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Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis

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This Article examines three facets of the relationship between statutory interpretation and the law of stare decisis: judicial interpretation, administrative interpretation, and interpretive methodology.

In analyzing these issues, I emphasize the role of stare decisis in pursuing balance between past and present. That role admits of no distinction between statutory and constitutional decisions, calling into question the practice of giving elevated deference to judicial interpretations of statutes. The pursuit of balance also suggests that one Supreme Court cannot bind future Justices to a wide-ranging interpretive methodology. As for rules requiring deference to administrative interpretations of statutes and regulations, they are articulated at high levels of generality, cut across numerous contexts, and dictate the inferences that future Justices must draw from congressional and administrative ambiguity. Taken in combination, these factors give rise to a strong argument that administrative-deference regimes like the Chevron *and* Auer *doctrines fall outside the bounds of stare decisis.*

Introduction

Statutory interpretation isn't always a clean slate. Courts are commonly asked to revisit or revise statutory provisions they previously encountered. Those requests implicate the doctrine of stare decisis.

Applying principles of horizontal stare decisis to the domain of statutes raises a number of complicated questions for judges. One is how to treat prior judicial *interpretations* of particular statutory provisions. Another is how to treat the *methodologies* that led to those interpretations. A third is how to treat interpretations by *administrative agencies*.

The Supreme Court has left no doubt that specific interpretations of statutory provisions receive a unique, elevated form of deference going forward. It has said less about the stare decisis implications of interpretive methodologies. And the rules for judicial review of administrative

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interpretations create uncertainty given their unique nature: Those rules are not limited to any particular statute, but neither do they sweep as widely as wholesale methodologies of statutory interpretation. If the Justices part ways on the soundness of certain administrative-deference rules—and there is evidence that they do—it is debatable what role the doctrine of stare decisis should play.

This Article examines the operation of stare decisis across specific interpretations, general methodologies, and administrative-deference regimes. Thinking about the three problems together illuminates a common theme: the function of precedent in striking a balance between past and present. Stare decisis enhances the continuity of legal rules. It calls upon individual Justices to remain cognizant of their membership in an enduring institution with a history that predates them and a future that will extend beyond their tenure. That awareness sometimes leads Justices to stand by prior opinions they might have resolved differently in the first instance.

At the same time, fidelity to precedent is not absolute. The doctrine of stare decisis recognizes the possibility that today's Justices might deviate from the Supreme Court's established precedents. History and practice should not be taken lightly, but today's Justices must have space to exercise their own judgment. The goal is balance.

This framing can help us think through some of the most vexing questions at the intersection of stare decisis and statutory interpretation. To begin with the Supreme Court's practice of according elevated deference to its interpretations of specific statutory provisions, the abiding tension between past and present suggests that the Court's current approach ought to be reconsidered. The problem is not the threshold decision to defer to such interpretations. The problem, rather, is the practice of giving the interpretation of statutes heightened deference relative to other judicial decisions, such as constitutional rulings.[1] A system of stare decisis respects the prerogatives of sitting Justices while allowing the law to maintain its basic shape despite personnel shifts.[2] This rationale is general, applying in like

1. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) ("[*S*]*tare decisis* carries enhanced force when a decision . . . interprets a statute."); Agostini v. Felton, 521 U.S. 203, 235 (1997) (noting that stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions"). I will focus on the distinction between statutory and constitutional precedents. There is also a third category of common law precedents, which leading commentators have described as receiving an intermediate degree of deference somewhere between that given to statutory and constitutional decisions. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 334–35 (2016); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321 (2005); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362–64 (1988).

2. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 103 (2001) ("Stare decisis . . . furnishes a functionally crucial response to the phenomenon of reasonable

fashion to statutory and constitutional cases. It reflects an integrated approach in which all precedents are entitled to meaningful deference and overruling always requires a "special justification."[3] Whether applied to statutory decisions or other cases, stare decisis draws together Justices across time notwithstanding their disagreements. By deferring to precedent, today's Justices validate the Supreme Court's institutional identity.

Existing stare decisis jurisprudence is consistent with this account in some respects. The Court regularly talks about the doctrine's conceptual underpinnings in general terms without separating the statutory and constitutional contexts. Still, the Court has held fast to the doctrinal divide: enhanced deference for statutory decisions and reduced deference for constitutional ones. Some of the Court's justifications emphasize the unique dynamics of statutory interpretation. Others work in reverse, positing that the nature of constitutional adjudication lends itself to a relatively weak form of deference and that statutory decisions receive more respect by comparison. But each of these justifications has its shortcomings, and it is worth reconsidering whether there is sufficient cause for singling out statutory interpretations and giving them their own, unique brand of deference—particularly if one believes that the most important functions of precedent generalize across contexts.

As we move from specific interpretations of statutes to the methodologies that yield them, we confront a different set of challenges. Interpretive methodologies do not receive stare decisis effect from the Supreme Court. It doesn't have to be this way; some states appear to treat methodologies as implicating the doctrine of stare decisis. As a normative matter, I will suggest that interpretive methodologies should not carry precedential effect at the Supreme Court.[4] The doctrine of stare decisis calls upon the Justices to consider their own interpretive tendencies in tandem with the Court's institutional history. Yet room for the individual must remain. Asking a Justice to give presumptive fidelity to a wide-ranging methodology with which she disagrees is asking too much. Today's Court cannot tell tomorrow's Court that it must (or must not) consult legislative history in interpreting a statute the Justices have never considered, any more than

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disagreement."); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711, 1737 (2013) ("The doctrine [of stare decisis] enables a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation.").

