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Precedent and Jurisprudential Disagreement

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Introduction

Over the years, some have lamented the Supreme Court's willingness to overrule itself and have urged the Court to abandon its weak presumption of stare decisis in constitutional cases in favor of a more stringent rule.[1] In this Article, I point out that one virtue of the weak presumption is that it promotes doctrinal stability while still accommodating pluralism on the Court. Stare decisis purports to guide a justice's decision whether to reverse or tolerate error, and sometimes it does that. Sometimes, however, it functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution.[2] Because the justices do not all share the same interpretive methodology, they do not always have an agreed-upon standard for identifying "error" in constitutional cases. Rejection of a controversial precedent does not always mean that the case is wrong when judged by its own lights; it sometimes means that the justices voting to reverse rejected the interpretive premise of the case. In such cases, "error" is a stand-in for jurisprudential disagreement.

The argument proceeds in three parts. After Part I explains the general contours of stare decisis, Part II develops the thesis that, at least in controversial constitutional cases, an overlooked function of stare decisis is mediating jurisprudential disagreement. Identifying this function of stare decisis offers a different way of thinking about what the weak presumption accomplishes in this category of precedent. On the one hand, it avoids entrenching particular resolutions to methodological controversies. This reflects respect for pluralism on and off the Court, as well as realism about the likelihood that justices will lightly let go of their deeply held interpretive commitments. On the other hand, placing the burden of justification on those justices who would reverse precedent disciplines jurisprudential disagreement lest it become too disruptive. A new majority cannot impose its vision with only votes. It must defend its approach to the Constitution and be sure enough of that approach to warrant unsettling reliance interests. Uncertainty in that regard counsels retention of the status quo.

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1. *See infra* notes 22–24 and accompanying text.

2. *Cf.* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 537 (1999) ("Anyone who cares about constitutional law confronts a large and proliferating number of constitutional theories, by which I mean theories about the nature of the United States Constitution and how judges should interpret and apply it.").

Insofar as it keeps open the prospect of overruling, the weak presumption undeniably comes at a cost to continuity. Part III observes, however, that less rides on the strength of stare decisis than is commonly supposed. Discussions of stare decisis tend to proceed as if horizontal stare decisis—the Court's obligation to follow its own precedent—is the only mechanism for maintaining doctrinal stability. Other features of the system, however, also serve that goal, and may well do more than horizontal stare decisis to advance it. In particular, the prohibition upon advisory opinions, the obligation of lower courts to follow Supreme Court precedent, the Court's certiorari standards, its rule confining the question at issue to the one presented by the litigant, and the fact that the Court is a multimember institution whose members have life tenure are all factors that work together to contribute to continuity in the law. To be sure, overruling precedent is disruptive. But some instability in constitutional law is the inevitable byproduct of pluralism. Were there greater agreement about the nature of the Constitution—for example, whether it is originalist or evolving—we might expect to see greater (although of course still imperfect) stability. In the world we live in, however, that level of stability is more than we have experienced or should expect in particularly divisive areas of constitutional law.

I. The Doctrine of Stare Decisis

Stare decisis is a many-faceted doctrine. It originated in common law courts and worked its way into federal courts over the course of the nineteenth century.[3] By the twentieth century, the doctrine had become a fixture in the federal judicial system.[4] That is not to say that its shape was then or is now fixed. On the contrary, the strength of stare decisis is context dependent.

Stare decisis has two basic forms: vertical stare decisis, a court's obligation to follow the precedent of a superior court, and horizontal stare decisis, a court's obligation to follow its own precedent.[5] Vertical stare decisis is an inflexible rule that admits of no exception.[6] Horizontal stare decisis, by contrast, is a shape-shifting doctrine. For one thing, its strength

3. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1065 (2003) (describing the development of stare decisis in the federal judicial system).

4. *See* Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008) (asserting that "by 1900 the Supreme Court had settled into the practice of citing and relying upon its precedents as modalities of argumentation and sources of decision").

5. Barrett, *supra* note 3, at 1015.

6. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

varies according to the court in which it is invoked.[7] It is virtually nonexistent in district courts, which do not consider themselves bound to follow their own prior decisions.[8] It is a virtually absolute rule in courts of appeals, which prohibit one panel from overruling another, allowing only the rarely seated en banc court to overrule precedent.[9] In the Supreme Court, stare decisis is a soft rule; the Court describes it as one of policy rather than as an "inexorable command."[10] The strength of horizontal stare decisis varies not only by court, but also by the subject matter of the precedent. The Supreme Court has divided precedent into three categories, and courts of appeals have generally followed suit.[11] Statutory precedents receive "super-strong" stare decisis effect, common law cases receive medium-strength stare decisis effect, and constitutional cases are the easiest to overrule.[12] Its rationale for giving constitutional precedent only a weak presumption of validity is that while Congress can correct erroneous statutory interpretations by passing legislation, the onerous process of constitutional amendment makes mistaken constitutional interpretations difficult for the People to correct.[13]

As this discussion reflects, there is nothing inevitable about the shape of stare decisis. It is a judge-made doctrine that federal courts have given varied force in varied contexts. This Article is concerned with the force that stare decisis should have in one particular context: when a Supreme Court justice confronts constitutional precedent with which she disagrees. To be sure, stare decisis does far more than simply constrain judging. Precedent influences the decision in every case insofar as it gives a justice a way of thinking about the problem she must decide.[14] Justices can more easily apply

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7. Barrett, *supra* note 3, at 1015. In addition to the variations described in the text, both vertical and horizontal stare decisis are dependent upon jurisdictional lines. District courts need only obey decisions of the court of appeals in the circuit in which they sit, and courts of appeals are not bound by the decisions of their sister circuits. *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 516–18 (2000).

8. *See* Barrett, *supra* note 3, at 1015 & n.13 ("As a general rule, the district courts do not observe horizontal stare decisis.").

9. *See id.* at 1015 (suggesting that courts of appeals feel the restrictions imposed by horizontal stare decisis more strongly than do district courts or the Supreme Court).

10. Payne v. Tennessee, 501 U.S. 808, 827–28 (1991).

11. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321 & nn.20–22 (2005). As I have discussed elsewhere, the categories make much less sense at the circuit level, whatever their merit at the Supreme Court. *Id.* at 327–51.

12. *Id.* at 321 & n.22.

13. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.").

14. *See* Barrett, *supra* note 3, at 1068 ("[J]udges do not decide cases in a vacuum; rather, precedent always affects the way they view the merits."). In this regard, stare decisis promotes efficiency. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion) (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921), for

the Constitution's broad language because precedent offers them a framework for doing so; Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[15] is a notable example. Decided cases enable the justices to reason by analogy, and the doctrine itself is a reference for arguments grounded in other modalities like text, structure, ethics, prudence, and history.[16] Because of these and many other contributions, stare decisis can fairly be characterized as the workhorse of constitutional decisionmaking.[17] The doctrine has its greatest bite, however, when it constrains a justice from deciding a case the way she otherwise would.[18] In this situation, a justice must decide, to paraphrase Justice Brandeis, whether it is better for the law to be settled or settled right.[19] This is the decision upon which this Article will focus.

Scholars have a range of views about how the Court should behave when deciding whether to overrule constitutional precedent. Those who favor weak stare decisis tend to do so because of their methodological commitments. Thus, some living constitutionalists have argued for freedom to overrule lest precedent hinder progress,[20] and some originalists have argued for freedom to overrule lest doctrine trump the document.[21] Those

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the proposition that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it").

15. *See* 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring) (articulating a three-part framework for evaluating presidential assertions of power).

16. *Cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) (describing the modalities of constitutional argument).

17. *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 65 (2008) ("The extreme frequency with which the justices cite, or ground their opinions in, precedent establishes precedent as a, if not the, principal mode of constitutional argumentation."). For an excellent catalogue of the many contributions other than constraint that stare decisis makes to constitutional law, see *id.* at 147–76.

18. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (1997) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) ("The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.").

19. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

20. For example, Justin Driver argues that common law theories of constitutional adjudication risk overemphasizing the importance of stare decisis, for judges should feel free to "cast aside their predecessors' outmoded thinking." Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2012); *see also id.* ("Living constitutionalism, properly conceived, must create significant leeway for judicial interpretations that deviate from even well-settled precedents.").

21. Some originalists insist that the Court may never follow precedent that conflicts with the Constitution's original meaning. *See, e.g.*, Randy E. Barnett, Response, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (describing himself as a "fearless originalist[]" because he is willing to reject stare decisis when it would require infidelity to the text); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994) (arguing that it is unconstitutional to

who favor more robust stare decisis tend to do so because of the values the doctrine serves, including judicial restraint,[22] the rule of law,[23] and the legitimacy of judicial review.[24] Here, I develop an account of weak stare decisis, but it is not grounded in the claim that any particular methodological commitment demands that approach. Instead, I argue that the variety of such commitments on the Court makes a more relaxed form of constitutional stare decisis both inevitable and probably desirable, at least in those cases in which methodologies clash.

