one is a strict originalist, however, one at least implicitly accepts the idea that core legal propositions—constitutional or otherwise—derive their stability from generalized acceptance of them as correct. Stare decisis serves as a buffer against radical change, to be sure, but only with respect to those propositions outside the range of general acceptance, which is where radical change is most likely to occur.

¹¹² Monaghan, *supra* note 37, at 744-46 (discussing the agenda-limiting function of stare decisis).

¹¹³ This is contrary to the role some commentators assert for precedent. Monaghan, for example, suggests that stare decisis leads to some issues being so well settled that they are off the table. *Id.* I contend that they are off the table for reasons apart from stare decisis. *See supra* Part I.B.4.

¹¹⁴ *See, e.g.*, MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE, at x (2013) (“When the Court intervenes to defend a minority position or even to resolve an issue that divides the country down the middle, its decisions can generate political backlash, especially when the losers are intensely committed, politically organized, and geographically concentrated.”).

¹¹⁵ *E.g.*, Monaghan, *supra* note 37.

II. THE PROSPECT OF METHODOLOGICAL STARE DECISIS

Let us put all of this together. The basic case for methodological stare decisis in constitutional interpretation is straightforward and it has considerable superficial appeal. In capsule form, it is that preservation of the values furthered by stare decisis—equal treatment, predictability, stability, and enhanced decision making—would be furthered as much, if not more, by adherence to a consistent methodology, as they are by adherence to the results of past decisions.

Consider the matter first from the perspective of the parties affected by a decision. To them, a change in methodology could feel illegitimate—even where the result the new methodology generates can be squared with past cases. Take a non-legal example. Imagine siblings whose favorite food is pizza and who ask to have the preceding night's leftovers for lunch. In Case 1 parent says to Child A, "you can have half of whatever is left," which turns out to be two slices. The following week, in Case 2 parent says to Child B, "you can have two slices," where there are six slices left. Child B could plausibly claim to be aggrieved in this situation. The decisional methodology seems to have changed from one based on the amount of pizza remaining to one based on some sort of assessment of how much pizza is appropriate to have for lunch. Indeed, the children might find this change in approach upsetting even if it generated the same result in both situations (i.e., if there were only four slices left in Case 2). Under the first methodology the children had an ability to influence outcomes—by eating less pizza for dinner—that they lose under the second.

As this simple example suggests, knowing how a decision will be made can be significant and its effects will extend beyond the parties to a decision. Indeed, in at least some situations, it would appear to be that knowledge of a court's methodology, and not merely knowledge of its past results, is necessary to produce the beneficial predictability and stability associated with stare decisis. Only if one has a basis on which to extrapolate from past results can one predict what a future court will do and knowing something about methodology seems necessary for effective extrapolation. My sense of the scope of my Second Amendment rights, for example, depends on my sense of whether those rights will continue to be assessed via an originalist methodology. The pizza example also highlights the indistinct nature of the

boundary between method and substance,¹¹⁶ which further underscores the seeming appropriateness of giving stare decisis effect to both sorts of decisions.

Yet there are features of stare decisis that ought to give us pause as we consider whether to apply it to methodology. As we have seen, the doctrine of stare decisis operates both incrementally and in a limited domain. It works to hold rules in place until such time as they either become generally accepted (to the point that no court need rely on stare decisis in support of or justification for its decision, because all courts and observers accept the proposition in question as true) or are determined to have been wrong. At the same time, stare decisis as implemented within a substantive domain necessarily has a limited scope. There are many approaches to determining the boundaries of that scope, but all assume that the precedential holding of an opinion will be limited to a particular swath of substantive law.¹¹⁷ A given case will be, at its broadest level, a tort, contract, or constitutional law precedent and more precisely a precedent within some doctrinal subset of those areas. To the extent that it has applicability beyond that, it will be only in the sense of being persuasive authority, for the substantive law framework that the precedent implements will be part of what defines the parameters of its applicability.

It is also useful to recall the connection between stare decisis and social consensus in the common law.¹¹⁸ There we saw that the scope and validity of stare decisis is tied to the social consensus underlying the doctrinal proposition embodied in a given precedent. Judicial methodology is likewise developed in common-law fashion. Put differently, since there is no valid and authoritative external source (i.e., legislation or the Constitution) imposing interpretive methods on courts, at least with respect to the questions we are considering, the development of these methods is left to the courts themselves.¹¹⁹

¹¹⁶ See *supra* note 25.

¹¹⁷ For example, Melvin Eisenberg provides three approaches to the task of determining what a past precedent stands for: (1) “Under a *minimalist* approach, the rule of a precedent consists of that part of the rule announced by the precedent court’s opinion that was necessary for the decision.” EISENBERG, *supra* note 56, at 52; (2) “Under a *result-centered* approach, the rule of a precedent consists of the proposition that on the facts of the precedent (or some of them) the result of the precedent should be reached.” *Id.*; (3) “Under [the *announcement*] approach, the rule of a precedent consists of the rule it states, provided that rule is relevant to the issues raised by the dispute before the court.” *Id.* at 55.

¹¹⁸ See *supra* Part I.B.4.

¹¹⁹ Cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing that Congress has and should exercise the power to impose rules of statutory construction on the federal courts).

Resort to *stare decisis* is anchored in the same social consensus underlying the doctrinal propositions themselves. The same holds for other methodological tools. *Stare decisis* is a product of, rather than external to, the consensus that legitimates the rest of law in its substantive and procedural dimensions. To say that *stare decisis* confers legitimacy on or privileges a particular interpretive method, then, is to say not only that consensus supports the use of *stare decisis* to force methodological choices as a general matter, but also that it countenances the privileging of this specific method.

To put the point differently, what counts as proper legal argument is what we accept as legal argument, and what we accept is, by virtue of that acceptance, what is proper. Fred Schauer has argued that “the recognition and non-recognition of law and legal sources is better understood as a *practice* in the Wittgensteinian sense: a practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source—and thus what will count as law.”¹²⁰ In Philip Bobbitt’s phrasing, “arguments are conventions . . . they could be different, but . . . then we would be different.”¹²¹ Legal reasoning thus takes place within a framework established by the acceptance of certain conventions. Judges can reason *from* those conventions, but they cannot reliably reason *to* them.¹²²

The choice to follow a consistent methodology, then, is necessarily the product of the same sort of analysis as that which produced the general commitment to *stare decisis*. It is an analysis that is prior to, rather than a product of, precedential reasoning. What is required instead is firmly established social consensus underlying the methodological choice of the sort that makes the resort to *stare decisis* unnecessary. This sort of consensus underlies some methodological choices—that courts should not resort to coin flips to decide cases, that they should start with the text when presented with a question of statutory

¹²⁰ Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1957 (2008).

¹²¹ PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 6 (1984).

¹²² Schauer argues

that constitutions rest on logically antecedent presuppositions that give them their constitutional status. As a result, constitutions can and do change not only when they are amended according to their own provisions or their own history, however broadly those provisions or that history may be understood, but whenever there is a change in these underlying presuppositions—political and social, but decidedly not constitutional or legal.

interpretation, etc.—but is not widely enough shared to support all of them. It also explains why we are able to see methodological consistency, and perhaps even something that can properly be called methodological stare decisis, in certain narrower domains.

The following two subsections explore these ideas in greater detail. First by exploring the merits of the recently advanced case for stare decisis as to statutory interpretation methodology and second by taking up the prospect of methodological stare decisis in constitutional interpretation.

A. *Methodological Stare Decisis and Statutory Interpretation*

Constitutional law is not the only area in which there is a clear lack of methodological consensus. Statutory interpretation, at least in the federal courts, is another. Here, too, the Supreme Court's opinions often include broad methodological statements, made in a manner that suggests their uncontroversial nature and consistent application. Yet such statements are often in conflict with those appearing in both preceding and subsequent opinions.¹²³ As is true in the context of constitutional methodologies, these changes in approach occur without any discussion of whether the Court ought to consider itself bound by past pronouncements, and with no Justices suggesting that they might have voted differently but for an allegiance to the settled methodologies of past cases.¹²⁴ As Abbe Gluck summarizes, “the U.S. Supreme Court is simply not in the practice of picking a single interpretive methodology for statutes. Indeed, the Court does not give stare decisis effect to *any* statements of statutory interpretation methodology.”¹²⁵

There is, of course, no shortage of scholarship advocating in favor of particular methods of statutory interpretation, and

¹²³ See Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 385-86 (2005).

¹²⁴ See Foster, *supra* note 18, at 1875-76.

¹²⁵ *Laboratories*, *supra* note 13, at 1765 (citing Rosenkranz and Siegel). As Gluck's own analysis demonstrates, she overstates the point, but only slightly. As she acknowledges, the *Chevron* doctrine is an exception. *Id.* at 1817 (“The Court *does* apply methodological stare decisis in this unique context: *Chevron* is precedential for much more than its mere substantive (environmental law) holding; far more significant has been the *methodology* it sets forth for all future potential deference cases.”). The Court's opinions also suggest that it consistently adheres to certain textual canons of interpretation. Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 701 (2008). These islands of consistency appear to be ad hoc, at least in that the Court has not openly discussed why it is that these areas are settled and not others.

those arguments, at least implicitly, also call for the uniform adoption of the method they advocate.¹²⁶ There are also judges who consistently follow certain interpretive approaches.¹²⁷ In these senses, the landscape of statutory interpretation resembles that of constitutional interpretation. It also does so in the sense that none of the participants in the debates advocate that courts should give *stare decisis* effect to the methodological components of decisions.