3. *E.g.*, *Kimble*, 135 S. Ct. at 2409; Dickerson v. United States, 530 U.S. 428, 443 (2000).

4. This Article considers the U.S. Supreme Court's treatment of its own precedents pursuant to the doctrine of horizontal stare decisis. The operation of vertical stare decisis, which relates to a superior court's ability to constrain inferior courts, is a separate matter.

today's Court can tell tomorrow's Court that it must (or must not) consult *The Federalist* in resolving a novel constitutional dispute.[5]

The conceptual space between specific interpretations and general methodologies is where we find the rules of engagement for judicial review of administrative interpretations. A prominent example is the *Chevron* doctrine, pursuant to which an agency's interpretation of an ambiguous statute that it administers is lawful so long as it is reasonable.[6] Another is the *Auer* doctrine, which takes a deferential approach toward an agency's interpretation of the regulations it has crafted in the course of implementing Congress's statutory directives.[7] In 2015, Justice Thomas wondered whether administrative-deference regimes should be "classified as interpretive tools" that lack stare decisis effect.[8] The Court has not yet resolved the matter.

There are difficulties with treating administrative-deference regimes as implicating the doctrine of stare decisis. Deference regimes bear little resemblance to the specific interpretations of particular provisions at the doctrine's core. Though such regimes are not as capacious as wholesale interpretive methodologies, they are articulated at high levels of abstraction and apply across a wide range of cases and contexts. What is more, they dictate particular interpretive choices on behalf of today's Court. A Justice applying *Chevron* is told which inference to draw from legislative silence on a matter encompassed within the statute under consideration: she must conclude that Congress intended to give the agency the power to fill the gap. Likewise, a Justice applying *Auer* is told which inferences she may draw in the face of regulatory ambiguity—for example, that the correct interpretation of the regulation is the one the agency now favors, even if the Justice reads the regulation differently.

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5. *Cf.* State v. Short, 851 N.W.2d 474, 520 (Iowa 2014) (Mansfield, J., dissenting) ("Actual decisions are binding and can have stare decisis effect, but is a philosophical approach binding? . . . Could four Justices of the Supreme Court bind this court in the future to follow 'original intent,' 'legal realism,' or 'economic analysis of the law'? I doubt it.").

6. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnote omitted)). The Court addressed the scope of *Chevron* in *United States v. Mead Corp.*, 533 U.S. 218 (2001). *See* Kevin M. Stack, *The Interpretive Dimension of* Seminole Rock, 22 GEO. MASON L. REV. 669, 670 (2015) ("In *Mead*, the Court constricted the application of *Chevron* deference to statutes that grant lawmaking authority to the agency and to agency actions exercising that authority.").

7. Auer v. Robbins, 519 U.S. 452, 461–63 (1997). Like *Chevron*, *Auer* has some limitations on its scope. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 n.4 (2015) ("*Auer* deference is not an inexorable command in all cases.").

8. *Perez*, 135 S. Ct. at 1214 n.1 (2015) (Thomas, J., concurring in the judgment) (citing CALEB E. NELSON, STATUTORY INTERPRETATION 701 (2011)); *cf.* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 486 (2014) (contending that "on a question as important as administrative law, judges cannot simply cite their prior cases, but must pause to consider what they are doing").

This combination of (a) breadth and (b) compulsion of interpretive choice goes too far in asking the individual Justice to subordinate her authority to the Court's institutional past. The consequence, I will contend, is that administrative-deference regimes like *Chevron* and *Auer* are not entitled to stare decisis effect, at least as those regimes are presently justified in the Court's jurisprudence. This is not to say that *Chevron* or *Auer* should be abandoned. The stare decisis analysis does not determine whether rules in the spirit of *Chevron* and *Auer* are sound on the merits, nor does it predict how the law would operate if *Chevron* or *Auer* were rejected or revised.[9] Moreover, even if *Chevron* and *Auer* were not entitled to stare decisis effect, we might nevertheless expect many lower courts to follow them—a point that matters immensely given the Supreme Court's limited capacity to hear and decide cases.[10] Lower courts might agree with those regimes on the merits, or they might accept them because they enjoy currency at the Supreme Court even if they are not entitled to deference as a formal matter.[11] I take no position on such possibilities. I simply question whether a Justice ought to feel compelled to follow *Chevron* or *Auer* if she has concerns about those approaches on the merits.[12]

This Article begins in Part I by analyzing the stare decisis effect of judicial interpretations of particular statutory provisions. Part II moves from

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9. *Cf.* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 184 (2006) [hereinafter VERMEULE, JUDGING UNDER UNCERTAINTY] (defending a "*second-order default rule* that agencies rather than judges will be allowed to choose the interpretive default rules, such as the canons of construction, unless statutes clearly say otherwise"); ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 31 (2016) [hereinafter VERMEULE, LAW'S ABNEGATION] ("[S]upposing *Chevron* to be overruled tomorrow, in all likelihood nothing of substance would change."); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1091 (2016) ("The shift from deference to *de novo* may be a marginal one measured against the actual amount of interpretive deference occurring today.").

10. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987) ("The Court not only expects the lower courts to vary in their judgments, but also knows that it may not reach these unresolved conflicts for years, until they have proved their importance."); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 121 (2018) ("[W]hen assessing the impact of deference doctrines on judicial behavior, the federal courts of appeals are the more appropriate focus. After all, these circuit courts review the vast majority of statutory interpretations advanced by agencies . . . .").