Before I develop this argument, a word of clarification is in order. Studies of stare decisis sometimes describe the way the doctrine restrains the Court as an institution,[25] but I will view the problem from the perspective of an individual justice. Each justice doubtless takes into account the interests of the institution in deciding whether overruling is appropriate. At least before it issues a decision, however, the Court does not have an institutional view about whether the precedent under consideration is right or wrong. Assessment of a precedent's consistency with the Constitution can depend upon a justice's interpretive commitments; the question for a justice who disagrees with a prior decision is whether the constraint of precedent overrides those commitments. Thus, while stare decisis serves institutional interests, this Article treats its tether as operating upon the individuals rather than the entity.

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adhere to precedent in conflict with the Constitution's text). Other originalists concede that the Court may do so in rare circumstances. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 834 (2009) ("Under our consequentialist approach, the goal is to use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (characterizing himself as a "faint-hearted originalist" because of his willingness to follow some precedents that may conflict with the Constitution's text).

22. *See, e.g.*, Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977, 981 (2008) ("A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy.").

23. *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, 159 (2006) (advancing a neoformalist argument as to why "the Supreme Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions").

24. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) (arguing that the Court should follow precedent even when overruling it would not unduly disrupt societal expectations or institutions in order "to demonstrate—at least to elites—the continuing legitimacy of judicial review").

25. *See, e.g.*, *id.* at 755 n.184 (explaining that the author "focuses on stare decisis in terms of the Court rather than in terms of the obligation of an individual member of the Court towards precedent").

II. Errors and Jurisprudential Disagreement

The classic formulation of stare decisis asks a justice to weigh the benefits of error correction against the costs of overruling.[26] In many cases, the justices will have a shared sense of how a prior case should be judged. *Arizona v. Gant*[27] is a good example. There, the Court addressed the question whether to overrule *New York v. Belton*,[28] which held it categorically permissible for police to search the interior of a car after arresting someone who had recently been in it.[29] The decision whether to overrule *Belton* turned on the same issue that the Court considered in *Belton* itself: whether the rationale of *Chimel v. California*[30] permits the search of an automobile incident to arrest after the scene has been secured.[31] The *Gant* Court thought that its predecessor had misapplied that governing precedent.[32]

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26. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 362 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 858 (1992) (plurality opinion) ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection . . . ."); Payne v. Tennessee, 501 U.S. 808, 842–43 (1991) (Souter, J., concurring) ("[W]hen this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent."); Oregon v. Mitchell, 400 U.S. 112, 218 (1970) (Harlan, J., concurring in part and dissenting in part) ("I think it my duty to depart from [these cases], rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.").

27. 556 U.S. 332 (2009).

28. 453 U.S. 454 (1981).

29. *See Gant*, 556 U.S. at 341 (characterizing this as the dominant view of *Belton*); *see also id.* at 357 (Alito, J., dissenting) (asserting that the categorical rule established by *Belton* "could not be clearer").

30. 395 U.S. 752 (1969).

31. *See id.* at 763 (maintaining that the Fourth Amendment permits a warrantless search of the area "'within [an arrestee's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence"); *see also Belton*, 453 U.S. at 460 (extending *Chimel* to hold that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" (footnote omitted)).

32. *Gant*, 556 U.S. at 350 (criticizing *Belton*'s assumption that articles inside a passenger compartment are typically "within the area into which an arrestee might reach" (internal quotation marks omitted)). The *Gant* dissenters would have reaffirmed *Belton* because of both the merits and stare decisis. *Id.* at 358–65 (Alito, J., dissenting). Justice Breyer noted that he would have chosen a new rule had the case been one of first impression, but he did not think that the existing rule caused enough harm to justify overruling it. *Id.* at 354–55 (Breyer, J., dissenting). In this regard, Justice Breyer apparently viewed the *Belton* rule as lying within the prior Court's discretion to adopt, even if he would have exercised that discretion differently. *See id.* This is the kind of situation in which Caleb Nelson has persuasively argued, by way of analogy to the "second step" of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), that the presumption against overruling makes the most sense. Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 7 (2001) ("Before we let current judges substitute their discretionary choices for the discretionary choices made by their predecessors, we may well want to require a 'special justification' (such as the proven unworkability of the prior judges' chosen rules)."). Cases representing discretionary choices are particularly well-suited to the application of stare decisis considerations like whether a precedent is workable, has been undermined by changed circumstances or subsequent case law, or would be

Justices may disagree about whether a rule like *Belton*'s is necessary to protect police safety and preserve evidence, but that disagreement does not flow in any strong way from a justice's fundamental approach to the Constitution. In other words, it is not the kind of case that turns on issues like the weight given original public meaning, the relevance of foreign law, or whether constitutional meaning evolves.

There are other cases, however, that do turn on such disagreements. In these cases, the calculation of "error" may greatly depend upon the eye of the beholder. Randy Kozel has observed that "[p]recedents are neither good nor bad; it is interpretive method that makes them so,"[33] and there is no doubt that there are some questions of constitutional interpretation upon which members of the Court are sharply divided.[34] These differences surface early. Nominees to the Court are routinely asked to describe their judicial philosophies, reflecting the public's expectation that they have one and keen interest in what it is.[35] However cagey a justice may be at the nomination stage, her approach to the Constitution becomes evident in the opinions she writes. For example, it would be difficult for a modern justice to avoid revealing her position on whether the original public meaning of the Constitution controls its interpretation.[36] Justices must decide whether function can trump form,[37] and whether the content of the Equal Protection and Due Process Clauses is static or evolving.[38] They must decide whether

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costly to change. *See, e.g.*, *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (identifying factors relevant to deciding whether to overrule).

33. Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEXAS L. REV. 1843, 1846 (2013).

34. *See* Fallon, *supra* note 2, at 561 ("In practice, the demand that everyone should actually coalesce on a constitutional theory, and accept it as justifying constitutional outcomes, is too stringent to be realistic; reasonable disagreement is endemic to free societies." (citation omitted)). Fallon identifies a rough division between "text-based theories," which focus on the written Constitution, and "practice-based theories," which try to account for "a constitutional 'practice' in which judges sometimes decide cases based on considerations that go beyond the constitutional text." *Id.* at 538. He draws another rough distinction between theories that "seek to identify substantive values that constitutional adjudication ought to advance" and formalist theories that prescribe interpretive methodology rather than values. *Id.*

35. *See, e.g.*, Sheryl Gay Stolberg, *Kagan Promises 'Modest' Approach*, N.Y. TIMES, June 28, 2010, http://www.nytimes.com/2010/06/29/us/politics/29kagan.html (describing Elena Kagan's judicial philosophy as a "core theme" of her confirmation hearings).

36. *Compare* McDonald v. City of Chi., 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring) ("I believe the original meaning of the Fourteenth Amendment offers a superior alternative [to the Court's atextual, ahistorical approach] . . . ."), *with id.* at 3117 (Stevens, J., dissenting) ("Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the Second Amendment, the evidence often points in different directions.").

37. *Compare* INS v. Chadha, 462 U.S. 919, 959 (1983) (holding that the one-house veto violated the formal requirements of bicameralism and presentment), *with id.* at 999 (White, J., dissenting) (insisting that the separation of powers doctrine is not only about form, but also about "accommodation and practicality").

38. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 122–30 (1989) (plurality opinion) (emphasizing the centrality of history and tradition in identifying "fundamental rights" protected by

the laws and traditions of foreign countries are fair game or out of bounds in the interpretation of our Constitution.[39] And these, of course, are just a few of the general issues upon which a justice must take a position. Even apart from opinions, justices particularly passionate about their philosophies take them on the road. Justice Brennan praised living constitutionalism in speeches and articles.[40] Justice Scalia has made the case for originalism in books, articles, and public appearances,[41] and Justice Breyer has energetically made the case for his constitutional philosophy of "active liberty."[42] Other justices, too, have taken their views about the Constitution to the court of public opinion.[43]

When the evaluation of precedent turns on a question on which the justices are sharply divided, it is difficult to say that there is an agreed-upon means of identifying error.[44] An erroneous precedent is one that reflects the "wrong" constitutional philosophy: a judge espousing an approach of active liberty may judge an originalist precedent mistaken, not because it incorrectly determined the relevant provision's original public meaning, but

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the Due Process Clause), *with id.* at 137–41 (Brennan, J., dissenting) (disputing the role of tradition in substantive due process decision making).