Or so it was. A recent strain of scholarship has made the case for the adoption of a single method of statutory interpretation, and done so in a way that expressly emphasizes the values of uniformity and that is (largely) agnostic with respect to the particular method chosen. One such approach would involve the legislative imposition of an interpretive methodology.¹²⁸ Another approach urges the Court to draw on *stare decisis* to impose a uniform methodology on itself and the federal judiciary.¹²⁹

The basics of the argument are as follows. It begins with the fact that the Court gives greater *stare decisis* effect to the substantive components of its statutory interpretation decisions than it does to its constitutional decisions.¹³⁰ This is justified based on the relative ease with which statutory decisions can be corrected. It is far easier for Congress to amend a statute in reaction to the Court's interpretation than it is for the Constitution to be amended.¹³¹ The argument for methodological *stare decisis*, as applied to methods of statutory interpretation, begins in a similar place. Its proponents contend that the establishment of a consistent interpretive methodology would enable legislatures to better anticipate how the courts will read proposed statutes and thereby avoid the use of language that would be misinterpreted by the courts.¹³² A legislature that understands that the courts will never consult legislative history or will always apply a certain canon of construction, the reasoning goes, can be more careful in its choice of language and thereby better effectuate its intent. Much like substantive *stare*

¹²⁶ See generally WILLIAM N. ESKRIDGE ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* (2d ed. 2006).

¹²⁷ The most prominent judicial advocate of adherence to a single interpretive approach is undoubtedly Justice Scalia. See Siegel, *supra* note 123, at 370 ("Justice Scalia is the Supreme Court's most persistent and doctrinaire thinker with regard to matters of statutory interpretation.")

¹²⁸ *E.g.*, Rosenkranz, *supra* note 119, at 2086.

¹²⁹ Foster, *supra* note 18, at 1884.

¹³⁰ *E.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989).

¹³¹ *Id.*

¹³² *E.g.*, Connors, *supra* note 125, at 683-84; Foster, *supra* note 18, at 1887.

decisis, this would not be cost-free.¹³³ Litigants under such a regime would be better able to pitch their arguments to courts, and overall the adoption of a consistent approach would further rule-of-law values by enhancing predictability and thereby making life easier and less expensive for the other actors in the system, be they legislatures, lower courts, or litigants.¹³⁴

This turns out to be more than academic theorizing. As Abbe Gluck has demonstrated, the methodological disagreement that characterizes the federal courts does not necessarily hold in state courts. Not only do state legislatures routinely enact rules of interpretation,¹³⁵ many state courts have imposed interpretive methodologies on themselves. Gluck studied the statutory interpretation case law in five states and found conclusive evidence of the adoption of a consistent methodology in four of them.¹³⁶ The courts in two of these states—Michigan and Wisconsin—have adopted and adhered to a methodology despite bitter ideological divisions.¹³⁷ The courts in these states have adopted versions of what she calls “modified textualism.”¹³⁸ The approach “ranks interpretive tools in a clear order: textual analysis, then legislative history, then default judicial presumptions.”¹³⁹ And while she concedes that it is a methodology that may be agreeable because it is malleable—strict textualists can be persuaded to march under its banner because it gives primacy to the text, while purposivists see it as

¹³³ For example, Foster concedes that “some interpretive principles have distributive consequences” in that they will systematically tend to favor certain types of parties, and that the application of these principles “require[s] normative justification independent of the rule-of-law and coordination justifications.” Foster, *supra* note 18, at 1890. She rejects the suggestion that this is fatal to the project of methodological stare decisis, on the grounds that judges will have to make the required normative judgments anyway, with the only difference being that in a world of methodological stare decisis these judgments will be binding. This is not problematic, she continues, because the precedent will be set by judges with different preferences. “There are a multitude of statutory interpretation doctrines and thus, over the long run, the normative desirability of statutory interpretation doctrine from the perspective of any given individual is likely to be similar under a regime of stare decisis and a regime of no stare decisis.” *Id.* at 1891-92. This analysis, it seems to me, overlooks some key points. One is that different interpretive doctrines will have different scopes of both application and normative effect, such that there is a greater potential for uneven distribution than the analysis suggests. Moreover, implementing a regime of methodological stare decisis privileges those who are able to make the initial decisions, and there is no reason to believe that that group will be representative of all relevant perspectives. Yet that initial group is likely to face the questions that arise most frequently and have the broadest applicability.

¹³⁴ *Laboratories*, *supra* note 13, at 1767.

¹³⁵ *Id.* at 1754.

¹³⁶ Her study focused only on these five states, rather than being a comprehensive survey. As a result, it is likely that these five are not the only ones to have achieved some level of methodological consistency.

¹³⁷ *Id.* at 1801-02, 1823.

¹³⁸ *Id.* at 1829-45.

¹³⁹ *Id.* at 1758.

offering sufficient room to escape the limitations of text-only approach¹⁴⁰—she nonetheless finds evidence that it provides actual constraint. “Judges concur to say they would decide cases differently were they not constrained by the interpretive framework; lower court cases are being vacated and remanded solely on the ground that they were decided using the wrong methodology.”¹⁴¹ Her analysis of the Oregon Supreme Court’s application of its methodological framework revealed that the court managed to create:

[A] small and predictable universe of interpretive tools, producing very few intracourt fights about whether cases are to be decided at step one, two, or three, and giving rise to apparently not a single dissenting or concurring opinion claiming the court was manipulating its methodological framework to reach preferred results.¹⁴²

Of course, the fact that adoption of a uniform approach seems to have worked at the state level does not mean that its logic necessarily transfers to the federal courts. The state courts Gluck found to have reached methodological consensus have done so while drawing on the literature relating to interpretation at the federal level but without having examined or acknowledged the potential institutional and other differences that might hold in the two contexts.¹⁴³ She identifies a number of differences between the states and the federal government that might influence their respective willingness or practical ability to adopt a uniform interpretive framework. These include the greater history of and familiarity with common-law adjudication in the states, the fact that many state court judges must be elected, the greater administrative responsibilities of many state supreme courts, and the likely ability of a state legislature to monitor judicial outputs.¹⁴⁴ There are atmospheric differences as well. The Supreme Court is subject to scrutiny in a way that state’s highest courts are not, and the Justices are individually of much higher profile than

¹⁴⁰ Gluck notes that the case for modified textualism is not so much that it provides the best approach, but rather that it is valuable as a “second best”:

This is important because it shifts the inquiry away from the idea that there is a single “ideal” way to ascertain the meaning of a statute—a question more likely to divide judges and scholars—to, instead, the question of whether there is a sufficiently satisfying theoretical compromise that will also enhance coordination and stability in a complex and (for lower courts) overworked legal system.

Id. at 1856.

¹⁴¹ *Id.* at 1823 (internal citation omitted).

¹⁴² *Id.* at 1785.

¹⁴³ *Id.* at 1789 (Texas); 1793 (Connecticut); 1804 (Michigan).

¹⁴⁴ *Id.* at 1813, 1815-16.

their counterparts in the states. These factors, combined with the fact that the cases that make it before the Supreme Court tend to be the most difficult, may exaggerate the differences between the various interpretive camps and make agreement less likely.¹⁴⁵

We might also question the extent to which the benefits are as advertised. A skeptic might question the underlying notion that legislatures are sufficiently sensitive to methodology,¹⁴⁶ or that an interpretive methodology—even one that judges purport to feel constrained by—can be determinate enough to enable legislatures to predict its application with enough certainty for it to make a difference. The statutory interpretation issues that end up before the courts, after all, are likely to relate to provisions that the legislature did not foresee applying to the situation at hand, or else they would have made the statute clear on the point. There may be something to the idea that a legislature that knows the interpretive rules ahead of time will be able to draft a statute in such a way as to skew the resolution of unanticipated cases in one direction or another. But if the core problem is that courts are often asked to apply statutes to situations that the legislature did not anticipate, then it is not clear that enabling the legislature to know what interpretive rules will apply in these cases purchases much in terms of interpretive clarity. A fallback argument might be that clear rules would at least enable the drafting of language with confidence concerning what courts will not do with it; in other words, that it better positions legislatures to head off certain interpretations. The questions are ultimately empirical, of course, and so my point is not to be conclusive but instead to question the asserted magnitude of the benefits.¹⁴⁷

Reflection on this literature concerning statutory interpretation uncovers another point. Though the authors often use the phrase “stare decisis” to describe what they are advocating, the basic cluster of reasons supporting the methodological uniformity they advocate differs from the bases of stare decisis as traditionally understood. What we see instead, in both the normative arguments for the adoption of a

¹⁴⁵ *Id.* at 1821.