11. Lower federal courts sometimes defer to statements from Supreme Court opinions even while recognizing those statements as dicta. RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 81–82 (2017). For more on the impact of methodological precedent in the lower courts, see Aaron-Andrew P. Bruhl, *What Would It Mean to Have Methodological Precedent (And Do We Already Have It)*? (unpublished manuscript) (on file with author).

12. If one were unpersuaded by my analysis, the appropriate course presumably would be to apply the Court's established doctrine of stare decisis. *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3225880## [https://perma.cc/3GNE-ZCVR] (concluding that the argument for overruling *Chevron* is relatively weak).

interpretations to methodologies, which raise unique questions for the doctrine of stare decisis. In Part III, the Article turns to administrative interpretations of statutes and related regulations. Across all three Parts, I draw on a vision of precedent as a bridge between Justices and a mechanism for accommodating the present and past.

I. Judicial Interpretations

Judicial interpretations of federal statutes receive more insulation from overruling than do other types of precedents. As a recent study observes, "[s]tare decisis applies with special force to questions of statutory construction."[13]

Though the unique status of statutory precedent is well established under existing law, the justifications for elevated stare decisis remain subject to debate. As we will see, some of the assumptions underlying the distinction between statutory and constitutional decisions are questionable, and the distinction has been described as lacking the historical pedigree of other components of the doctrine of stare decisis.[14] In addition, there are claims that the distinction actually has little explanatory force in determining whether a precedent will be overruled.[15] Even so, the statutory/constitutional divide is a salient feature of the modern law as described by the Supreme Court.[16]

Stare decisis means something different in statutory cases, and a decision's statutory nature has a prominent place in the Supreme Court's discussions. But the theoretical foundations of stare decisis keep the same shape across the statutory and constitutional contexts.

A. Areas of Conceptual Convergence

1. Justifications.—Despite the Supreme Court's singling out of statutory interpretations for special treatment, its opinions commonly recite broader principles of stare decisis that cut across contexts. For example, in *Patterson*

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13. GARNER ET AL., *supra* note 1, at 333. For a recent argument that this practice should be reconsidered with respect to statutory precedents that "amount to gap-filling exercises" in judicial implementation, see Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 216 (2018).

14. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 735 (1999) (arguing that "[t]he notion that the constitutional or statutory nature of a precedent affects its susceptibility to reversal was largely rejected in the founding era and did not gain majority support until well into the twentieth century").

15. *See* Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1146 (2015) (challenging the significance of the statutory/constitutional distinction in recent Supreme Court cases).

16. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015).

v. McLean Credit Union,[17] the Court considered the meaning of a civil rights statute, 41 U.S.C. § 1981, as applied to racial harassment in employment. One question was whether § 1981 extends to private conduct at all. The Court had answered in the affirmative thirteen years earlier.[18] In *Patterson*, the Court stood by its precedent on grounds of stare decisis.[19]

The *Patterson* Court noted that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation."[20] That statement unmistakably recognizes a distinction between statutory and constitutional cases. Yet much of the Court's discussion of stare decisis was framed in general terms. It described the doctrine as "a basic self-governing principle within the Judicial Branch" and invoked Hamilton's statement about the importance of precedent in fending off the exercise of "an arbitrary discretion."[21] The Court also drew on a recent decision for the overarching proposition that stare decisis "ensures that 'the law will not merely change erratically' and 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.'"[22] While the statutory context certainly mattered in bumping up the force of stare decisis, the Court presented a unified account of the doctrine's foundations.

To similar effect is *Kimble v. Marvel Entertainment, LLC*,[23] decided in 2015. That case dealt with the application of the patent laws to royalty agreements. As in *Patterson*, the Court stood by its precedent despite a request to depart.[24] The Court noted that stare decisis "carries enhanced force when a decision . . . interprets a statute."[25] Once again, though, the Court framed its discussion more broadly. Among its citations was a constitutional case, *Payne v. Tennessee*,[26] which *Kimble* quoted in affirming that stare decisis "'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.'"[27] Likewise, before it discussed the "enhanced force" of statutory precedents, *Kimble* explained in general terms that "an argument that we got something wrong—even a

17. 491 U.S. 164 (1989).

18. *See* Runyon v. McCrary, 427 U.S. 160 (1976).

19. *Patterson*, 491 U.S. at 172–75.

20. *Id.* at 172.

21. *Id.* (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Henry Lodge ed., 1888)).

22. *Id.* (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

23. 135 S. Ct. 2401 (2015).

24. *See id.* at 2406.

25. *Id.* at 2409.

26. 501 U.S. 808 (1991).

27. *Kimble*, 135 S. Ct. at 2409 (quoting *Payne*, 501 U.S. at 827–28).

good argument to that effect—cannot by itself justify scrapping settled precedent."[28]

Cases like *Patterson* and *Kimble* complicate the conventional depiction of the relationship between statutory and constitutional precedents. The Supreme Court continues to note that its interpretations of statutes are entitled to more deference than other types of decisions. At the same time, the Court's discussions of stare decisis do not treat the two categories as sealed off from one another. Though there remains a doctrinal divide, there is a notable amount of conceptual convergence.