39. *Compare* Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (extensively considering international opinion regarding the execution of juveniles), *with id.* at 622–28 (Scalia, J., dissenting) (vehemently objecting to the majority's reliance upon foreign law). *Compare also* Lawrence v. Texas, 539 U.S. 558, 573, 576–77 (2003) (considering the views of foreign countries with respect to consensual homosexual conduct), *with id.* at 598 (Scalia, J., dissenting) (maintaining that the laws of foreign countries are irrelevant to the interpretation of our Constitution and insisting that "'this Court . . . should not impose foreign moods, fads, or fashions on Americans'" (citing Foster v. Florida, 537 U.S. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari))).

40. *See, e.g.*, Justice William J. Brennan, Jr., Address at the Text and Teaching Symposium, Georgetown University: Constitutional Interpretation (Oct. 12, 1985), *available at* http://teachingamericanhistory.org/library/index.asp?document=2342. Describing his approach to constitutional interpretation, Justice Brennan said:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time[?] For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Id.

41. *See generally, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); SCALIA, *supra* note 18.

42. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005). Justices Breyer and Scalia have publicly debated their competing philosophies. *See, e.g.*, Stephen Breyer & Antonin Scalia, Remarks at the U.S. Association of Constitutional Law Discussion at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), *available at* http://www.freerepublic.com/focus/f-news/1352357/posts.

43. *See, e.g.*, Earl Warren, *The Law and the Future*, FORTUNE, Nov. 1955, at 106, 224 ("[I]t is the spirit and not the form of law that keeps justice alive.").

44. *See* Kozel, *supra* note 33 (describing how different approaches to interpretation can lead to different analyses of precedent and how these differences have led to dissonance in constitutional adjudication).

because it treated that meaning as dispositive. *Lawrence v. Texas*[45] is an example of a case reflecting both jurisprudential disagreement and rejection of a precedent on its own terms. *Lawrence* overruled *Bowers v. Hardwick*[46] to hold unconstitutional a Texas statute criminalizing certain forms of sexual conduct between two persons of the same gender.[47] In reaching a contrary conclusion about a statute criminalizing homosexual sodomy, *Bowers* had relied heavily on the fact that the country had a long tradition of such statutes.[48] *Lawrence* challenged *Bowers*'s historical account—i.e., finding the case wanting on its own terms—but said that in any event, current attitudes, rather than tradition, should control—i.e., that *Bowers* took the wrong approach to the Due Process Clause.[49] The case thus turned on a flashpoint in Fourteenth Amendment jurisprudence: whether history and tradition control the definition of protected rights. Disagreement on this point was also the primary reason that the *Lawrence* dissenters defended the merits of *Bowers*.[50]

Consider other situations in which overruling represents a clash of jurisprudential commitments.[51] *Roper v. Simmons*[52] overruled *Stanford v.*

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45. 539 U.S. 558 (2003).

46. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

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

48. *Bowers*, 478 U.S. at 192 (denying the existence of "a fundamental right . . . to engage in acts of consensual sodomy" because "[p]roscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights" (citation omitted)); *id.* at 193 n.6 (cataloging state criminal sodomy laws in existence when the Fourteenth Amendment was ratified).

49. On the former point, see *Lawrence*, 539 U.S. at 571 ("[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate."). On the latter, see *id.* at 571–72 ("In all events we think that our laws and traditions in the past half century are of most relevance here . . . . '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" (alteration in original)).

50. *See id.* at 598 (Scalia, J., dissenting) (asserting that "an 'emerging awareness' does not establish a 'fundamental right'"). The dissenters also objected to the majority's use of foreign law in determining current attitudes about homosexual conduct. *See id.* ("Much less do [constitutional entitlements] spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.").

51. My focus here is on jurisprudential rather than political disagreement. *But see* SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 110 (1995) (contending that the choice to overturn precedent is driven by "the personal policy preferences" of the justices). I conceive of justices as being driven by first-order commitments to constitutional methods rather than solely by partisan political preference. To be sure, a justice's first-order jurisprudential commitments tend to break down along political lines, with conservative justices tending toward originalism and liberal justices tending toward a more evolutionary approach. That does not mean, however, that votes are driven by partisan political preferences for particular results rather than by different starting points on the nature of the Constitution. *Cf.* Richard H. Fallon, Jr., Keynote Address, *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116–17 (2008) ("[A]lthough lawyers, judges, and law professors need to reckon with findings that Supreme Court Justices typically vote consistently with their ideological values in the contested cases on their

Kentucky[53] to hold that the Eighth Amendment prohibited capital punishment for juveniles.[54] While the Court criticized *Stanford* on that case's own terms,[55] its decision was driven by a disagreement with the *Stanford* majority about whether the "Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders."[56] *Payne v. Tennessee*,[57] another Eighth Amendment case, similarly rejected the very premises of controlling precedent.[58] There, the Court overruled two cases that held unconstitutional the admission of victim impact evidence in a capital sentencing hearing because it refused to accept the "two premises" on which the precedent rested: that victim impact evidence "do[es] not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."[59] *Adarand Constructors, Inc. v. Pena*[60] overruled *Metro Broadcasting, Inc. v. Federal Communications Commission*[61] because of disagreement about the deeply contested question whether racial classifications drawn in affirmative action statutes should be subject to strict scrutiny.[62] *Mapp v. Ohio*[63] overruled *Wolf v. Colorado*[64] to hold the Fourth Amendment's exclusionary rule applicable to the states, a decision that flowed from the *Mapp* majority's fundamentally different position on incorporation.[65] *Seminole Tribe v. Florida*[66] overruled *Pennsylvania v.*

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docket, it does not follow that the Justices do not adhere to legal norms."). If one is cynical enough to think that votes are driven almost entirely by partisan preference, there is very little reason to give precedent significant weight—or, for that matter, to believe judicial review legitimate. *See infra* notes 108–11 and accompanying text.

52. 543 U.S. 551 (2005).

53. 492 U.S. 361 (1989), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005).

54. *Roper*, 543 U.S. at 578–79.

55. *See id.* at 574 (asserting that *Stanford* incorrectly counted the number of states prohibiting juvenile capital punishment and explaining that while *Stanford* properly focused on attitudes in 1989, the proper focus for the *Roper* Court was attitudes in 2004).

56. *Id.*

57. 501 U.S. 808 (1991).

58. *Id.* at 827–30 (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

59. *Id.* at 819; *see also id.* at 819–27 (discussing the use of victim impact evidence).

60. 515 U.S. 200 (1995).

61. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

62. *Adarand*, 515 U.S. at 227.

63. 367 U.S. 643 (1961).

64. 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

65. *Compare Wolf*, 338 U.S. at 27–28, 33 (holding that the right to privacy is implicit in the Fourteenth Amendment's concept of "ordered liberty," but refusing to hold the Fourth Amendment applicable to the states (internal quotation marks omitted)), *with Mapp*, 367 U.S. at 657 (treating the applicability of the exclusionary rule to the states as "an essential part of both the Fourth and Fourteenth Amendments").

66. 517 U.S. 44 (1996).

Union Gas Co.[67] to hold Congress incapable of abrogating state sovereign immunity in reliance upon its commerce power, a view resting upon an interpretation of the Eleventh Amendment that has long been a matter of heated dispute.[68]

In cases like these, stare decisis seems less about error correction than about mediating intense jurisprudential disagreement. Asking whether a prior case is in "error" according to a shared standard does not generally require a justice to relinquish her fundamental interpretive commitments. But when a justice rejects the premises of a precedent rather than its conclusion, affirming it requires her to let those commitments go. Seen in this light, it is unrealistic to think that the Court should give its constitutional precedent more weight than it currently does, at least in those cases that strike at a justice's core positions. (Indeed, the fact that statutory and common law cases more rarely involve fundamental commitments may be one reason why more robust stare decisis is easier to sustain in those contexts.) Justices are unlikely to set aside easily their most closely held jurisprudential commitments; in fact, history shows that they have been unwilling to do so. They express the hope that "the intelligence of a future day" will turn their dissents into majorities.[69] And sometimes they cling to dissents repeatedly in future cases, steadfastly refusing to give stare decisis effect to a precedent with which they disagreed at the time it was decided.[70]

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67. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

68. *See* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1352–56 (1998) (describing the debate).