¹⁴⁶ *E.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

¹⁴⁷ Abbe Gluck and Lisa Bressman have surveyed congressional staffers concerning their knowledge and use of the canons of statutory interpretation, finding that only some are consistently known and relied on. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 902 (2013).

uniform methodology and Gluck's descriptive account, is the case for consensus.¹⁴⁸ The arguments certainly overlap with those rooted in *stare decisis*, and many of the underlying goals are the same. But these are ultimately more general rule-consequentialist arguments for methodological uniformity rather than *stare decisis* arguments. The primary difference is in terms of the doctrine's bite. As we have already seen, precedent as traditionally conceived exerts scalar rather than absolute force¹⁴⁹ and is thereby a device for incrementalism, one that enables courts to place provisional markers along the path, and that allows them to pick up those markers and move in a different direction if the path turns out to be unworkable. Yet what Foster, at least, advocates, is that "courts should give doctrines of statutory interpretation what I call 'extra-strong' *stare decisis* effect."¹⁵⁰ It is, in effect, an implied acknowledgment that the coordination and rule-of-law benefits, which she suggests would follow from methodological *stare decisis*, will come into being only if the regime is ironclad.¹⁵¹ Put differently,

¹⁴⁸ Foster acknowledges, but does not really grapple with, the categories of assimilation/rules of relevance issues. She raises the example of a holding that it is impermissible to consult a floor statement in connection with the interpretation of a particular statute, which in turn prompts the question of how broadly such a holding would apply. Her answer: "Like questions of substantive law, such questions would have to be decided on a case-by-case basis and would turn on considerations such as the degree to which the rationale for the rule of statutory interpretation at issue is broadly applicable." Foster, *supra* note 18, at 1869. Consideration of the whole of her analysis, however, suggests that the logic of methodological *stare decisis* in the statutory context pushes toward a broad precedential scope. Recall that a significant part of the case for methodological *stare decisis* in this context is that it would provide a fixed background for the legislature to act against. The use of narrow categories of precedent would run contrary to that justification, both in that it would make it more difficult for the legislature to determine what the applicable interpretive approach is, and in that it would make it easier for a court to distinguish away a past methodological precedent. Moreover, because the justifications for statutory methodological *stare decisis* are global in nature, achievement of the concomitant ends likewise requires their application at a broad level. This is not to suggest that differentiation amongst types of statutes would be categorically inappropriate. There is, for example, a strong case to be made for the application of a different approach to criminal statutes. But, in light of the justifications for statutory methodological *stare decisis*, it seems difficult to suggest that the rule of relevance governing a prohibition on consulting floor statements would have to be "statutes," or something nearly as broad. So conceived, the case for methodological *stare decisis* in the statutory context may be less compelling than its advocates suggest.

¹⁴⁹ See *supra* Part I.B.3.

¹⁵⁰ Foster, *supra* note 18, at 1868.

¹⁵¹ She identifies two primary benefits associated with methodological *stare decisis*. First, that it would further the rule of law by enhancing the predictability of law and reducing judicial discretion. *Id.* at 1887. Second, that it would enhance interbranch coordination by making it easier for Congress to know how its statutes will be handled by the judiciary. *Id.* at 1887-89. These benefits, she contends, are unique to the statutory interpretation context, whereas the costs associated with *stare decisis* here are equivalent to those present in substantive *stare decisis*. *Id.* at 1892. But this may be to undersell the costs, even if it is not to oversell the benefits. With respect to the benefits, her argument assumes a certain version of legislative supremacy and a certain conception of the judicial

it is a suggestion that stare decisis take on a binary, rather than scalar, character in this context.

Whatever the ultimate merits of the case for methodological stare decisis as applied to statutory interpretation,¹⁵² the idea has gained considerable traction in both academia and the courts. What is more, many of its academic proponents have suggested that the idea would transfer to constitutional interpretation.¹⁵³ The next subpart takes up that possibility.

B. *Methodological Stare Decisis and Constitutional Interpretation*

Let us, then, finally turn our attention specifically to the application of stare decisis to constitutional interpretive methodology. Why does the Supreme Court not give precedential effect to the methodological choices in its past decisions? Considered in the language of the *Casey* joint opinion, it is easy to appreciate the potential allure of methodological stare decisis as applied to constitutional interpretation. Much of the joint opinion's justification for continued adherence to the basic holding of *Roe v. Wade* turns on the relationship between principled decision making and the Court's legitimacy.

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.¹⁵⁴

role that, as she acknowledges, limits judicial discretion. She is careful to note that she does not equate methodological stare decisis as applied to statutory interpretation with rigid formalism, *id.* at 1869, yet it seems inescapable that the benefits she associates with methodological stare decisis are correlated with the level of formality present in the regime. One that allowed for flexibility and discretion, after all, would seemingly generate less predictability for both the legislature and private actors. The remainder of her assessment of costs and benefits is rooted in the stare decisis literature, *id.* at 1892-97, but what she overlooks is the scalar nature of stare decisis as doctrine. This is not to suggest that her analysis or the factors that she considers are inapposite, but rather that the arguments that underlie stare decisis will also serve as valid arguments for methodological consensus (or settlement).

¹⁵² For a powerful critique, see Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014).

¹⁵³ *E.g.*, Foster, *supra* note 18, at 1871-72 (suggesting that the reasoning behind the argument for methodological stare decisis in the statutory context might also apply to constitutional interpretation, but noting clear differences between the two contexts).

¹⁵⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865-66 (1992).

Frequent overruling, it continues, “would overtax the country’s belief in the Court’s good faith.”¹⁵⁵

Those claims seem to apply with equal, if not greater, force to methodological choices. A Court free from methodological disputes and free from casual gliding back and forth between different methodological approaches without remark is arguably a Court better able to convince the people to accept its decisions on the terms it offers, and one that is truly grounding them in principle rather than political expediency. Indeed, the notion of treating like cases alike seems to fit more comfortably with methodology than with substance, since methodology would seem to present a more generalizable criterion for assessing likeness. It is likewise easy to imagine methodological consistency as congenial to predictability in that it would allow one to anticipate the sorts of arguments and authorities that would factor into the decisional process. There are perhaps aspects in which decision making would be strengthened as well, at least in the sense that a court would not have to reconsider interpretive methodology in each new case, and would instead be free to devote its resources to the increasing refinement of its single, favored approach.

As suggested above, there are multiple respects in which the Court consistently adheres to what can plausibly be described as methodologies, some of which are more akin to the sort of interpretive methodologies with which this article is primarily concerned. Consider, for example, the familiar tiered-scrutiny framework that applies to claims under the Equal Protection Clause.¹⁵⁶ That framework sets up a process by which courts faced with equal protection claims will analyze them—a specific (which is not to say precise) methodology by which a court is to apply a given level of scrutiny depending on the nature of the alleged violation. And it is but a single example of a more general phenomenon. Indeed, much of the work of constitutional doctrine can be conceived of in terms of methodology, insofar as it entails the development, refinement, and application of tests designed to assess whether the Constitution has been complied with. There is also a great deal of consensus with respect to what does not count as an appropriate method. The excluded processes include not only somewhat plausible mechanisms (decisions announced via *seriatim* or advisory opinions) but also a wide array of

¹⁵⁵ *Id.* at 866.

¹⁵⁶ U.S. CONST. amend. XIV.

implausible approaches (decisions reached by coin flip or by reference to the writings of L. Ron Hubbard).

An initial task, then, is to consider whether it is possible to draw a meaningful line between the situations in which there appears to be methodological consistency and those as to which there is not. A promising distinction turns on the difference between, on the one hand, determining constitutional meaning, and on the other, implementing the Constitution once its meaning is settled. Mitch Berman has captured the idea in his differentiation of operative propositions and decision rules. Operative propositions are “constitutional doctrines that represent the judiciary’s understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision.”¹⁵⁷ Decision rules, in contrast, are “doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied.”¹⁵⁸

An example will help. The Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The courts are called upon, in the process of adjudication, to determine what this provision means. In performing that task, the courts may rely on any number of interpretive considerations, including such “modalities” as text, history, precedent, structure, moral judgment, and the like. Suppose the federal judiciary interprets the provision to mean that government may not classify individuals in ways not reasonably designed to promote a legitimate state interest. Such, then, is the constitutional operative provision. But that is not the whole of judge-made constitutional doctrine. A court cannot implement this operative proposition without some sort of procedure (perhaps implicit) for determining whether *to adjudge* the operative proposition satisfied when, as will always be the case, the court lacks unmediated access to the true fact of the matter. It needs, that is to say, a constitutional decision rule.¹⁵⁹

As Berman’s discussion reveals, decision rules do not exist independently of operative propositions, but rather are premised on a particular understanding of an operative proposition. They are subsequent to and arise out of the effort to understand the meaning of a constitutional provision and are designed to facilitate the implementation of that provision given some prior understanding of what the provision means. For example, tiered scrutiny exists as a product of a certain understanding of the Equal Protection Clause, and a different understanding of that clause—a different formulation of the

¹⁵⁷ Berman, *supra* note 19, at 9.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 9-10 (internal citations omitted).

operative proposition—would most likely lead to a different framework of decision rules. Thus decision rules are designed in large part to account for the various constraints, primarily limited time and a lack of complete information, that prevent judges from confidently being able to accurately apply operative propositions on an ad hoc basis. Tiered scrutiny provides a roughly calibrated mechanism for ensuring the protection of certain types of interests that we might fear would be underprotected under an alternate scheme. We subject racial classifications to strict scrutiny, for example, because of the nature of the harm at stake and the difficulty of determining the true motives behind such a classification.