Convergence also occurs in decisions that end up departing from precedent. A good example is *Hubbard v. United States*,[29] involving the federal false statement law. A Supreme Court decision from 1955 reasoned that the law extends even to statements made to courts.[30] Four decades later, the Court described that interpretation as "seriously flawed."[31] The question was what role stare decisis would play. Writing for a plurality, Justice Stevens noted that deference to precedent is strongest in the statutory context.[32] But he drew on broader principles as well. He reasoned that "[a]dherence to precedent . . . serves an indispensable institutional role within the Federal Judiciary," and he echoed the Court's prior description of stare decisis as a fundamental part of how the judiciary operates, citing *Patterson* as well as the Court's constitutional ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[33] Deference to precedent is never absolute, and Justice Stevens saw *Hubbard* as presenting the exceptional situation in which an overruling is justified.[34] Nevertheless, the bases of stare decisis applied across contexts.

Some reasons for deferring to precedent involve the mechanics of litigation, such as the argument that it would be costly and inefficient to require de novo consideration of every legal question.[35] Respect for precedent helps judges economize on decision costs and saves litigants from the hassle and expense of arguing matters that are well settled. Other defenses of stare decisis revolve around judicial humility and the possibility that today's

28. *Id.*

29. 514 U.S. 695 (1995).

30. United States v. Bramblett, 348 U.S. 503, 509 (1955).

31. *Hubbard*, 514 U.S. at 702.

32. *Id.* at 711 (plurality opinion).

33. 505 U.S. 833 (1992).

34. *Hubbard*, 514 U.S. at 713.

35. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.").

Justices may be mistaken in their diagnoses of past error.[36] That prospect counsels caution before departing from what has gone before.

There are also considerations of predictability and reliance. If people feel the ground shifting beneath their feet, they may be reluctant to act—or, alternatively, they may act in ways that are subsequently undermined.[37] Stare decisis allows people to plan their affairs with added confidence in the legal backdrop. One might respond that there are no sure bets in life, so when people act based on the existing web of legal rules, they should account for the possibility that those rules may change.[38] But the Supreme Court has taken a different tack. It has accepted the importance of protecting reliance, albeit while recognizing that countervailing interests sometimes require departures from precedent.[39] The goal is not simply to encourage people to rely on the law going forward; it is also to protect people who have relied on the law in the past.[40] On this understanding, the law possesses an enduring essence that society properly perceives as stable. Solicitude for reliance expectations does double duty: it identifies a set of interests that the Supreme Court views as important, and it offers lessons about the Court's conception of the law.

None of these justifications is context-dependent. Fidelity to statutory and constitutional decisions alike can create efficiencies, protect reliance expectations, urge caution against hasty departures, and imbue the law with added stability and predictability. That does not mean precedents of either

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36. *See* Deborah Hellman, *An Epistemic Defense of Precedent* (discussing the epistemic argument for a rule of deference to prior decisions), *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 63, 66 (Christopher J. Peters ed., 2013).

37. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (noting that stare decisis "fosters reliance on judicial decisions").

38. *See* KOZEL, *supra* note 11, at 49 (noting the argument that stakeholders should take precautions against overrulings); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1554 (2000) (reasoning that prudent actors should "discount" their reliance based on the possibility of legal change).

39. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007) (concluding that while "reliance on a judicial opinion is a significant reason to adhere to it," in the case at hand "[r]eliance interests do not require us to reaffirm" the relevant precedent); *cf.* Arizona v. Gant, 556 U.S. 332, 349 (2009) ("The fact that the law enforcement community may view the State's version of [the rule embodied in the relevant precedent] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected.").

40. *See* Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2410 (2015) ("So long as we see a reasonable possibility that parties have structured their business transactions in light of [the relevant precedent], we have one more reason to let it stand."); Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law . . . ."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) ("The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application.").

type are beyond reconsideration. The lesson, rather, is that the core of stare decisis is general in its operation and impact.

2. Unifying Function.—When they interpret statutes, Supreme Court Justices exhibit a range of methodological tendencies. In Part II, I will discuss the extent to which methodologies are entitled to stare decisis effect. Before reaching that discussion, I consider the distinct question of how methodological disagreements affect the deference owed to particular interpretations of statutory provisions.

It is unremarkable that two Justices with different methodological preferences might sometimes reach different conclusions about whether a prior interpretation was correct. Fidelity to precedent allows the law to maintain its stability notwithstanding those methodological divergences. Yesterday's decisions retain their claim to respect even if today's Justices harbor doubts about the decisions' animating methodologies. By emphasizing the Court's nature as a continuous institution rather than a shifting assemblage of individuals, stare decisis supports a conception of judging as "a collective project to develop and elucidate the law."[41] That is what gives the doctrine its "fundamental importance to the rule of law."[42]

Rather than allowing the law to ebb and flow with personnel shifts and attendant shifts in prevailing interpretive philosophies, stare decisis pursues continuity in the face of change. In the realm of statutory interpretation, the purposivist Justice is asked to give presumptive deference to the decisions of her more textualist predecessors.[43] The textualist Justice is asked to do the same with respect to more purposivist interpretations. The aspiration is to smooth out the path of the law even as the composition of the Court changes. A shared commitment to precedent also gives today's Justices something to work with when their respective methodologies point them in different directions. Respect for prior decisions facilitates cooperative and deliberative decision-making notwithstanding the reality of philosophical disagreement.[44]

This dynamic is not unique to the statutory context; it arises in constitutional cases as well. There are philosophical differences between those who emphasize the original meaning of the Constitution and those who

41. Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 549 (2017) (book review); *see also* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 21 (2012) (arguing that a later judge "should think of himself not as an individual charged with deciding cases but as a member of a court").