69. *See* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 68 (1928) ("A dissent in a court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."); *see also, e.g.*, Scalia, *supra* note 21, at 864 (expressing the hope that "at least some of [my] dissents will be majorities"); Ruth Bader Ginsburg, Remarks at the 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_10-21-07.html (expressing the hope that a future majority of the Court will adopt her dissenting position in *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

70. Allison Orr Larsen calls this the practice of "perpetual dissent." *See generally* Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008). The consistent dissent of Justices Brennan and Marshall to the death penalty is perhaps the best known, but by no means the only, example. *See id.* at 451 (asserting that after the Court upheld the constitutionality of the death penalty, Justices Brennan and Marshall registered more than 2,100 dissents to that view); *see also, e.g.*, Tennard v. Dretke, 542 U.S. 274, 293 (2004) (Scalia, J., dissenting) ("I have previously expressed my view that this 'right' to unchanneled sentencer discretion has no basis in the Constitution. I have also said that the Court's decisions establishing this right do not deserve *stare decisis* effect." (citation omitted)); McConnell v. FEC, 540 U.S. 93, 326 (2003) (Kennedy, J., concurring in part and dissenting in part) ("I dissented in *Austin* [*v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)], and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting) ("I would affirm the judgment below because I continue to believe that the Constitution does not constrain the size of punitive damage awards." (internal quotation marks omitted)); United States v. Morrison, 529 U.S. 598, 662 (2000)

One function of stare decisis is to keep these kinds of disagreements in check. In hot-button cases where differences in constitutional philosophy are in the foreground, the preference for continuity disciplines jurisprudential disagreement. Absent a presumption in favor of keeping precedent, and absent the system of written opinions on which stare decisis depends, new majorities could brush away a prior decision without explanation. If only the votes mattered, and neither deference to precedent nor a reason for departing from it was required, a reversal would represent an abrupt act of will more akin to a decision made by one of the political branches. But in a system of precedent, the new majority bears the weight of explaining why the constitutional vision of their predecessors was flawed and of making the case as to why theirs better captures the meaning of our fundamental law.[71] Justifying an initial opinion requires reason giving, particularly if the majority is challenged by a dissent. Justifying a decision to overrule precedent, however, requires both reason giving on the merits *and* an explanation of why its view is so compelling as to warrant reversal.[72] The need to take account of reliance interests forces a justice to think carefully about whether she is sure enough about her rationale for overruling to pay the cost of upsetting institutional investment in the prior approach.[73] If she is not sure enough, the preference for continuity trumps. Stare decisis protects

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(Breyer, J., dissenting) (continuing to reject the interpretation of the Commerce Clause advanced in *United States v. Lopez*, 514 U.S. 549 (1995)); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., concurring in part and dissenting in part) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent."); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) ("I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*."); Shaw v. Hunt, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting) ("As I have explained on prior occasions, I am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided.").

71. William Cranch praised the connection between stare decisis, opinion writing, and accountability in the preface to his Supreme Court reports, where he observed that a judge "can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public." William Cranch, *Preface* to 5 U.S. (1 Cranch) iii, iii–iv; *see also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 664 (1999) (citing Cranch, *supra* at iii). In this regard, deference to precedent encourages both humility and respect for other justices. *Cf.* Gerhardt, *supra* note 4, at 1295 (asserting that "fidelity to precedent generally . . . constitutes an indispensable feature of 'judicial modesty' . . . that calls upon Justices and judges to be respectful of the opinions of others to the fullest extent possible and not to decide more than is required in any given case").

72. *See* Payne v. Tennessee, 501 U.S. 808, 848–49 (1991) (Marshall, J., dissenting) (stating that the Supreme Court has "never departed from precedent without 'special justification'").

73. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("But even when justification [for overruling precedent] is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute."); *see also* Arizona v. Gant, 556 U.S. 332, 354–55 (2009) (Breyer, J., dissenting) (observing that while he would "look for a better rule" than that established by precedent if the case were "one of first impression," stare decisis counseled the Court to stay the course).

reliance interests by putting newly ascendant coalitions at an institutional disadvantage. It doesn't prohibit them from rejecting a predecessor majority's methodological approach in favor of their own, but it makes it more difficult for them to do so. The doctrine thus serves as an intertemporal referee, moderating any knee-jerk conviction of rightness by forcing a current majority to advance a special justification for rejecting the competing methodology of its predecessor.[74] It also channels disagreements into the less disruptive approach of refusing to extend precedent—an approach that maintains better continuity with the past than does the abrupt turn of getting rid of it altogether.

Although it was not fashioned with this goal in mind, the traditionally weak presumption of stare decisis in constitutional cases is both realistic about, and respectful of, pluralism. And it accommodates not only a pluralistic Court, but also a pluralistic society.[75] In hard cases, Americans largely look to the Court to flesh out the terms of our compact.[76] We accept the Court's opinions as contingent resolutions of disputes about the content of the Constitution; we abide by them unless and until they are changed. That said, challenges to precedent reflect a general unwillingness to permit a process short of constitutional amendment to articulate the terms of our fundamental law in a permanent way. Challenges to precedent generally originate with litigants[77] and are a means of pushing back against the proposition that the Constitution embodies the principles the Court says it does—for example, that the right to terminate a pregnancy is a fundamental one[78] or that Congress's power to regulate interstate commerce does not support statutes like the Gun-Free School Zones Act.[79] That is not to say that every such challenge should succeed.[80] But the weak presumption permits disputes like these to be aired. Robert Post and Reva Siegel have argued that "[b]acklash to judicial decisions interpreting [the Fourteenth, Eighth, and First Amendments] demonstrates that for some constitutional questions,

74. *See* Barrett, *supra* note 3, at 1018–19 (emphasizing that even if a court has the authority to overrule precedent, it will not do so absent "special justification," which requires more than a mere showing that the prior case is erroneous (internal quotation marks omitted)).

75. *See* Sanford Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 386 (1982) (describing competing ways of understanding the Constitution as "the result of a genuine plurality of ways of seeing the world, rather than of the obdurate recalcitrance of those who refuse to bend to superior argument").

76. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (referring to the Court's duty "to say what the law is").

77. *See infra* notes 117 & 124–26 and accompanying text.

78. Roe v. Wade, 410 U.S. 113, 164 (1973).

79. United States v. Lopez, 514 U.S. 549, 567 (1995).

80. *Cf.* Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) ("[I]t should go without saying that the vitality of the[] constitutional principles [announced in *Brown v. Board of Education*, 347 U.S. 483 (1954)] cannot be allowed to yield simply because of disagreement with them.").

authoritative settlement is neither possible nor desirable."[81] There is insufficient space here to explore the claim that authoritative settlement through judicial decisions is normatively undesirable. But as a descriptive matter, Post and Siegel's claim rings true. Soft stare decisis helps the Court navigate controversial areas by leaving space for reargument despite the default setting of continuity.

It is probably true that justices who subscribe to text-based theories are more likely than others to encounter conflict between precedent and jurisprudential commitment. Caleb Nelson has observed that "the more determinate one considers the underlying rules of decision in a particular area, the more likely one may be to conclude that a past decision in that area is 'demonstrably erroneous.'"[82] It makes sense that one committed to a textualist theory would more often find precedent in conflict with her interpretation of the Constitution than would one who takes a more flexible, all-things-considered approach.[83] Indeed, Michael Gerhardt has said that, at least as of 1994, "no two justices in this century have called for overruling more precedents than Justices Black and Scalia,"[84] both of whom were textualists, even though Black was a liberal and Scalia a conservative. Gerhardt's more recent statistics show that each of the two self-identified originalists, Justices Thomas and Scalia, urged and joined in overruling precedents more than any other justice during the last eleven years of the Rehnquist Court,[85] although Gerhardt also points out that one must be careful

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81. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007). This is consistent with Michael Gerhardt's observation that reversals of constitutional precedent are concentrated in a few areas:

> [T]he areas in which the Court has overruled itself six or more times are criminal procedure (forty), Fourteenth Amendment Due Process Clause (nineteen), the Commerce Clause (eighteen), Fourteenth Amendment Equal Protection Clause (eight), Eleventh Amendment (seven), Article I other than Commerce Clause (six), and freedom of expression or speech (six). The Court has overruled itself fewer than six times in other areas of constitutional law.

Gerhardt, *supra* note 4, at 1282 (footnote omitted).

82. Nelson, *supra* note 32, at 50. "Demonstrably erroneous" is the standard that Nelson would apply to the determination of whether precedent should be overruled. *See generally id.*

83. *Cf. The Nomination of Elena Kagan to be An Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 89 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm ("I think in general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing."); *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) ("I have said I do not have an overarching judicial philosophy that I bring to every case, and I think that's true.").

84. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 33 (1994).