The distinction between decision rules and operative propositions may be, as Berman acknowledges, easier to grasp in theory than to apply with precision.¹⁶⁰ The line is, at best, blurred. But the distinction is useful and illuminates our consideration of the possibility of methodological stare decisis. The bulk of constitutional theory, and of what we might call interpretive methodology, concerns the processes of divining constitutional meaning—that is, of formulating operative propositions. This involves familiar theoretical debates that turn on the resolution of big questions such as the nature of constitutional legitimacy, the proper role of judicial review in a democracy, and the nature and authority of proper sources for consultation in such an inquiry. The formulation of decision rules involves a qualitatively different debate and one that is largely instrumentalist in nature. Berman identifies “six analytically distinct factors or families of factors that might appeal to a judge considering whether, and how, to form a constitutional decision rule—considerations [that he calls] *adjudicatory*, *deterrent*, *protective*, *fiscal*, *institutional*, and *substantive*.”¹⁶¹ Especially when contrasted with a textualist or originalist approach to identifying the content of operative propositions, these stand as a distinct set of considerations.

Much, if not all, of the methodological agreement in the Court occurs in the context of decision rules. *Chevron* deference,¹⁶² tiered scrutiny,¹⁶³ and *Pike* balancing,¹⁶⁴ to take just

¹⁶⁰ “[W]hether a given piece of doctrine is an operative proposition depends on one’s account of constitutional meaning, which in part depends upon one’s theory of constitutional interpretation. Because there exist different plausible conceptions of constitutional meaning.” *Id.* at 80.

¹⁶¹ *Id.* at 93.

¹⁶² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁶³ For an overview, see Calvin R. Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004).

¹⁶⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

a few examples, are mechanisms by which the Court consistently implements a relatively fixed understanding of the meaning of an operative proposition. The methodological disagreement that characterizes constitutional law relates to decision making at a higher level and concerns questions ranging from how to interpret specific provisions of the Constitution to whether the enterprise of judicial review is legitimate. This disagreement exists not only in academic theory, but also in the practices of the Supreme Court, and the Justices have shown no interest in attempting to bring it to a halt.

As the following discussion reveals, this is no coincidence. Stare decisis is ill-suited for methodology as applied to operative propositions, but well-suited to decision rules.

1. Stare Decisis and Operative Propositions

It is easy to construct an argument in favor of giving stare decisis effect to the methods by which the court establishes operative propositions. Boiled down, it is Judge Bork's argument: the consistent application of a methodology is just another name for the rule of law.¹⁶⁵

On reflection, however, that argument's plausibility is only superficial. Here it is important to recall that the choice of a methodology for interpreting the Constitution cannot be made based entirely on the document but must instead be at least partly a product of extra-textual grounds.¹⁶⁶ The question, as Richard Fallon phrases it, becomes one of "fit," which in turn applies a second question, namely "fit to what?"¹⁶⁷ The choice of a method of interpreting the document is further tied to the source of the Constitution's legitimacy. If we accept some varieties of the social-contract theory of the Constitution, then we are likely to be led to choose some variety of originalism as the interpretive approach that best fits.¹⁶⁸ If, in contrast, constitutional legitimacy stems from acceptance, then the range of criteria to be taken into account is much broader and will ultimately be tied to that same legitimating acceptance. The factors that might bear on our choice of methodology then include not only some privileging of the text and original understanding, but also things like the proper place of the judiciary within our governmental structure, the relative

¹⁶⁵ See BORK, *supra* note 8.

¹⁶⁶ See *supra* Part I.C.

¹⁶⁷ See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 549-50 (1999).

¹⁶⁸ See *supra* note 89 and accompanying text.

competence of the judiciary to determine constitutional meaning, and the sorts of external constraints that the judiciary might face in attempting to impose its view of the Constitution on those who would be subject to its rulings. This is surely an incomplete list. It is sufficient, however, to establish at least one important point, which is that the universe of factors involved in methodological choice (at the broad level) is much greater than that involved in the application of stare decisis doctrine. It is not that the factors that drive the application of stare decisis are not relevant to methodological choice, it is that they are only a portion of a larger range of considerations underlying the decision. Indeed, that larger range of considerations includes many if not all those that drive our decision to accept the validity of stare decisis.

Consider the consequences of adherence to a single methodology. That approach would certainly bring about like treatment of like cases, but only insofar as we accept that methodology's conception of what makes one case like another as the appropriate metric. And if the methodology in question is one that purports to apply to the interpretation of the entire Constitution, then it may be that what makes one case like another for purposes of that methodology is that its resolution turns on the interpretation of the Constitution. Let us return to *Heller* and consider the application of an originalist analysis. For substantive purposes, *Heller* is a Second Amendment case, and its holding would not likely have a broad impact beyond that context. Originalism, however, is not merely a Second Amendment theory, but rather a theory that applies to the whole Constitution. Under the most natural conceptions of originalism, the fact that would trigger an originalist analysis is that a case concerns the application of the Constitution.¹⁶⁹ For purposes of assessing whether a subsequent case was "like"

¹⁶⁹ Randy Kozel has recently illustrated this dynamic in his examination of the interrelationship between the application of precedent and interpretive theory. He demonstrates "that whatever one's interpretive theory of choice, it will be inextricably linked to the proper treatment of constitutional precedents and questions of stare decisis." Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1864 (2013). In other words, one's conclusions about whether a prior case is one that should be given precedential effect will depend, in part, on one's interpretive theory. His analysis is focused on precedential weight, in the sense that methodology influences whether a past case was wrongly decided and if so whether it is intolerably wrong. A strict originalist, for example, will accept no past case that is contrary to a proper originalist understanding, while a living constitutionalist will be more tolerant of error. Although weight is the focus, there are aspects of scope present here as well. Moreover, he recognizes the point I assert above, namely that the analysis necessarily generalizes across the entire Constitution (although the specific mix of the living constitutionalist's analysis will vary from one context to another). *Id.* at 1869.

the first one, then, the relevant question would simply be whether it, too, concerned the application of the Constitution.

This aspect of the “likeness” assessment has at least two significant implications. First, it suggests that methodological *stare decisis* could not be contained.¹⁷⁰ That is, its application would tend immediately to require the extension of the same methodology to all corners of the Constitution.¹⁷¹ To be sure, that would not be problematic in the eyes of everyone. For a strict originalist, who views substantive *stare decisis* as unpalatable because it condones the maintenance of doctrine inconsistent with original understanding, this is precisely how the world should work. But there are very few strict originalists. And many Justices (or commentators, or citizens) who are willing to go along with an originalist analysis of the Second Amendment will not be willing to thereby commit to originalist analysis across the Constitution.¹⁷² One response to this observation is to suggest that a theory need not apply across the entire Constitution. Perhaps there could be one approach for the rights-related provisions and another for the structural provisions. We might imagine slicing things up even more finely than that. This might reduce, but it would not eliminate, the effect. The risk of spillover would remain within whatever domains we arrive at. What is more, settlement on the appropriate set of methodological subareas would itself require resort to some broader theory of the Constitution, which would of course have to be applied across the Constitution in order to support the coherence of the resulting distinctions and thereby return us to our starting place.

The second implication is that we might not be comfortable with the narrow, rigid conception of likeness that would result from using methodology as our measuring stick. Consider again the example of originalism. The Framers viewed the world very differently than we do, and consistent application of their understanding would result in classes of cases in which their assessment of likeness would control even though it is radically different from our own. The Framers were, for example, much more inclined toward the differential treatment of men and women. To them, cases involving males

¹⁷⁰ See GERHARDT, *supra* note 5, at 48-49.

¹⁷¹ Not all theories, of course, claim to have application to the entire Constitution, and one can certainly imagine a principled line calling for the application of different methodologies to, say, the “rights” provisions of the Constitution versus the “powers” provisions. There would nonetheless remain a substantial risk that giving precedential effect to methodological choices would impose a too-rigid measure of likeness.

¹⁷² See Scalia, *supra* note 89, at 861 (noting that originalism, “[i]n its undiluted form, at least, . . . is medicine that seems too strong to swallow”).

and females would not be “like” cases in the way that they would be for us. The generalized application of a single methodology, then, would enable a single metric for assessing likeness—whatever it is that triggers application of the methodology—to swamp all the other facts and circumstances of the case, even though as a society we might be inclined to regard some of these latter factors as more significant to the determination of likeness. In broad form the argument I have just outlined tracks one of the more powerful critiques of originalism, with the analysis simply generalized to other methodologies. Any form of originalist analysis with bite, it seems, would generate unpalatable results when viewed from a contemporary perspective. There are too many established nonoriginalist doctrines and practices for it to be otherwise. It is this reality that leads Justice Scalia to acknowledge that he is a “faint-hearted” originalist.¹⁷³ It is a reality that afflicts every theory of interpretation.