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

43. On the distinction between textualism and purposivism, see *infra* Part II.

44. *See* KOZEL, *supra* note 11, at 107 (articulating a theory of precedent designed to "facilitate[] coordinated action among justices who are inclined to view the world differently"); *cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4–5 (1999) (noting the connection between respect for precedent and the challenge of resolving difficult issues).

view constitutional principles as informed by contemporary norms and values.[45] Even as these (and other) methodologies compete for primacy at the Court, a shared commitment to precedent fosters stability in constitutional jurisprudence. To limit vacillation, the Justices presumptively defer to what has come before, whether or not a prior decision embodies the interpretive methodology that currently prevails at the Court. In doing so, they ensure that constitutional principles are "more than what five Justices say" they are.[46]

The role of stare decisis as a source of constraint, stability, and impersonality does not depend on whether a precedent involves the interpretation of a statute or a constitutional provision. Whether in the statutory or constitutional context, deference to precedent underscores the Supreme Court's status as a stable institution notwithstanding the various interpretive tendencies of individual Justices. Each Justice has an important role to play, but she is called upon to recognize the Court to which she belongs as an enduring body with a history that preceded her and a future that will carry forward indefinitely. That makes it imperative to render decisions with an eye toward continuity in order to promote the notion of the Court, and the law, as transcending the moment.[47] This focus on continuity suggests not a stratified approach to precedent, but rather a unified one in which decisions receive meaningful deference no matter their context.[48]

3. Doctrinal Composition.—Just as the core justifications and functions of stare decisis hold their shape across decisional contexts, so do the considerations that affect whether a precedent is retained or overruled. The Supreme Court has made clear that deference to precedent is not "an inexorable command."[49] A variety of factors have emerged to guide the inquiry into whether the presumption of deference is rebutted in a particular case. They include whether the precedent's logic has been undermined by

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45. Lawrence Solum describes originalism as defined by the belief that the "communicative content of the constitutional text is fixed at the time each provision is framed and ratified," and that "constitutional practice should be constrained by that communicative content of the text." Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269 (2017). By comparison, David Strauss defines a living constitution as "one that evolves, changes over time, and adapts to new circumstances, without being formally amended." DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010).

46. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990); *see also* CARDOZO, *supra* note 35, at 150 ("The situation would . . . be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings."); *cf.* Allison Orr Larsen, *Supreme Court Norms of Impersonality*, 33 CONST. COMMENT. 373 (2018).

47. *See* Waldron, *supra* note 41, at 21 (arguing that judges across time share the responsibility of "seeing that cases that come before the court are decided on the basis of the rule of law").

48. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) ("[A]n argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.").

49. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

subsequent developments and whether its rule has been unworkable as a procedural matter. On the other side of the scale are considerations like whether the precedent has generated significant reliance interests that might warrant its retention. These factors are not context-dependent. They appear in the Court's discussions of stare decisis in statutory cases and constitutional cases alike.[50]

B. Areas of Conceptual Distinction

1. Prospect of Override.—Enacting a statute is not easy. But it is easier than amending the Constitution. In the statutory realm, "Congress remains free to alter what" the Supreme Court has done.[51] In the constitutional context, by contrast, popular revision of the Court's judgments is commonly deemed to be a nonstarter. For the Article V amendment process to get off the ground, there must be a proposal endorsed by two-thirds of both houses of Congress or a call for a convention by two-thirds of the states.[52] And ratification of an amendment requires three-fourths of the states to approve.[53] That degree of consensus, the argument goes, is too much to expect.

Short of the amendment process, Congress lacks authority to override the Supreme Court's constitutional decisions. Justice Brandeis made the point nearly a century ago, arguing that "in cases involving the Federal Constitution . . . correction through legislative action is practically impossible."[54] Decades later, the Court echoed this statement in noting that stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."[55]

At the outset, it is worth noting that legislatures sometimes have the ability to respond effectively to the Supreme Court's constitutional edicts.[56]

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50. *See, e.g.*, *Kimble*, 135 S. Ct. at 2410–11 (noting that the relevant precedent's "statutory and doctrinal underpinnings have not eroded over time" and that "nothing about [the relevant precedent] has proved unworkable"); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 900–07 (2007) (discussing factors such as whether a precedent has been undermined by subsequent cases and its impact on reliance interests); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988) (discussing whether the rule derived from a precedent was "unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals"); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (noting the relevance of workability, reliance implications, subsequent developments in the law, and factual changes).

51. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

52. U.S. CONST. art. V.

53. *Id.*

54. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

55. Agostini v. Felton, 521 U.S. 203, 235 (1997). The Court recently reiterated this point in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018).

56. *See* Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 594 (2018) (discussing the protection of rights through legislation following judicial decisions).

Imagine, for example, that the Court had declined in 2010 to recognize a First Amendment right on behalf of corporations and labor unions to advocate for political candidates.[57] There would have been nothing to prevent Congress and the states from allowing those organizations to engage in candidate advocacy irrespective of the Court's decision.[58] This is emblematic of a broader category of cases in which the Court decides that the Constitution does not guarantee an asserted right or liberty. In many such cases, legislatures possess the power to respond through subconstitutional legal protections.[59] Legislative protections are not perfect substitutes for constitutional rights, of course. Nevertheless, in some situations Congress and the states have significant authority to shape the practical implications of the Supreme Court's constitutional decisions.[60] It is not always true that "correction through legislative action is practically impossible."[61] Even if one assumes that the Article V amendment process is too cumbersome to present a viable option in many cases, there will be situations in which legislation can plug a gap left by an incorrect constitutional ruling.