85. GERHARDT, *supra* note 17, at 12. Gerhardt gives the following statistics for the average number of times a Justice called for the overruling of precedent per year during this period: "2.07 for Justice Thomas, 1.84 for Justice Scalia, 1.74 for Chief Justice Rehnquist, 1.78 for Justice Kennedy, 1.75 for Justice O'Connor, 1.45 for Justice Stevens, 1.4 for Justice Souter, 1.27 for Justice Breyer, and 1.0 for Justice Ginsburg." *Id.*

in the inferences one draws from the numbers, which "do not indicate either why or on what basis the justices urged overruling."[86] Even assuming, however, that the higher numbers for textualists are driven by methodological commitment, Gerhardt's statistics also show that calls for overruling are not confined to that quarter.[87] As discussed above, the tension between jurisprudential commitment and precedent is one experienced by justices across the spectrum,[88] even if some may experience it more frequently than others.

III. Institutional Legitimacy and Reliance Interests

Because stare decisis is relatively weak in constitutional cases, the moderating function is the main contribution of the constraint against overruling in cases involving deep-seated jurisprudential disagreement. It forces the Court to proceed cautiously and thoughtfully before reversing course, but it does not force the Court to retain precedent. Yet while this may be consistent with the Court's actual practice, it is contrary to the arguments of those who have argued in favor of a significantly stronger role for stare decisis in constitutional cases.[89] It also arguably gives short shrift to the risks associated with departures from precedent—in particular, preservation of the Court's institutional legitimacy and the protection of reliance interests.[90] This Part considers those concerns in turn and concludes that even a weak system of constitutional stare decisis protects institutional legitimacy and reliance interests more than is commonly supposed.

A. Institutional Legitimacy

Leaving room for new majorities to overrule old ones allows changed membership to change what the Court says the Constitution means. One of the stated goals of stare decisis, including stare decisis in constitutional cases, is institutional legitimacy, both actual and apparent.[91] If the Court's opinions change with its membership, public confidence in the Court as an institution

86. *Id.* at 13.

87. *See supra* note 85.

88. *See supra* notes 45–70 and accompanying text.

89. *See supra* notes 22–24 and accompanying text.

90. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

91. *See* Solorio v. United States, 483 U.S. 435, 466 (1987) (Marshall, J., dissenting) ("[B]edrock principles are founded in the law rather than in the proclivities of individuals." (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (suggesting that stare decisis preserves the perception of "the judiciary as a source of impersonal and reasoned judgments"); *see also* Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260, 1262–63 (1990) (arguing that strong precedent rules are justified because they protect the Court's institutional legitimacy).

might decline.[92] Its members might be seen as partisan rather than impartial[93] and case law as fueled by power rather than reason.[94]

Others have challenged the view that protecting the Court's reputation is a valid reason to retain precedent.[95] Akhil Amar captures the criticism well: "[I]t does not seem to me that when the Supreme Court has made a mistake, it ought to respond by not telling the citizenry because it fears that the American people cannot handle the news."[96] But even assuming that the Court should make decisions with an eye toward its reputation, there is little reason to think that reversals would do it great damage. Stare decisis is not a hard-and-fast rule in the Court's constitutional cases, and the Court has not been afraid to exercise its prerogative to overrule precedent.[97] Still, public

92. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (arguing that "[a] basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government" and contending that "[n]o misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (contending that the Court's institutional strength is weakened when it views its decisions as little more than a "restricted railroad ticket, good for this day and train only"); Earl M. Maltz, Commentary, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 484 (1980) (insisting that adhering to precedent is necessary because the public will not accept the Supreme Court's authority unless it believes that "in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes"); Monaghan, *supra* note 24, at 753 n.170 (describing Judge Posner's opinion that "a general failure to adhere to precedent in constitutional cases would weaken the legitimacy of the federal judiciary by weakening the popular acceptance of judicial decisions").

93. *See* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) ("[E]limination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is.").

94. *See Payne*, 501 U.S. at 844–45 (Marshall, J., dissenting) (lamenting that "[p]ower, not reason, is the new currency" of the majority that believes "itself free to discard any principle of constitutional liberty" that it has the votes to overrule).

95. *See, e.g.*, *id.* at 834 (Scalia, J., concurring) (arguing that "the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes" undermines the Court's legitimacy); Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (contending that "[t]he jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to [precedent], a decision contrary to the public sense of justice as it is, operates . . . to diminish respect for the courts . . . ." (quoting Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959))); *see also* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 834 n.114 (2009) (arguing that the "institutional legitimacy" rationale "is troubling because it suggests that hiding and perpetuating errors is superior to acknowledging and correcting them"); Nelson, *supra* note 32, at 72–73 ("[T]he legitimacy argument may well strike [some] as a giant ruse: It concedes that the public's acceptance of court decisions rests on the idea that judges act like scientists rather than politicians, but it tells courts to act like politicians in order to preserve that idea.").

96. Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 967 (2008).

97. Consider just a few of the well-known fluctuations in the Court's constitutional case law. The Court has flipped twice on the question whether Congress can regulate state governments with respect to prescribing wage and hour limitations for state employees. *Compare* Maryland v. Wirtz, 392 U.S. 183, 201 (1968), *with* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985), *and* Nat'l League of Cities v. Usery, 426 U.S. 833, 840 (1976). The Court has also changed course on the question of incorporation, *compare* Adamson v. California, 332 U.S. 46, 51 (1947),

confidence in the Court remains generally high.[98] Moreover, members of the public (and particularly elites) regularly argue that the Court should overrule certain of its cases.[99] If anything, the public response to controversial cases like *Roe* reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle rather than desire that precedent remain forever unchanging. Court watchers embrace the possibility of overruling, even if they may want it to be the exception rather than the rule.

The "protecting public confidence" argument seems to assume that the public would be shaken to learn that a justice's judicial philosophy can affect the way she decides a case and that justices do not all share the same judicial philosophy.[100] This, however, is not news to the citizenry. Americans understand that there is a difference between Justice Scalia's originalism and Justice Breyer's "active liberty"; that is why Supreme Court nominations are an issue in presidential elections.[101] Many Americans are informed enough

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and Palko v. Connecticut, 302 U.S. 319, 323 (1937), *with* Mapp v. Ohio, 367 U.S. 643, 654–55 (1961); the protection given by the Free Exercise Clause, *compare* Sherbert v. Verner, 374 U.S. 398, 410 (1963), *with* Emp't Div., Dep't of Human Res. of State of Or. v. Smith, 485 U.S. 660, 672 (1988); the scope of the Commerce Clause, *compare* Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 561–62 (1923), *and* Lochner v. New York, 198 U.S. 45, 58 (1905), *with* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937); the lawfulness of segregation, *compare* Plessy v. Ferguson, 163 U.S. 537, 552 (1896), *with* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954); and the freedom of corporations to engage in political speech, *compare* McConnell v. FEC, 540 U.S. 93, 170 (2003), *and* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 655 (1990), *with* Citizens United v. FEC, 558 U.S. 310, 319, 365–66 (2010).

98. *See Supreme Court: Gallup Historical Trends*, GALLUP, http://www.gallup.com/poll/4732/supreme-court.aspx (showing that a majority of Americans have approved of the way the Supreme Court has handled its job in the past decade).

99. *See, e.g.*, Monaghan, *supra* note 24, at 761 (describing how elites in the 1950s believed that the Court should end segregation despite stare decisis principles); Doug Kendall, Citizens United, *President Obama, and His Liberal Naysayers*, HUFFINGTON POST (Nov. 2, 2012, 10:04 AM), http://www.huffingtonpost.com/doug-kendall/citizens-united-president_b_2064049.html (describing President Obama's hope that the Supreme Court will overrule *Citizens United* and his support for a constitutional amendment overruling the case if the Court does not).

100. *See* Payne v. Tennessee, 501 U.S. 808, 853 (1991) ("[T]his Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing 'principles . . . founded in the law rather than in the proclivities of individuals.'" (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))); *see also* Monaghan, *supra* note 24, at 752 (arguing that adhering to contested precedent "demonstrate[s]—at least to elites—the continuing legitimacy of judicial review" by sending the message that "the law is impersonal in character").

101. *See* Abby Livingston & Mark Murray, *Context of Obama's 'Empathy' Remark*, FIRST READ, NBC NEWS.COM (May 1, 2009, 4:58 PM), http://firstread.nbcnews.com/_news/2009/05/01/4430634-context-of-obamas-empathy-remark (reporting on President Obama's commitment to appoint Supreme Court justices who interpret the Constitution in favor of the powerless rather than in a "cramped and narrow way"); Jeffrey Rosen, *Can Bush Deliver a Conservative Court?*, N.Y. TIMES, Nov. 14, 2004, http://www.nytimes.com/2004/11/14/week inreview/14jeff.html (reporting on President Bush's pledge to appoint Supreme Court justices who would be "strict constructionists").

to have a general preference for one or the other,[102] and while each side undoubtedly suspects the other of being motivated by politics rather than sincere jurisprudential commitment, judicial supremacy is alive and well. That Americans—and thus Supreme Court justices—disagree about how to interpret the Constitution is a fact of our political culture. These disagreements not only look forward at what the Court should do in cases it has yet to confront, but also backward in critiques of cases the Court has already decided.