It is also worth revisiting the non-binary nature of stare decisis as doctrine. It creates a presumption—not a requirement—that courts will adhere to past cases. Especially in the context of constitutional law,¹⁷⁴ the very nature of the doctrine contemplates overruling and change. This is manageable when tied to substance. When precedent is applied within a substantive domain its binding effects are limited, as are the consequences of its overruling. This is because the categories of assimilation that come into play with the application of stare decisis to substantive law have natural limits. A Fourth Amendment case, for example, will almost certainly not cast its precedential shadow over any other portions of the Constitution, and its scope is likely to be limited to some specific subset of cases, such as those involving a particular context or type of search. The effects of its overruling would likewise be contained.

When the categories of assimilation are as broad as they almost invariably are in the case of methodology, however, the dynamic changes. Because of the wide range of application, one possibility is that we would end up in a position in which stare decisis necessarily operated as a binary doctrine, given the large costs that would be associated with any reversal.¹⁷⁵ Another is that we would experience wild shifts across constitutional law as shifting majorities of the Court decided to

¹⁷³ *Id.* at 864.

¹⁷⁴ See *supra* note 59 and accompanying text.

¹⁷⁵ As noted above, this seems to be an implication of methodological stare decisis as applied to statutory interpretation. See *supra* notes 150-51 and accompanying text.

change methodological course. In both scenarios, of course, there would be sweeping substantive effect, as methodological change would generate different substantive rules. The most likely effect would be that methodological stare decisis would simply be unsustainable; the Court would be unlikely to find all the substantive conclusions generated by a particular methodology palatable. It would feel compelled to depart from the application of any methodology in at least some cases, and the question would become whether it would do so openly—thus forsaking methodological stare decisis—or do so covertly, in which case there would be a great(er) gulf between what the courts are actually doing and how they depict what they are doing. Alternatively, the settled methodologies would be so malleable as to provide no real constraint, allowing shifting majorities to reach results that would seem inconsistent under a more rigid methodology without providing the relative transparency that contemporary pluralism provides.

Let us return to the example of originalism, and assume it has been given precedential effect as the proper interpretive methodology. There are situations in which it is understood that a strict application of originalism would lead to an unpalatable result, such as with respect to the constitutionality of paper money.¹⁷⁶ Were the Court faced with a challenge under the Legal Tender Clause, it would have to choose between a “correct” but incredibly disruptive result (a declaration that paper money is unconstitutional) or a departure from the established methodology. A methodological departure could itself have disruptive effects because, however justified, it would call into question the general applicability of the preferred methodology. If the Court allowed itself to depart from originalism because of the costs associated with its application in one type of situation, then, at a minimum, it would raise the possibility that there are other situations where a similarly justified departure would be warranted as well.¹⁷⁷ However broad the exception, its existence would

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A Supreme Court that held that paper money and Social Security were unconstitutional, that *Brown v. Board of Education* was wrongly decided, or that states need not adhere to one-person, one-vote principles would be rightly denounced by the public as committing grave constitutional errors—even if the Court could demonstrate compellingly that its rulings reflected the original understanding in every case.

Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1141-42 (2008).

¹⁷⁷ Monaghan, *supra* note 37, at 723-24, 772.

undercut the benefits of a regime of methodological stare decisis, which depends to a great degree on the uniformity of the preferred methodology's application. Of course, it might be possible to implement some sort of carve out for already-decided cases that reach a result inconsistent with the preferred methodology. But that would be to commit the same sin that originalists who accept non-originalist precedents commit, and it would be to sanction an essentially pragmatist methodology (that of stare decisis) over the preferred originalist approach.

This decay in the universality of methodological stare decisis would undercut the other benefits associated with stare decisis. Predictability would suffer because it would be difficult to anticipate precisely when application of the preferred methodology would generate a result that was sufficiently unpalatable as to be overridden. At the same time, decisional cost savings would decrease as it became necessary to assess whether each case presented a suitable candidate for departure. These are, to be sure, comparative points, and one could credibly contend that even a watered-down version of methodological stare decisis would be preferable to the methodological free-for-all that characterizes the Court's present practices.

In the end, any effort to impose methodological stare decisis seems likely, at most to settle into a weak hierarchy of methodological preferences rather than the sort of rigid obligation that the logic of methodological stare decisis would entail. The Justices surely recognize the concern Justice O'Connor voiced in *Michael H.*,¹⁷⁸ namely that commitment to a single mode of analysis might prove too constricting in future cases both anticipated and unanticipated. We will return to the matter in Part III.

2. Stare Decisis and Decision Rules

When we shift our gaze from operative propositions to decision rules, the analysis changes considerably. As we have just seen, there are two difficulties that preclude the easy application of stare decisis to interpretive methodology as applied to operative propositions. The first is mechanical, in that resort to methodology as the metric for assessing like treatment leads to consideration of "likeness" in terms of amenability to methodology, which means using a very broad

¹⁷⁸ See *supra* note 4.

category of assimilation. As a result, it would almost certainly require application of the same methodology across wide swaths of the Constitution and indeed probably to the entire document. This would, in turn, overwhelm the more specific, situational features of cases that we would be likely to regard as more germane to determining which are alike. The second is more theoretical and stems from the recognition that the use of stare decisis and other methodologies arises out of the same base of social consensus. As such, it is consensus rather than stare decisis that must provide the ultimate basis for methodological uniformity.¹⁷⁹

Decision rules, in contrast, do not present the same difficulties. The mechanical problem of indefinite scope falls away because decision rules come with built-in limits, for the simple reason that they are tied to specific operative propositions. Methodological stare decisis at this level, then, incorporates the same built-in scope restrictions as apply to substantive stare decisis. The Court can accordingly adopt and bind itself to a methodology for implementing an operative proposition¹⁸⁰ without fear that it will bind itself in some unanticipated way in some distant corner of the Constitution. Consider, for example, the Court's recent line of cases formulating and refining a framework for the treatment of hearsay evidence under the Confrontation Clause. In *Crawford v. Washington*,¹⁸¹ the Court, via a deeply originalist analysis, held that the clause applies only to "testimonial hearsay."¹⁸² Subsequent cases¹⁸³ have refined the tests by which the

¹⁷⁹ This is not to suggest that such consensus cannot manifest itself through the use of stare decisis or something that looks like stare decisis, but rather that for that to happen the consensus that shapes our broader choice of methodological tools would have to evolve so as to give stare decisis that sort of power. Even then, stare decisis would be acting as something of a pass-through doctrine, and would serve more as evidence of an emerging consensus about a given methodology than it would as a reason for privileging that methodology.

¹⁸⁰ This process raises another possible context for the implementation of methodological stare decisis, namely the methodology by which the Court formulates decisions rules in service of operative propositions. The factors that presently go into that formulation are, as Berman describes, fairly ad hoc, turning on an assessment of, among other things, the values served by the operative proposition being implemented and a sense of the institutional capacities of courts and other actors to get to the bottom of whether the operative proposition is being satisfied in any given case. See *supra* note 161 and accompanying text. Given the wide range of values served by operative propositions, it would seem most appropriate to treat the process of formulating decision rules as on par with that of determining the scope of the operative propositions themselves.

¹⁸¹ See *supra* note 3, at 138-41.

¹⁸² *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

¹⁸³ See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Giles v. California*, 554 U.S. 353 (2008); *Davis v. Washington*, 547 U.S. 813 (2006). For a more complete discussion, see Oldfather, *supra* note 3.

testimonial nature of statements is to be assessed. Because they are tied to a specific context, those cases do not naturally apply more broadly. Put differently, the categories of assimilation are tied to the substantive reach of the Confrontation Clause, and this is because the cases' methodological commitments are tied to an understanding of an operative proposition that applies only in certain contexts.

To generalize, the connection between the applicability of decision rules and operative propositions means that the relevant categories of assimilation will be tied more closely to the factual aspects of situations that would normally be taken into account in considering whether two cases are equivalent. Thus a decision rule implementing the Fourth Amendment will be based on the sorts of factors that come into play in the typical case implementing the Fourth Amendment, and a court need not worry that it will be applied to the First Amendment or Article III or any provision beyond the Fourth Amendment (and perhaps even some subset of situations to which the Fourth Amendment applies). Because the applicability of a decision rule will be limited in this way, the consequences of overturning a decision rule will likewise be contained. *Stare decisis*, as doctrine, can apply in this context, and do so in its typical, scalar way.

In similar fashion, the other justifications for precedent fit more comfortably with its application to decision rules, due largely to the different nature and narrower scope of the categories of assimilation. Predictability becomes much more easy to achieve when a methodology applies within a defined scope because it is easier to anticipate the various scenarios that might arise under that scope and how the methodology might apply, which in turn contributes to stability. Decisional efficiency is likewise enhanced as the methodological framework becomes familiar.

The theoretical disconnect disappears as well. Because a decision rule exists only in service of an operative proposition, consensus is built in. So long as the Court continues to adhere to a given understanding of an operative proposition, that understanding serves to fix the Justices' concept of what a decision rule in that context should be designed to do. Because, for example, the Court has maintained rough consistency in its conception of the meaning of the Equal Protection Clause, it has maintained fidelity to tiered scrutiny as an appropriate tool for implementing that meaning. A change in the Court's conception of the operative proposition would destroy that

consensus, but a new formulation would provide a relatively fixed starting point from which to establish another.