As for the remaining cases in which the legislature has no effective response to a flawed constitutional ruling, it is debatable whether the effect should be to reduce the potency of stare decisis. The difficulty of amending the Constitution might be something for the judiciary to emulate rather than alleviate. That is, Article V can be read to imply the importance of stability in the path of constitutional law, creating a meaningful presumption of continuity in the face of not only popular reconsideration via the amendment process, but judicial reconsideration as well.[62] If that argument holds, we lose another rationale for giving more deference to statutory precedents than constitutional ones.

2. Inferences from Legislative Behavior.—Beyond arguments about the viability of various mechanisms of legal change, other defenses of elevated

57. *See* Citizens United v. FEC, 558 U.S. 310 (2010).

58. *Cf. id.* at 357 ("Indeed, 26 States do not restrict independent expenditures by for-profit corporations.").

59. *Cf.* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1443 (2007) (distinguishing between situations where the Supreme Court intervenes and where it fails to intervene).

60. For a recent rejection of the argument that Congress's power to respond to a flawed constitutional decision should dissuade the Supreme Court from overruling it, see *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096–97 (2018) ("It is inconsistent with this Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation.").

61. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

62. *Cf.* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430 (1988) ("The observation that it is hard to amend the Constitution does not imply that judges should revise their work more freely.").

stare decisis for statutory interpretations depend on inferences about congressional intent.

a. Legislative Acquiescence.—The Supreme Court interprets a statute. Some are pleased, some are chagrined, and the world keeps turning. Everyone understands that Congress, if it so desired, could enact new legislation that overrides the Court's interpretation. But Congress declines to do so. Maybe it takes no action at all. Or maybe it introduces responsive legislation but never follows through by passing it.[63] In either scenario, there is an argument that Congress's failure to act should be viewed as tantamount to acceptance of the Court's construction, and the Court should resist calls to reconsider its decision now that Congress has tacitly signed off. This is the "legislative acquiescence" rationale for elevated statutory stare decisis.[64]

The Supreme Court's approach to legislative acquiescence has not been entirely consistent, and the Court's jurisprudence reflects some skepticism of the view that failure to alter a statute carries the imprimatur of legislative approval.[65] A good illustration is *Helvering v. Hallock*,[66] which considered the taxation of trust property. There, the Court declined to view the "want of specific Congressional repudiations" as "an implied instruction by Congress to us not to reconsider" the Court's prior interpretation.[67] It resisted trying to "explain the cause of non-action by Congress when Congress itself sheds no light."[68] In other cases, however, inferences from congressional inaction play a significant role in justifying the Court's choice to stay the course.[69]

One problem with the acquiescence argument relates to changes in legislative bodies over time. Even if congressional inaction sometimes amounts to a stamp of approval, it is not obvious that the Court should rely on what *today*'s legislators think about the meaning of a law enacted by a

63. *See* Flood v. Kuhn, 407 U.S. 258, 283 (1972) ("Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. . . .").

64. Eskridge, *supra* note 1, at 1367 (describing the argument that "tacit congressional approval allegedly raises the normal presumption of a precedent's correctness to the super-strong presumption for most statutory precedents").

65. *See* GARNER ET AL., *supra* note 1, at 347 ("Courts generally don't 'draw inferences of approval from the unexplained inaction of [the legislature].'" (quoting United States v. Bd. of Comm'rs of Sheffield, 435 U.S. 110, 135 (1978))); Lee, *supra* note 14, at 705 ("The nature of the inference from congressional inaction has varied over the years . . . ." (footnote omitted)).

66. 309 U.S. 106 (1940).

67. *Id.* at 119.

68. *Id.* at 119–20; Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186 (1994) ("[O]ur observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent.").

69. *See, e.g.*, John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("Congress has long acquiesced in the interpretation we have given."); *Cent. Bank of Denver*, 511 U.S. at 187 ("It is true that our cases have not been consistent in rejecting arguments [based on congressional silence].").

previous Congress. Justice Scalia pressed the point in one of his early dissents. He noted that the proper referent in evaluating "the correctness of statutory construction" is "what the law as enacted meant," not "what the current Congress desires."[70] On that logic, congressional failure to revise a statute reveals nothing about the sort of intent that matters.

This view assumes that the meaning of a statute remains static from the time of its enactment. If one believes instead that the meaning of statutes tends to change over time, the acquiescence argument fares no better. From that perspective, the touchstone is not what the statute *meant* upon its enactment, but rather what it *means* today, as informed by factors including contemporary "societal or legal context."[71] Congressional inaction is no more revealing on this score than it is in revealing whether judicial interpretations are consistent with a statute's meaning as originally enacted. Moreover, clinging too tightly to prior interpretations might prevent judges from being open to the sort of updating that is important for some dynamic approaches to statutory interpretation.[72]

Further challenges arise from the nature of the legislative process, whose various barriers and requirements complicate attempts to equate "congressional failure to act" with "approval of the status quo."[73] The alternative explanations for inaction are legion: There might have been a widespread belief within Congress that the status quo should be altered but disagreement about how to do it. Congress might not have paid much attention to the Supreme Court's interpretations of the statute in question. Or it might have known about the interpretations but not cared much one way or another.[74] At the end of the day, Justice Scalia noted, "vindication by congressional inaction" is really just "a canard."[75] As Hart and Sacks observe, the "reasons which legislators may have either for opposing a bill or simply withholding the votes necessary for its forward progress" include everything

70. Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 671 (1987) (Scalia, J., dissenting); *see also* Easterbrook, *supra* note 62, at 427 ("If the purpose of statutory construction is to carry out the decisions of the enacting body, the quiescence of a later body does not reflect at all on the propriety of the interpretation.").

71. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481 (1987).

72. *See id.* at 1544 ("Of course, prior statutory precedents should normally be upheld, based upon the same precepts of stare decisis that apply to common law precedents; they should simply not be given any greater deference than is necessary.").

73. *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

74. *See id.*; Easterbrook, *supra* note 62, at 427.

75. *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

from "[c]omplete disinterest" to "[b]elief that the bill is sound in principle but defective in material particulars" to "[e]tc., etc., etc., etc., etc."[76]

None of this is to deny that in any given case, Congress's failure to act might owe in part to agreement with the way in which the Supreme Court has interpreted a statute—though that would leave the question whether approval by today's Congress should matter to the status of yesterday's law. In any event, there are always alternative explanations for legislative inaction, and the Court will seldom have the information necessary to determine which type of situation it is confronting.

b. Legislative Reenactment.—Sometimes Congress reenacts a statutory scheme that the Supreme Court previously considered.[77] Such action might suggest that Congress intended to endorse the Court's reading of any provisions that it left unchanged,[78] and that the Court should not deviate from its prior interpretation now that Congress has signified its approval and assent.

An example of the reenactment argument in action comes from *Bank of America Corp. v. City of Miami*,[79] which dealt with allegations of racial discrimination in mortgage lending. The City of Miami sued under the Fair Housing Act, and the Supreme Court ultimately determined that the City was an "aggrieved person" as the Act defines that term.[80] In reaching its conclusion, the Court noted that it had a track record of broadly defining the universe of persons who can file lawsuits under the Act. When Congress amended the Act in 1988, it effectively retained the preexisting definition of aggrieved persons—the same definition the Court had construed broadly. The *Bank of America* Court was persuaded that "Congress 'was aware of' our precedent and 'made a considered judgment to retain the relevant statutory text.'"[81] The Court concluded that "principles of statutory interpretation require us to respect Congress' decision to ratify [the relevant] precedents."[82]

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76. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1359 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

77. *See, e.g.*, Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305 (2017).

78. *See* GARNER ET AL., *supra* note 1, at 346 (describing the structure of arguments based on reenactment).

79. 137 S. Ct. 1296 (2017).

80. *Id.* at 1301; *see also* 42 U.S.C. § 3602(i) (2012).

81. *Bank of America*, 137 S. Ct. at 1303–04 (quoting Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2519 (2015)).

82. *Id.* at 1305.

Given the reenactment, there was no basis for the Court to reconsider its prior approach.[83]

The Court grappled with related issues in *Kimble v. Marvel Entertainment, LLC*. The question was whether a patentholder may charge royalties after a patent term expires.[84] In 1964, the Court said no in a case called *Brulotte*.[85] The *Kimble* Court noted that despite having revised the patent laws numerous times in the intervening years, Congress never saw fit to reject the *Brulotte* rule.[86] Writing for himself and two others, Justice Alito challenged the majority's application of stare decisis. He rejected the inference that "Congress' failure to act shows that it approves" a prior decision.[87] Because "[p]assing legislation is no easy task," there are explanations aside from legislative approval for why Congress may have allowed a judicial interpretation to remain operative.[88] For Justice Alito, the *Kimble* majority put "too much weight on Congress' failure to overturn *Brulotte*."[89]

Reenactment arguments often seem stronger than arguments based purely on acquiescence. After all, reenactment means Congress actually *did* something. Still, there are difficulties with drawing inferences about congressional intent from reenactment. Some of the difficulties run parallel to those raised by arguments from acquiescence: Congress might have reenacted a statute but not thought much about the specific provision in question, devoting its attention and political capital to other matters. In those circumstances, treating the Court's prior construction as conclusive would be unwarranted. Or there might have been widespread agreement about the need to reenact legislation but competing views of how to handle a particular issue the Court previously addressed, with the reenactment reflecting a choice to put those disagreements aside in pursuit of other goals.[90] As a structural matter, it is also worth considering whether the Supreme Court may effectively forbid Congress to reenact a statute unless it is prepared to take a stand, explicitly or implicitly, on every prior interpretation of the statute

83. *See id.* at 1304–05; *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 79 (1988) (discussing the Supreme Court's acceptance of certain reenactment arguments).

84. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2405 (2015).

85. Brulotte v. Thys Co., 379 U.S. 29, 33–34 (1964).

86. *See Kimble*, 135 S. Ct. at 2410 ("Congress's continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.").

87. *Id.* at 2418 (Alito, J., dissenting).

88. *See id.* at 2418–19.

89. *Id.* at 2418.

90. *Cf.* Eskridge, *supra* note 83, at 107 n.213 ("When Congress reenacts a statute, . . . it has few incentives to reexamine issues 'settled' by Supreme Court decisions.").

contained in the Court's caselaw.[91] The reenactment argument thus requires a leap—just not as long a leap as the acquiescence argument.

3. Galvanizing Congressional Action and Cabining the Judicial Role.— So far, I have challenged defenses of elevated statutory stare decisis that are grounded in the relative ease of revising statutes or the implications of congressional acquiescence or reenactment. Another possible justification for heightened deference to statutory decisions draws on the respective roles of the legislature and the judiciary in the democratic process.