The above speaks to the Court's *apparent* legitimacy. The question remains whether overruling precedent affects the Court's *actual* legitimacy. Does the Court act lawlessly—or at least questionably—when it overrules precedent? I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.[103] That itself serves an important rule-of-law value.[104] Of course, constant upheaval in the law would disserve rule-of-law values insofar as it would undermine the consistency—and therefore the predictability—of the law.[105] But constant upheaval is not what a weak presumption of stare decisis has either promised or delivered. The Court follows precedent far more often than it reverses precedent.[106] And even though overruling is exceptional, it is worth observing that the Court's longstanding acceptance of it lends legitimacy to the practice. Our legal culture does not, and never has, treated the reversal of precedent as out-of-bounds.[107] Instead, it treats departing from precedent as a permissible move,

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102. *See* Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 414 (2011) (describing "the collapsing wall between methodological and popular discourse").

103. While originalists are best known for making this point, *see, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994), nonoriginalists too express fidelity to their best understanding of the Constitution when they choose to overrule precedent, *see, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 895 (1996) (arguing that "[i]f one is quite confident that a practice is wrong—or if one believes, even with less certainty, that it is terribly wrong—this conception of traditionalism permits the practice to be eroded or even discarded").

104. *Cf.* Kozel, *supra* note 33, at 1862 (observing that "[e]xcessive deference to flawed constitutional precedents can . . . create systemic concerns for the rule of law" insofar as "society is forced to endure pervasive misapplications of its most important document").

105. *Id.* at 1857 (asserting that "adherence to precedent advances the rule of law . . . by fostering a sense of uniformity, consistency, and reliability").

106. *See* Gerhardt, *supra* note 4, at 1282 (arguing from statistics that most of constitutional law is stable because, historically, reversals have been concentrated in a few areas of doctrine).

107. By way of contrast, imagine if the Court began deciding all cases without opinion. It is very unlikely that opinion writing is constitutionally required. The early Court did not always issue opinions, and when it did, it often issued them seriatim rather than as a majority. *See* Lee, *supra* note 71, at 670 n.117 (describing John Marshall's "rejection of 'the custom of the delivery of opinions by the Justices *seriatim*,' in favor of the new practice of 'announcing, himself, the views of that tribunal'" (quoting 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800–1815, at 16 (1919))). Opinion writing is such an entrenched practice, however, that the legal community would likely view its elimination as illegitimate, even if not unconstitutional.

albeit one that should be made only for good reason. Because there is a great deal of precedent for overruling precedent, a justice who votes to do so engages in a practice that the system itself has judged to be legitimate rather than lawless.

Critics sometimes suggest that reversals occur because new appointments make new political preferences dominant.[108] It is surely true that reversal is more likely to result from a new justice's heretofore unexpressed opinion than from an existing justice's change of mind.[109] But the criticism is framed to suggest that overruling is driven by—and therefore tainted by—partisan political preferences. To be sure, partisan politics are not a good reason for overturning precedent. But neither are they a good reason for deciding a case of first impression. One who believes that an overruling reflects votes cast based on political preference must believe that all cases (or at least all the hot-button ones) are decided that way, for there would be no reason for politics to taint reversals but not initial decisions. If all such decisions are based on politics, there is no reason why the precedent—itself thus tainted—is worthy of deference. (Nor, for that matter, would there be reason to accept the legitimacy of judicial review.) Basic confidence in the Supreme Court requires the assumption that, as a general matter, justices decide cases based on their honestly held beliefs about how the Constitution should be interpreted. If one is willing to make that assumption about the decision of cases of first impression, one should also be willing to make it about the decision to overrule precedent. A change in personnel may well shift the balance of views on the Court with respect to constitutional methodology. Yet the fact that a reversal flows from a disagreement between the new majority and its predecessors about constitutional methodology does not itself render the overruling illegitimate, as criticisms of overruling sometimes suggest.[110] Reversal because of honest jurisprudential disagreement is illegitimate only if it is done without adequate consideration of, and due deference to, the arguments in favor of letting the precedent stand.[111]

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108. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) ("Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."); BRENNER & SPAETH, *supra* note 51, at 110 (contending that the changed membership of the Court explains reversals, for the choice to overturn precedent is driven by the "personal policy preferences" of the justices); *cf.* CARDOZO, *supra* note 14, at 150 (arguing that a court's changed composition should not occasion changed precedent).

109. *See infra* note 128 and accompanying text.

110. *See supra* notes 92–94 and accompanying text.

111. *See supra* notes 71–73 and accompanying text.

B. Reliance

Reliance interests are one of the classic concerns of stare decisis.[112] Indeed, while the doctrine serves many goals, the protection of reliance interests is paramount.[113] Treating the Supreme Court's constitutional precedent as always subject to revision risks undermining the stability of constitutional law. People must be able to order their affairs, and they cannot do so if a Supreme Court case is a "restricted railroad ticket, good for this day and train only."[114] It is inescapably true that a weak presumption of validity protects reliance less than a virtual rule against overruling.

Horizontal stare decisis, however, is not the only—or necessarily even the primary—mechanism for protecting reliance interests in the Supreme Court's constitutional cases. Indeed, other features of the federal judicial system, working together, do more than the constraint of horizontal stare decisis to keep the Court's case law stable.

1. Vertical Stare Decisis.—Even when a Supreme Court opinion reflects sharp disagreement on the Court, and even when the public is divided in its views about the opinion, lower courts are forbidden to revisit it.[115] Vertical stare decisis locks in the holding of a Supreme Court case in lower courts, and this is a significant stabilizing force in constitutional law.

2. Advisory Opinions.—The Court cannot choose to revisit precedent simply because it disagrees with it. Article III requires that a controversy exist.[116] Litigants must bring cases in lower courts and take their losses to the Supreme Court in order for the question to be on the table. If litigants have no interest in questioning the continued validity of a precedent, the

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112. *See, e.g.*, *Payne*, 501 U.S. at 827 ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, *fosters reliance on judicial decisions*, and contributes to the actual and perceived integrity of the judicial process." (second emphasis added)).

113. *See id.* at 828 (arguing that stare decisis should have the most force in cases in which reliance interests are particularly strong).

114. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

115. *See supra* note 6. To be sure, some may argue that a lower court judge should be free to follow her best judgment about what the Constitution requires rather than a Supreme Court opinion in conflict with that judgment. The federal judicial hierarchy and the Supreme Court's authority to review state court judgments make this a different question than the one posed by a Supreme Court justice confronted with her Court's own precedent. *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (offering constitutional and prudential rationales to justify the system of judicial hierarchy). For present purposes, it suffices to make the descriptive observation that federal and state judges do not consider themselves free to depart from Supreme Court precedent and that vertical stare decisis thus serves as a stabilizing force.

116. U.S. CONST. art. III, § 2. For a discussion of the foundations of the rule against advisory opinions, see generally Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73, 129–30 (2007).

Court will have no opportunity to decide it.[117] The ban on advisory opinions prevents a justice from roaming through the Court's cases to remake them all in her own interpretive image.

3. Certiorari Standards.—It takes not only litigants, but also lower courts and the justices themselves to put an issue on the Court's agenda. In contrast to the lower federal courts, which must take all comers, discretionary jurisdiction permits the Court to pick and choose the questions it hears. One way in which the Court maintains stability in the case law is by *not* granting certiorari to revisit well-settled questions.[118] Indeed, even if an individual justice thinks some well-settled case wrongly decided (to use the classic example, the constitutionality of paper money), the certiorari process permits her to avoid confronting the question whether it should be overruled.

As a general rule, the Court takes cases presenting an important question upon which lower courts are divided.[119] This rule protects reliance interests by putting a challenge to precedent on the Court's agenda only when disagreement below signals to the Court that reconsideration of the precedent may be timely.[120] This disagreement does not typically express

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117. Henry Monaghan identifies the constitutionality of remittitur practice as an example of an issue that is off the Court's agenda because it is one "about which there is no current interest." Monaghan, *supra* note 24, at 746 n.133. Monaghan identifies horizontal stare decisis as the force keeping such issues off the Court's agenda. *Id.* at 744. I tend to agree with Max Radin, however, that it is "estoppel or the force of custom" rather than the force of stare decisis that performs this agenda-limiting function. *See id.* at 757 & n.189 (internal quotation marks omitted) (describing Radin's position and noting that "[o]n this view, Radin would certainly deny that my agenda-limitation illustrations are examples of stare decisis at all" (citation omitted)). Once the legal system widely acquiesces in a holding, reliance interests give it a force that derives from something other than the Court's relatively weak commitment not to depart from its precedents. *See infra* notes 129–48 and accompanying text.