III. THREE EXPLANATIONS FOR METHODOLOGICAL PLURALISM

We live in a world in which constitutional interpretation is characterized by methodological pluralism. Sometimes the Court's opinions embrace an originalist analysis and sometimes they do not. When they do, the embrace is often partial and accompanied by other modes of analysis. What is more, later cases demonstrate no great concern for the methodology of their predecessors.¹⁸⁴ Yet, as we have seen, it is a pluralism that is bounded by areas of consensus, both in terms of methods that are consistently followed as well as those are universally regarded as inappropriate. Given the existence of some methodological uniformity within the realm of constitutional law, the persistence of pluralism presents a puzzle. If we can adhere to consistent methodologies in some aspects of constitutional interpretation, why not do so across the board? *Stare decisis* seems at first blush to present a promising mechanism for remedying this inconsistency, but as we have seen it can operate effectively only at the narrow level of decision rules. Methodological disputes relating to the meaning of operative propositions, in contrast, can ultimately be resolved only by reference to social consensus, which in the constitutional context is linked to the acceptance or acquiescence that legitimates the entire constitutional regime.

This Part broadens the focus to consider other categories of explanations for the pluralist world of constitutional interpretation that we live in. The goal is not so much to argue that any one of these explanations is correct, because there is likely something to each of them. The first is that methodological pluralism is normatively desirable, and the functioning of constitutional law is a recognition of that desirability. As we will see, although there are compelling arguments in favor of a pluralistic approach, there is little reason to believe that the participants in the system of constitutional law-making regard themselves as engaged in an intentionally pluralistic effort. The second explanation is that there is a lack of consensus on the methodologies of determining constitutional meaning, coupled with the absence of any mechanism by which any single methodology could

¹⁸⁴ See *supra* notes 1-8, 20-24 and accompanying text.

attain a privileged position over the others. Stare decisis, or some similar rule-consequentialist argument for the establishment of a single methodology, is the most obvious candidate, but does not work for the reasons we have seen. Pluralism, on this account, is simply a default. Finally, it may be that methodological consensus is unattainable for reasons that are external to the processes of adjudication. It might be that any methodology worthy of the title would be too determinate, and would thereby, if consistently adhered to, commit the Court to results that it could not afford to reach. The Court has limited institutional capital, and in situations where adherence to the preferred methodology would lead to a result that the other branches would ignore, it would be faced with a choice among openly departing from the preferred methodology, covertly departing from the preferred methodology, or reaching the politically unpalatable result. We will consider these possibilities in turn.

A. *The Prescriptive Case for Pluralism*

Because constitutional interpretation in practice is so clearly pluralistic in nature, it is natural to want to conclude that pluralism is normatively desirable. There are multiple versions of the case for pluralism. Among the grounds on which the Justices might affirmatively choose to engage in pluralistic interpretation are: (i) that pluralism is the interpretive approach that is best able to ascertain and give effect to the meaning of the Constitution; (ii) that there is no such thing as a fixed, ascertainable meaning of the Constitution, but that pluralism best gives effect to a core principle underlying the Constitution; (iii) that there is neither a fixed meaning nor a single underlying principle, but that pluralism best facilitates the achievement of other ends served by the Constitution; and (iv) that pluralism is desirable for reasons that have less to do with making sense of the Constitution as a document or set of ideas and more to do with pluralistic interpretation as social good in its own right. These justifications overlap with one another, of course, as well as with many of the ideas explored in the next subsection. We will consider them in turn.

One version of the argument that pluralism is the approach best able to give meaning to the Constitution rests on an understanding that the Constitution has a meaning that is more or less fixed. This could be so because the document itself has a fixed meaning (whether in the sense that there is a meaning that is fixed in the words of the document or in the sense that we can posit the

existence of a meaning of an evolving Constitution at any given moment) or because there is some determinate core to the practice of interpreting the Constitution. In either case, the argument is that pluralism provides the best route to ascertaining and applying this fixed meaning. This might, for example, be based on a conclusion about the Constitution's nature as a document that seeks to achieve a variety of ends through clauses that differ in their functions and specificity.¹⁸⁵ On that view, it might make sense to vary interpretive approach depending on whether the clause in question is a source of or limitation on governmental power, phrased in broad or narrow language, a term of art or not, and so on, as well as based on features of the factual setting in which it is being applied. Relatedly, it might be that the various rules, principles, and norms embodied in the Constitution are too nuanced to be captured in a tidy methodological approach.¹⁸⁶ Under either variation there is a discoverable meaning, but *ex ante* identification of the proper modes of uncovering that meaning is impossible either because the process is too context-specific or because the process is too nuanced to be reduced to words.¹⁸⁷ It may be, in other words, that language is too blunt an instrument to capture the ideas that drive methodological selection, and that any attempt to articulate an interpretive principle or approach to

¹⁸⁵ See, e.g., Griffin, *supra* note 2, at 1756 (“The Constitution is a complex document consisting of many clauses, each of varying degrees of generality and ambiguity. Just as we have a variety of rules of grammar, using a variety of principles or interpretive methods seems appropriate when interpreting a complex document such as the Constitution.”).

¹⁸⁶ For example, one might describe

constitutional interpretation [as] a ‘practice’ in the sense in which philosophers use that term: it is a complex form of socially established activity that is both made possible and given structure by implicit rules, norms, standards, and conventions—terms that, for the most part, I use interchangeably. The rule structure need not be articulable by everyone who participates in the practice, any more than someone must be able to state the rules of grammar in order to speak proper English. But without some structure of rules—capable of defining, for example, what counts as a constitutional argument at all—constitutional interpretation would not be a practice but a cacophony of confusion. In other words, the existence of at least some widely shared norms, establishing constitutional interpretation as a practice, is a necessary condition of our ability even to understand each other’s constitutional arguments as successfully as we do.

Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1232-33 (1987) (internal citations omitted). Proponents of what Fallon calls “open-system theories . . . maintain that the reasons for pronouncing an approach correct or incorrect form patterns so complex as to defy rule-like statements of the circumstances in which arguments of any particular kind ought to dominate the result.” *Id.* at 1224.

¹⁸⁷ See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1305-17 (2008).

selecting from among interpretive principles would inevitably miss the mark and lead the Court astray.¹⁸⁸

A second, related argument is based on a denial of the existence of such a fixed meaning. On this view, the inability to fully specify the norms governing the interpretive process also counsels in favor of methodological pluralism. Accordingly, settlement on a single interpretive approach would not only be unattainable, but also undesirable. It is hardly surprising that we might find ourselves unable to articulate all the features of an approach designed to hit a target that moves based on a large and complex array of social factors. For, as we have seen, if the meaning of the Constitution rests on extra-constitutional grounds, then interpretive theories applied to the task of extracting that meaning necessarily rest at least partially on extra-constitutional grounds.

What is more, it seems likely that the competing ends of constitutional interpretation and the various ways in which we prioritize them cannot be reduced to or reconciled via the consistent application of a single methodology. Our disagreements are broad and deep, and extend so far as to include whether the enterprise of judicial review is legitimate.¹⁸⁹ Thus, it is not surprising that we should find ourselves unable to reach any consensus as to the proper way to go about judicial review. To be sure, there is undoubtedly a practical consensus as to the legitimacy of judicial review, in the sense that its very existence is not contested as a matter of doctrine—though its reach is certainly contested via debates over things like justiciability rules¹⁹⁰ and the various doctrinal fights concerning the extent to which the political process ought to be regarded as the appropriate source of constitutional discipline.¹⁹¹ But differing conceptions of the

¹⁸⁸ As Richard Fallon puts it,

the Justices might believe that although they are bound by tacit norms of constitutional adjudication, their tacit knowledge defies accurate expression in propositional form. Specifically, the [J]ustice might believe that although one or another constitutional theory comes closest to describing accurately the normative constraints to which they are subject, none does so perfectly, and that the tacit norms of constitutional adjudication thus actually constrain them from adopting any theory that might diverge from those tacit norms in possibly unforeseeable future cases.

Fallon, *supra* note 2, at 1013-14 .

¹⁸⁹ BOBBITT, *supra* note 121, at 5.

¹⁹⁰ See, e.g., Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007) (critiquing the suggestion that justiciability rules provide a sensible set of limitations on judicial power).

¹⁹¹ See, e.g., John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 103-04 (2004)

function(s) of judicial review will have implications for specific interpretive tasks, and if one accepts the proposition that judicial review serves more than one function, then one is also likely to believe that different modes of interpretation are appropriate in different sorts of cases.¹⁹² A perspective that is fixated on the counter-majoritarian difficulty, and is accordingly skeptical of judicial intervention, will find different interpretive approaches congenial than will a perspective that views courts as proper agents of change. In essence, the suggestion is that there are simply too many different mechanisms and ideas within the Constitution, and too many perspectives brought to the Constitution by those interpreting it, for any single meaning to exist or method to work.¹⁹³

This suggests a third variety of normative argument in favor of pluralism, which rests on the view that pluralism best achieves some other goal that its proponent wishes to prioritize. Thomas Merrill, for example, has advocated an approach to judicial review that emphasizes judicial restraint, which he defines in terms of an observer's ability to predict the result in a case based on what has come before.¹⁹⁴ This approach is methodologically agnostic in the sense that it "simply requires that the judge adhere to whatever method produces the most easily-predicted results."¹⁹⁵ Laurence Tribe hints at a different

(discussing the claim that the political process can be relied on to protect federalism interests).