118. *See* GERHARDT, *supra* note 17, at 45 ("[I]n the certiorari process, the justices often demonstrate their desire to adhere to or accept precedents they might not have decided the same way in the first place.").

119. *See* SUP. CT. R. 10(a) (identifying conflict between federal courts of appeals as a reason for granting certiorari); *id.* R. 10(b) (identifying conflict between state courts of last resort or between state courts of last resort and a United States court of appeals as a reason for granting certiorari). The Court is also willing to grant certiorari when the issue is "an important question of federal law that has not been, but should be, settled by this Court," or when a lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* R. 10(c). The Court rarely takes a case seeking only the correction of an error below. *Id.* R. 10. In addition to the above guidelines, the Court will not take a case that has jurisdictional or factual quirks that would complicate the Court's consideration of the merits. *See* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, APPELLATE.NET (1999), http://www.appellate.net/articles/certpractice.asp (noting that the Court screens out cases containing issues that might prevent a clean ruling on the merits of a cert-worthy question). The need to wait for the right case is a further limitation upon the Court's ability to revisit precedent.

120. Some have stressed stare decisis's role in "conserving and perpetuating shared values" as a virtue of the doctrine. Monaghan, *supra* note 24, at 751; *see also* Merrill, *supra* note 22, at 981 (maintaining that "a strong theory of precedent in constitutional law . . . would reduce the prospects for change through constitutional interpretation"). *But see* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006) (observing that

itself by some courts of appeals or state supreme courts flouting precedent; vertical stare decisis prevents that.[121] But lower courts can resist the extension of a holding by distinguishing it.[122] The emergence of splits about the scope of a holding may reflect significant dissatisfaction with the holding itself.[123] If, moreover, affected litigants and judges below have not overwhelmingly acquiesced in a decision, that itself is a signal that its resolution may not be permanent and that interested parties should rely upon it advisedly.

4. Question Presented.—Generally speaking, the Court will not reach out to decide a question that a petitioner has not proposed.[124] This is not a

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while self-professed Burkeans argue in favor of retaining precedent as a means of preserving tradition, "there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution and of appealing to it to trump both contrary caselaw and contrary practices and traditions"). It is undoubtedly true that the large body of precedent that is never disturbed contributes to this aim. But the kinds of cases that the Court reverses are often ones implicating values on which society is divided. *See supra* note 81 and accompanying text.

121. *See* Caminker, *supra* note 115, at 824–25 (outlining the duty of lower courts to obey precedents of those courts that have "revisory jurisdiction" over them).

122. *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 16 (2008) ("Where judges do not wish to follow a precedent it is commonly assumed that they will either distinguish the precedent from the present case or overrule the precedent on the basis of an especially compelling reason or set of reasons.").

123. While not a constitutional case, *Pearson v. Callahan*, 555 U.S. 223 (2009), illustrates well the way in which dissatisfaction below can prompt overruling above. The Court observed that "[l]ower court judges . . . have not been reticent in their criticism of [*Saucier v. Katz*, 533 U.S. 194 (2001)]" and that "application of the rule has not always been enthusiastic." *Id.* at 234. That fact, combined with separate opinions in other cases from members of the Court, spurred reconsideration, and ultimately reversal, of the Court's holding in that case. *Id.* at 235–36; *see also, e.g.*, Arizona v. Gant, 556 U.S. 332, 338 (2009) ("The chorus that has called for us to revisit [*New York v. Belton*, 453 U.S. 454 (1981)] includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles."). *Gregg v. Georgia*, 428 U.S. 153 (1976), also illustrates this phenomenon. After *Furman v. Georgia*, 408 U.S. 238 (1972), held unconstitutional all of the death penalty statutes before the Court in that case, "at least 35 States . . . enacted new statutes that provide[d] for the death penalty for at least some crimes." *Gregg*, 428 U.S. at 179–80 (plurality opinion). Reviewing one of these statutes in *Gregg*, the Court retreated from *Furman* and permitted the death penalty when safeguards were present. *Id.* at 206–07. Pushback from the states caused the Court to change course, even though it did not overrule *Furman* outright. *See id.* at 180–81, 186–87 (finding important that "capital punishment itself has not been rejected by the elected representatives of the people" and invoking "[c]onsiderations of federalism" in deciding that capital punishment is not per se unconstitutional).

124. *See* SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The certiorari petition thus generally gives the Court notice of what it is getting into. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 376–77 (2010) (Roberts, C.J., concurring) (asserting that the Court had not considered whether to overrule precedent in other corporate speech cases because "[n]ot a single party in any of those cases asked us to . . . , and as the dissent points out, the Court generally does not consider constitutional arguments that have not properly been raised" (citation omitted)); Lawrence v. Texas, 539 U.S. 558, 564 (2003) (noting that the petition granted had expressly sought the overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986)). To be sure, the request is not always express in the petition for certiorari, for the Court considers itself free to entertain issues "fairly included" within the questions presented in the petition. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 456–58 (9th

firm constraint, for the Court can order supplemental briefing on a question raised by neither the petition for certiorari nor the merits brief, and it has exercised this power on occasion to order the parties to address whether precedent should be overruled.[125] Such orders are controversial, however, and issue only with the support of multiple justices.[126] The general rule of confining the issues to those pressed by the litigants, along with the need for multiple votes to exercise an exception to this rule, is another check on a justice ready to continue a disagreement that the litigants who sought review or the justices who granted certiorari on a specific question are not ready to reopen. The rule discourages—though does not forbid—the Court from stretching too far. And like the certiorari process, it provides the justices with a way of avoiding the question whether a troublesome precedent should be overruled. A justice who thinks precedent wrongly decided is not necessarily eager to confront that question. As I will discuss below, this is particularly true for so-called superprecedents.

5. Multi-member Court.—The Court's composition of nine is another factor promoting stability. It takes more than one vote to reverse course. It takes four votes for a grant of certiorari and five votes for a majority on the merits.[127] Thus, at least four justices must be willing to entertain a question that could provoke an overruling, and the existing resolution will not be disturbed unless at least five justices are certain enough of their own approach to assume the risk of disturbing reliance interests.

6. Life Tenure.—Life tenure gives the Court relatively stable membership. The slow rate at which seats turn over itself encourages continuity in case law. Justices do change their minds, but overruling is more likely when fresh eyes see a case. Indeed, Michael Gerhardt notes that

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ed. 2007) (describing circumstances in which the Court has deemed questions "fairly included" with those on which it granted certiorari).

125. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792, 797 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986) after calling for supplemental briefing on the question whether it should be overruled); Payne v. Tennessee, 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled). This practice has been sharply criticized. *See, e.g.*, *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is "unusual and inadvisable for a court"). The Court has also occasionally reconsidered precedent without even asking the parties to argue the point, a practice which is also criticized. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 673–74 (1961) (Harlan, J., dissenting) (criticizing the Court for having "reached out" to decide whether to overrule precedent when the issue was neither raised nor briefed by the parties (internal quotation marks omitted)).

126. The number of justices required to order briefing or reargument on a question not raised by the parties appears to be a question of internal practice, for it is not addressed in the Supreme Court Rules. Given that the practice is controversial and has been done over dissent, it is unlikely that it can be done without the support of at least five justices. *See supra* note 125.

127. *See* Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957) (discussing the origins of the "rule of four," which requires four votes to grant certiorari).

in the Supreme Court's history, only four constitutional precedents have been reversed in the absence of any change to the Court's composition.[128]

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These factors operate in all of the Court's cases, but their effect is particularly acute when it comes to so-called superprecedents.[129] Superprecedents are cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds.[130] Michael Gerhardt offers the following explanation:

> [T]he point at which a well-settled practice becomes, by virtue of being well-settled, practically immune to reconsideration is the point at which that precedent has become a superprecedent. Nothing becomes a superprecedent, at least in my judgment, unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.[131]

The following cases are included on most hit lists of superprecedent[132]: *Marbury v. Madison*,[133] *Martin v. Hunter's Lessee*,[134] *Helvering v. Davis*,[135] the *Legal Tender Cases*,[136] *Mapp v. Ohio*,[137] *Brown v. Board of Education*,[138]

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128. GERHARDT, *supra* note 17, at 11.