¹⁹² See BOBBITT, *supra* note 121, at 124 ("Because there are many facets to any single constitutional problem and . . . many functions performed by a single opinion, the jurist or commentator uses different approaches as a carpenter uses different tools and often many tools in a single project.").

¹⁹³ Pragmatic theories of constitutional interpretation take a similar approach. For example, Dan Farber and Suzanna Sherry ground their vision of judicial review in both a rejection of the various "grand theories" that seek to bind judges to a single idea, *see generally* DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002), and a recognition that judges operate under real though imperfect constraints that channel their constitutional decisionmaking yet allow for the exercise of judgment and the application of multiple methodologies, *see generally* DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009).

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As I use the term, judicial restraint refers to a style of judging that produces the fewest surprises. Restrained judges render decisions that conform to what an experienced lawyer, familiar with the facts of the case and the relevant legal authorities, would counsel a client would be the most likely outcome. A restrained judge, in this sense, is not necessarily deferential to other political institutions.

Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274-75 (2005).

¹⁹⁵ "In other words, the value to be maximized—judicial restraint in the sense of a minimum of surprises—does not logically entail any particular judicial

rationale. Having noted that constitutional argumentation inevitably flows from premises “that no one can claim to have ‘discovered’ in a privileged place external to the disputants themselves and insulated from who they are and what groups they belong to,”¹⁹⁶ Tribe observes that “in matters of power, the end of doubt and distrust is the beginning of tyranny.”¹⁹⁷

A final type of account is oriented less toward the document and the ideas it embodies and more toward pluralism’s value in facilitating collective buy-in to the enterprise of judicial review and indeed to the American governmental system more generally. The lack of any settled interpretive methodology allows us to transcend our varied disagreements in the sense that each of us can lay claim to the true meaning of the Constitution. This means that determinations of constitutionality can be shallowly reasoned and “incompletely theorized.”¹⁹⁸ Because they can resort to an array of different methodologies, the Justices are able to justify the Court’s decisions in a way that can provide multiple segments of society with what they regard as satisfactory reasons. At the same time, dissenting Justices are able to articulate an alternate path of reasoning that will resonate with a different segment of the populace, who are accordingly able to regard their perspectives as having been aired and who have reason to hope their view will prevail in the next case. The overall result is that the Court’s decisions are acceptable on a scale that would be unattainable were the Justices to attempt to reach agreement on a deeper justification.

There is a related sense in which pluralism might foster constitutional legitimacy. Because acceptance provides a very shallow source of constitutional legitimacy, it depends on breadth of support.¹⁹⁹ Our acceptance of the Constitution’s legitimacy is not, for most of us, the product of any sort of conscious choice to be bound, but rather comes about via something that is better described as acquiescence.²⁰⁰ The existence of differing methodological approaches, with their

methodology; the question of which methodology produces the most restraint is contingent upon other features of the legal system.” *Id.* at 275.

¹⁹⁶ LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 5 (1985).

¹⁹⁷ *Id.* at 7 (italics omitted).

¹⁹⁸ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).

¹⁹⁹ See, e.g., Dorf, *supra* note 26, at 1771-72 (contending that the Constitution’s legitimacy is tied to its general acceptance, which is in turn tied to a variety of interpretive approaches).

²⁰⁰ See *Legitimacy*, *supra* note 51, at 1827 (“There is too much controversy among legal elites, and too little informed endorsement among the mass public, to warrant strong claims of legal legitimacy (as opposed to weak or disputable ones) for the interpretive methodologies that substantially define the judicial role.”).

varying underlying conceptions of the functions of the Constitution, enables this thin acceptance to continue by giving most segments of the population at least an occasional victory and thus vindication of its constitutional vision.²⁰¹ It is easier for the losing side in a case to accept defeat if it knows that it is only the result, and not the premises underlying it, that are established. This provides an incentive for the consistent voicing of dissenting views, thereby keeping the dialogue alive. This dynamic could explain both the lack of strong stare decisis with respect to substantive holdings and the lack of any formal requirement of methodological consistency.²⁰²

These arguments have considerable appeal. Perhaps there is methodological consensus, but centered on pluralism rather than any single approach. Nonetheless, while pluralism undoubtedly characterizes the actual practice of constitutional argumentation and decision making, there is little evidence to suggest that any of the participants in the process regard themselves as intentionally engaged in a pluralistic process. Justice O'Connor's concurrence in *Michael H.*²⁰³ nods in that direction. And perhaps Chief Justice Roberts's confirmation hearing statements about not having "an overarching judicial philosophy that I bring to every case"²⁰⁴ can be regarded as an endorsement of pluralism.²⁰⁵ Indeed, perhaps those Justices and judges who claim not to have a theory are really endorsing pluralism, though there seems to be a difference between simply not having a theory of judging and affirmatively embracing a pluralistic approach.²⁰⁶ The consciously pluralistic Justice may actively seek to consider an array of perspectives

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If anything, the cacophony of American constitutional discourse over the last two hundred years suggests that it is not constitutional rhetoric that unites us; it is our collective, social ability to see ourselves and our views in the Constitution when they are not there that unites us [M]ost views with any significant political support in American society usually get reflected in the constitutional opinions and rhetoric of at least one Supreme Court Justice.

Steven G. Calabresi, *The Crisis in Constitutional Theory*, 83 VA. L. REV. 247, 264 (1997).

²⁰² See BOBBITT, *supra* note 121, at 187-89.

²⁰³ See *supra* note 4 and accompanying text.

²⁰⁴ See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 159 (2005) (statement of CJ. John G. Roberts, Jr.), available at <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>.

²⁰⁵ Cf. RUSH, *Freewill*, on PERMANENT WAVES (Mercury Records 1980) ("If you choose not to decide, you still have made a choice.").

²⁰⁶ But see Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 9 (1998) (observing that "while in one sense pragmatism is indeed a theory, . . . in an equally valid and more illuminating sense it is an avowal of skepticism about various kinds of theorizing").

in her decision making, for example, while the non-theorist will perhaps be less systematic. But there is little else in the Court's opinions to support the proposition that the Justices regard themselves as collectively committed to such a mission and even if some of the Justices support pluralism the support for it is quite obviously not unanimous. The descriptive reality thus seems not to be explained by some effort—whether in the sense that we can regard “the Court” as engaged in the effort or merely some of the Justices on it—to achieve a prescriptive ideal. The explanation must lie elsewhere.

B. *Pluralism as Default*

If it is not the case that the Justices are intentionally embracing pluralism, but it is the case that pluralism is what we see, perhaps the appropriate conclusion is that pluralism is the default position. When the participants in the system cannot agree on how to approach some of the interpretive problems presented, pluralism will result so long as there are zones of dissensus concerning constitutional interpretation. Consider the hypothetical Court with which we opened, facing a sequel to *Heller*.²⁰⁷ We could not expect it to adhere to *Heller*'s methodology because we have reached no consensus on what the Court should be doing, and what values the Justices should privilege, in these interpretive contexts. Yet the questions arise, and the courts must resolve them.

There are three components to the argument that this is the correct account of the interpretive practice that we see. The first is that there is no legal or extra-legal consensus that has developed with respect to questions of interpretive methodology. Whether it is a product of differing theories of constitutional legitimacy, differing notions of the function of judicial review or of the ends of government under the Constitution, or simply different psychological orientations, our constitutional discourse is cacophonous rather than choral. Each justice, each constitutional theorist, and, one imagines, each person to have given considerable thought to the matter, has his or her own take on the appropriate approach to the task. To take the easiest example, Justices Scalia and Thomas are both understood to be originalists, but they are not the same sort of originalists.²⁰⁸

²⁰⁷ See *supra* note 20 and accompanying text.

²⁰⁸ They parted ways, for example, in *Gonzales v. Raich*, 545 U.S. 1 (2005); see also Andrea Waters, *Justice Antonin Scalia vs. Justice Clarence Thomas: The*

This leads to the second component of the argument, which returns us to the notion that the Court is a collection of individuals rather than an institution with a collective will—a “they” and not an “it.”²⁰⁹ Each Justice has a different view of methodology, some of them fully developed and others less so, some of them based on a single factor and some of them more pluralistic. Each will find herself in the majority in some cases and will render opinions that read as if her preferred method of interpretation is established, accepted, and uncontroversial. She will do so on the understanding that these methodological pronouncements will not be regarded as binding, but perhaps with the hope that they will be persuasive. Each opinion thus serves as part of a largely uncoordinated effort to establish social consensus as to the appropriateness of the premises underlying the approach it adopts. Indeed, Justice Scalia has acknowledged as much with respect to his dissenting opinions.²¹⁰

The final component of this account is recognition that there is no mechanism for forcing consensus. As we have seen, *stare decisis* is incapable of overriding this lack of methodological clarity. The decision to apply *stare decisis* is itself a decision to employ a methodology. It is not a choice that is inevitable, as demonstrated by civil-law systems, which do not give precedential effect to judicial decisions. Instead, we have chosen it on the common law’s understanding that doing “law” entails the doctrine of precedent. That commitment is a general one, and within it there exists disagreement over the precise nature of what a commitment to precedent involves, especially in terms of its scope.²¹¹ There is more general

“Originalist Bloc” Divided, (2012) (unpublished honors thesis, Berkeley Legal Studies), available at <http://legalstudies.berkeley.edu/files/2012/02/Andrea-Waters-Sp-11.pdf>.