129. *See generally* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006) (identifying the origin of the term superprecedent and the role of such decisions in the Senate judicial confirmation process). The term was popularized by Senator Arlen Specter, who asked John Roberts during his confirmation hearing whether he agreed that there were "super-duper precedents" in constitutional law. *Id.* at 1204 (internal quotation marks omitted). Other commentators have debated the strength of superprecedent. *Compare* Fallon, *supra* note 51, at 1116 ("[T]he claim that there are superprecedents immune from judicial overruling seems basically correct."), *and* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–82 (2006) (endorsing the proposition that some bedrock precedents are so entrenched that they cannot be overruled), *with* Barnett, *supra* note 21, at 1233 (arguing that no case should be immune from overruling if it conflicts with the Constitution's text).

130. *See* Gerhardt, *supra* note 129, at 1221 ("Super precedent is a construct employed to signify the relatively rare times when it makes eminent sense to recognize that the correctness of a decision is a secondary (or far less important) consideration than its permanence.").

131. Gerhardt, *supra* note 4, at 1293. *Cf.* McGinnis & Rappaport, *supra* note 95, at 836–37 (arguing that an originalist should follow nonoriginalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic—as they would be with respect to paper money—or when the principles would be supported by constitutional amendment in the absence of the cases—as they would be with respect to race and gender discrimination).

132. *See, e.g.*, Gerhardt, *supra* note 129, at 1208–11, 1213–16 (identifying several "superprecedent" cases); Farber, *supra* note 129, at 1180 (citing New Deal-economic and twentieth-century Bill of Rights-incorporation cases as examples of "bedrock precedents").

133. 5 U.S. (1 Cranch) 137 (1803) (holding constitutional the exercise of judicial review).

134. 14 U.S. (1 Wheat.) 304 (1816) (holding constitutional the exercise of Supreme Court review of state court judgments).

135. 301 U.S. 619 (1937) (holding constitutional the Social Security Act).

136. Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870) (holding constitutional the issuance of paper money).

137. 367 U.S. 643 (1961) (holding the Fourth Amendment incorporated against the states through the Fourteenth Amendment).

138. 347 U.S. 483 (1954) (holding that the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools).

and the *Civil Rights Cases*.[139] These opinions are invoked as evidence that there are at least some occasions on which stare decisis undeniably and absolutely constrains the Court.

In my view, however, "superprecedents" do not illustrate a "super strong" effect of stare decisis at all. Stare decisis is a self-imposed constraint upon the Court's ability to overrule precedent. The force of so-called superprecedents, however, does not derive from any decision by the Court about the degree of deference they warrant. Indeed, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[140] shows that the Court is quite incapable of transforming precedent into superprecedent by *ipse dixit*.[141] The force of these cases derives from the people, who have taken their validity off the Court's agenda. Litigants do not challenge them. If they did, no inferior federal court or state court would take them seriously, at least in the absence of any indicia that the broad consensus supporting a precedent was crumbling. When the status of a superprecedent is secure—e.g., the constitutionality of paper money—a lawsuit implicating its validity is unlikely to survive a motion to dismiss. And without disagreement below about the precedent, the issue is unlikely to make it onto the Court's agenda.[142]

To be sure, even if they are not challenged, some of these foundational cases lie in the background of the decisions that the Court makes each term. No one would question the vitality of *Marbury v. Madison* in a petition for certiorari, but that case underlies every exercise of judicial review. The legitimacy of incorporation is water under the bridge, but a case reviewing whether a particular state action was consistent with the Fourth Amendment is premised upon it. Again, however, it is the mechanisms described above rather than stare decisis itself that insulate these precedents from reconsideration. Unless a justice wants to pick a fight with a superprecedent—and can persuade four others to go along with her—the rule confining the Court to addressing issues raised in the petition for certiorari and briefs keeps the question of overruling off the table.[143] Not even originalists claim a responsibility to exhume and rectify every nonoriginalist

139. 109 U.S. 3 (1883) (holding the Fourteenth Amendment applicable only to state action).

140. 505 U.S. 833 (1992).

141. In an op-ed in *The New York Times*, Senator Specter characterized *Roe v. Wade* as a superprecedent. Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES, July 24, 2005, http://www.nytimes.com/2005/07/24/opinion/24specter.html. Scholars, however, do not put *Roe* on the superprecedent list because the public controversy about *Roe* has never abated. *See, e.g.*, Fallon, *supra* note 51, at 1116 ("[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed."); Gerhardt, *supra* note 129, at 1220 (asserting that *Roe* cannot be considered a superprecedent in part because calls for its demise by national political leaders have never retreated).

142. *See supra* notes 119–23 and accompanying text.

143. *See supra* notes 124–26 and accompanying text.

precedent in the United States Reports.[144] Assuming *arguendo* that a justice thinks any particular superprecedent was wrongly decided,[145] the question of its soundness is not one that she will be asked—or likely want—to decide.[146] It thus seems inapposite to phrase the question as whether stare decisis forecloses the justice from reversing such a case. With no question on the table, there is no opportunity for the real constraint of stare decisis to kick in. Indeed, the justice would only face the question of overruling if the precedent lost its "super" status.[147]

That is not to say that the concept of widespread public acceptance of Supreme Court precedent is unimportant to constitutional theory. On the contrary, it is central. In particular, it provokes the question whether the behavior of nonjudicial actors can transform constitutional law outside of the Article V process. That is a difficult question, but it is one focused more on factors external to the Court than upon the Court's internal horizontal stare decisis doctrine. Once a case like *Brown v. Board of Education* achieves superprecedent status, its vitality is out of the Court's hands for as long as the widespread buy-in continues. Public support does not immunize these cases from overruling; it immunizes them from being challenged in the first place.[148] The phenomenon that scholars call superprecedent thus does not

144. Indeed, Justice Scalia has argued precisely the opposite. *See* SCALIA, *supra* note 18, at 138–39 ("[O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.").

145. Superprecedent is most often raised as a challenge to originalism. If many of the Court's foundational cases are inconsistent with the Constitution's original public meaning, the argument goes, originalism is unsustainable. *See* Gerhardt, *supra* note 129, at 1224 ("Originalists . . . have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law."). Originalists have resisted the premise of the challenge, at least in part. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 948–53, 962–71 (1995) (arguing that *Brown v. Board of Education* is consistent with the original meaning of the Fourteenth Amendment); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 900–07 (2009) (arguing that *Brown*, the *Legal Tender Cases*, and cases validating the administrative state are consistent with an originalist understanding of the Constitution). To the extent any long-standing precedent is in fact inconsistent with the Constitution's meaning, some originalists have attempted to justify adhering to it, while others would let go of the precedent in favor of the text. *See supra* note 21.

146. Sometimes a challenge may be to a new application of a foundational precedent rather than to the precedent itself. For example, an originalist may be deeply skeptical that the Due Process Clause protects substance as well as procedure, but the basic existence of substantive due process doctrine is no longer subject to challenge. The system requires the justice to respect that starting point; she cannot pick a fight that litigants (and other justices) have not. The justice may, however, respond by refusing to read that foundational precedent expansively, thereby simultaneously protecting reliance interests and the integrity of the Constitution on the question she has been asked to decide.

147. *Cf.* Gerhardt, *supra* note 4, at 1294–95 ("The larger the constituency—the more public authorities who are persuaded to reconsider some question of constitutional law—the more public and social support there would be to allow a heretofore well-settled issue to be reopened.").

148. This is not to say that such a case should be overruled if public acceptance wanes and a challenge makes its way to the Court. *See supra* note 80 and accompanying text. It is simply to say

have much to tell us about the strength that the Court ought to accord its constitutional precedent that the mine-run of constitutional cases does not. While superprecedent is important to constitutional theory, it has much less to contribute to a theory of stare decisis.

Discussions of reliance on precedent sometimes proceed as if everything depends on horizontal stare decisis. The gravitational pull of horizontal stare decisis is one means—and an important one—of encouraging stability. Even apart from that presumption, however, the system has features that temper the risk of swings in the Court's case law. These features also work toward ensuring that the law does not fluctuate simply because of the will of one justice, or even five, but because of an emerging sense among litigants and lower court judges that it might be time for the Court to change course.

Conclusion

The Court did not adopt the weak presumption in constitutional cases because it wanted to accommodate pluralism, but the presumption serves that end. Rather than extinguishing disagreement, constitutional stare decisis moderates it. The doctrine enables a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation.

Because disagreement about the right way to interpret the Constitution is focused most sharply upon the Supreme Court, stare decisis does not necessarily serve this same mediating function in the constitutional cases decided by lower courts. And because fights about the content of our fundamental law are different in kind than debates about how to interpret more transitory statutes, the thesis developed here is not necessarily applicable to statutory stare decisis. But in the Supreme Court's constitutional cases, recognition of the doctrine's role in tempering disagreement offers insight into one of the functions it serves and one of the reasons why the Court may be unwilling to give constitutional precedent more force.

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that the case lacks the superprecedent status that immunizes it from overruling by removing it from the Court's docket.

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