²⁰⁹ Vermeule, *supra* note 6, at 549.

²¹⁰ Justice Scalia has expressly noted that he regards his dissents as engaged in this sort of advocacy:

I’m advocating for the future. Who do you think I’m writing my dissents for? I’m writing for the next generation and for law students. You know, read this and see if you want to go down that road. We’d be better off on all sorts of issues—on legislative history, on originalism. But I’m not going to persuade my colleagues and I’m not going to persuade most of the federal bench. They’ve had this so-called living Constitution stuff, you know, from the time they were in law school. That’s not going to change. But maybe the next generation will see the advantages of going back to the way we used to do things.

Dan Slater, *Law Blog Chats With Scalia, Part II: ‘Master of the Dissent’*, WALL ST. J. LAW BLOG (May 30, 2008, 9:04 PM), blogs.wsj.com/law/2008/05/30/law-blog-chats-with-scalia-part-ii-master-of-the-dissent/.

²¹¹ See *supra* note 42 and accompanying text. For a recent, sophisticated effort to unpack the issues related to the scope of *stare decisis* in constitutional adjudication, see generally Randy J. Kozel, *The Scope of Precedent* (Notre Dame Legal Studies Paper, No. 1443, 2014), available at <http://ssrn.com/abstract=2312581> (click “Download This Paper”).

agreement concerning its strength, especially as applied to interpretation of the Constitution.²¹² It is understood to be a methodology of flexible application that comes into play only in the law's transitional zones.²¹³ It is, moreover, a process that in its application is not independent of other methodologies, but is instead deeply intertwined with them and grounded in the same base of social consensus. A court's conclusions about relevant categories of assimilation will often, if not always, be based in or at least influenced by its methodological assumptions. Facts that are relevant to drawing connections between cases under one methodology will be irrelevant under another.

This characterization is bolstered by the fact that the nature of the Court's case law is consistent with the suggestion that what appears to be methodological stare decisis is simply the emergence of consensus. Consensus is built-in when it comes to decision-rule methodology.²¹⁴ And insofar as the Court appears to engage in consistent analysis with respect to determining operative propositions, this consistency occurs not out of any conscious decision to maintain fidelity with the approach of past cases (or at least not primarily so) but rather out of the fact that a succession of majorities have found a given method to be a palatable approach. Over time, then, a given approach might build up enough inertia or buy in (or become engrained in the legal culture to such an extent) that it is no longer something to be called into question. As efforts to persuade become successful, "they" coalesce into "it." In the meantime, however, the Justices will continue to spar as they have.

C. *Pluralism and External Constraints*

A final category of explanation for methodological pluralism arises out of the fact that the Court does not operate in a vacuum. It has, as the saying goes, neither the power of the sword or the purse, and consequently must resort only to the power of its justifications to secure support for and compliance with its rulings.²¹⁵ Viewed from within the legal system, this seems at first to present a strong argument for methodological consistency. A court that can justify its decisions by referencing

²¹² See *supra* note 59.

²¹³ See *supra* Part I.B.4.

²¹⁴ See *supra* Part II.B.2.

²¹⁵ See THE FEDERALIST No. 78 (James Madison); *Baker v. Carr*, 369 U.S. 186, 267 (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

its use of the methodology that it always uses is seemingly a court that can invoke the rule of law rather than the rule of men.

Logical consistency, however, is not the same as political palatability. The consistent application of any methodology that is not completely manipulable and indeterminate would lead, at least occasionally, to results that place the Court at odds with those who must implement its decisions and with the public that must accept them. The case of originalism and paper money presents an easy example.²¹⁶ It might be the case that if the Court were to hold that paper money is unconstitutional the result would be an amendment to the Constitution authorizing paper money. Whether that were to result or not, it seems likely that such a holding would generate considerable backlash against the Court. Whether one accepts the version of the story about President Roosevelt's Court-packing plan, in which the Court's change in course was a result of the associated political pressure, the underlying dynamic—one in which the Court is aware of the fact that it risks being ignored whenever its holdings stray too far from what is politically palatable—is difficult to deny.²¹⁷

On this account, methodological pluralism serves as something like an institutional safety valve. The Court can avoid having to follow the logic of a single approach to an undesirable conclusion, and meanwhile preserves the ability to offer a justification for its decision that draws from methodologies that fall within the zone of appropriately legal argumentation.

We can also consider the appointment process as part of this dynamic. Whatever the significance of the “switch in time,” much of the work of the New Deal Court was undertaken by Justices appointed by President Roosevelt. The selection of those Justices, as is largely true with Supreme Court appointments more generally, depended to a great degree on their anticipated approach to the job.²¹⁸ This is not to suggest that the selection

²¹⁶ See *supra* note 176 and accompanying text.

²¹⁷ See, e.g., Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 544 n.246 (1997) (identifying situations in which the Court appeared to check itself based on political realities); cf. Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959) (noting that the Court “does not in the end have the power either in theory or in practice to ram its own personal preferences down other people's throats”).

²¹⁸ See, e.g., Robert S. Peck, *New Supreme Court Justices and the “Freshman Effect,”* 4 CHARLESTON L. REV. 149, 161-70 (2009); Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131, 160-61 (2009) (“[P]residents tend to get what they want on the issues they care about, even if their nominees surprise them (or their reconfigured political coalition) on other issues.”).

process turns to a great deal on methodological commitments. Indeed, one imagines that many prospective Justices would, like Chief Justice Roberts, disclaim any such commitments. The point is simply that the Court is not a closed system. Even if all the Justices were to arrive at methodological consensus among themselves, if that consensus were not shared by the legal community more broadly, the appointment of new Justices to the Court would upset whatever balance had been achieved.

CONCLUSION

As the proponents of statutory methodological stare decisis have recognized, the case for the doctrine's application to constitutional interpretation seems plausible. Indeed, one can credibly ask how we can claim to treat like cases alike without committing ourselves to employing a consistent mode of analysis. Why, then, do we not apply stare decisis to interpretive methodology? Why would we not require, or at least expect, a future Supreme Court that faces a Second Amendment question and disagrees with *District of Columbia v. Heller* to justify not only a departure from *Heller's* substantive holding but also its originalist mode of analysis?

At a narrow level, the answer is that stare decisis is, in effect, too weak and ill-fitting a tool. Its force is scalar rather than absolute, yet the logic of its application would entail a stare decisis effect stretching across the entire Constitution, or at least large swaths of it. Any attempt to use a case like *Heller* to bind interpretive choices, then, would collapse under its own weight. There is a theoretical disconnect as well, because resort to stare decisis draws on a common well of legitimating social consensus with other methodological choices. The privileging of any particular methodology must accordingly be rooted in that consensus.

This connection to social consensus is also apparent in those areas of constitutional adjudication where we do see methodological consistency. Mostly this is within the narrow realm of decision rules, like tiered scrutiny or *Chevron*, which do not threaten to escape their substantive bounds, and which are products of the provisional consensus generated by settled operative propositions. Acceptance of a given understanding of the meaning of the Equal Protection Clause, for example, generates a common understanding that tiered scrutiny is an effective means to implement that meaning. But it is also present at a broader level, as in our acceptance of the appropriateness of appeals to past cases and the inappropriateness of decisions based on coin flips or by resort

simply to judges' political preferences. In these latter situations we share an understanding that proper judicial decision making involves considering past cases but not deciding by coin flip or based simply on politics. Stare decisis has a role to play but it is as a handmaiden of transition, a device for providing provisional stability and consistency as a broader consensus forms or erodes. Stare decisis cannot, in other words, serve as an external, doctrinal thumb on the scale that counsels in favor of imposing and adhering to a specific methodological regime. Consistency, stability, and the other features of stare decisis are factors to be considered in the debate over methodology. They are not independent, superior reasons for cutting off debate.

This does not settle the question of our lack of methodological uniformity. It might be the answer, in the sense that the pluralism that characterizes constitutional decision making might simply be a default position, a necessary by-product of a Supreme Court acting as a "they" until enough consensus forms on a given proposition for the Court to act as an "it." Alternatively, perhaps we have reached consensus on pluralism as our methodology. The unremarked-on way in which the Justices bounce from one methodology to the next may be a product of a collective understanding that this is how we do it, that methodological clashes are important to ensure that all perspectives are aired, a function that would be lost if we adhered to a single approach. Finally, we must not forget that the Court does not act in a vacuum, and that the Justices must remain mindful of the limits of their authority. Adherence to a single methodology might entice them to exceed those limits, thereby creating the possibility of institutional clashes in which the Court is ill-equipped to engage.

In the end, the answer to the question of whether the Justices in our hypothetical sequel to *Heller* would feel themselves bound by its methodology is easy. They will not. Explaining why that is so, and whether it ought to be so, however, is not easy at all. This Article has certainly not provided the last word on these questions. If I have succeeded in my task, however, I will have demonstrated why they are important and provided a solid starting point for further conversation.