We might think of the rules of precedent as galvanizing continued legislative participation in reviewing and revising statutory schemes—and, at the same time, as limiting the role of the judiciary. Consider Lawrence Marshall's defense of an unflinching doctrine of statutory stare decisis designed to "let Congress know that it, and only it, is responsible for reviewing the [Supreme] Court's statutory decisions."[92] The goal is to limit the judiciary's participation in the lawmaking process.[93] In this respect Professor Marshall's reasoning coheres with that of Justice Black, who invoked the separation of powers in arguing that "[h]aving given our view on the meaning of a statute, our task is concluded, absent extraordinary circumstances."[94] To ensure that Congress has every "reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair," the judiciary should relent after interpreting a statute for the first time.[95] Such an approach respects both "Congress' role . . . and the compelling need to preserve the courts' limited resources."[96]

In one of its formulations, this argument is part of a genre that derives rules of adjudication from hoped-for effects on congressional behavior.[97]

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91. *See* HART & SACKS, *supra* note 76, at 1367 (challenging the idea that Congress must commit itself to endorsing prior judicial interpretations by reenacting a statutory provision). If Congress is deemed to endorse interpretations not only of the Supreme Court but also of other federal courts, the situation is even more complicated, for it increases the costs to Congress and assumes legislative awareness of a much larger universe of judicial interpretations. *See* Barrett, *supra* note 1, at 318 (describing different expectations regarding congressional responses to Supreme Court decisions as compared with decisions from the lower federal courts).

92. Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183 (1989).

93. *See id.* at 207; *cf.* Barrett, *supra* note 1, at 317 (describing the argument that "[b]ecause statutory interpretation inevitably involves policymaking, it risks infringing upon legislative power, and consequently, the Supreme Court should approach the task with caution").

94. Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 258 (1970) (Black, J., dissenting).

95. Neal v. United States, 516 U.S. 284, 296 (1996).

96. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part).

97. *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) (discussing canons designed to elicit legislative preferences).

Like other arguments within the genre, it faces questions about the ability of interpretive practices within the courts to affect how Congress goes about its business.[98] Alternatively, it is possible to detach the argument from assumptions about legislative responses to judicial interpretations. The idea would be that "courts ought generally to refuse to revisit statutory precedents *regardless* of whether their refusal prompts congressional action."[99] On this account, the appeal of statutory stare decisis is in limiting the judicial role, irrespective of whether Congress is likely to respond.

This separation-of-powers argument may resonate with those who are concerned about repeated judicial engagements with a statutory provision. If one believes instead that judicial reconsideration is as lawful, legitimate, and consonant with the constitutional scheme as is judicial interpretation in the first instance, the need for elevated statutory stare decisis diminishes. There still might be worries about excessive judicial reconsideration and vacillation, but those worries are not unique to the statutory context. They reflect the importance of stare decisis as a general matter.

C. A Word on Common-Law Statutes

The conventional distinction between statutory and constitutional precedents is subject to an important exception: when the Supreme Court understands a statute as requiring something akin to common law development of legal principles, it is more willing to reconsider its prior interpretation.

The paradigmatic example is the Sherman Act, which prohibits contracts and agreements "in restraint of trade."[100] The Court has "treated the Sherman Act as a common-law statute" that must "adapt[] to modern understanding and greater experience."[101] For purposes of stare decisis, that entails a reduced level of deference relative to opinions interpreting other statutes.[102] For example, when "respected authorities in the economics literature" suggested that a line of antitrust cases rested on faulty assumptions, the Court was willing to revise its jurisprudence instead of waiting for Congress to act[103]—though not without prompting a response by Justice Breyer arguing that the customary stare decisis factors counseled against overruling.[104]

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98. Adrian Vermeule adds that such rules require a critical mass of judicial participation in order to be effective. *See* VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 9, at 223.

99. Barrett, *supra* note 1, at 348.

100. 15 U.S.C. § 1 (2012).

101. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).

102. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2412–13 (2015) ("This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act."); *id.* at 2418 (Alito, J., dissenting).

103. *Leegin*, 551 U.S. at 900.

104. *Id.* at 929 (Breyer, J., dissenting).

Common-law statutes like the Sherman Act add further complexity to the application of stare decisis, for they represent an exception to the principle that statutory decisions receive elevated deference. They introduce this complexity despite the fact that the foundations of deference and the factors that are relevant to a precedent's overruling are common across domains. Maybe the Supreme Court should stand by one of its antitrust decisions despite doubts about that decision on the merits. Or maybe the Court should treat new evidence or theories about competitive effects as challenging the decision's underpinnings and warranting a fresh look. These types of arguments are familiar features of the law of precedent, irrespective of context.

The Supreme Court's current doctrine of stare decisis carves out statutory decisions for special treatment, then makes an exception to the exception by relegating common-law statutes back to "ordinary" status. An alternative is to simplify the doctrine and recognize that no statutory precedents warrant special status, because precedents from every decisional context raise related issues involving the role, function, and conceptual foundations of stare decisis.

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In sum, the arguments in favor of a stratified doctrine of stare decisis are contestable. Accepting them requires some combination of assumptions about legislative attention to Supreme Court edicts, the appropriate inferences to be drawn from congressional action and inaction, and the optimal incidence of legal change in both the statutory and constitutional domains.

Moreover, the doctrine of stare decisis rests on general norms, values, and aspirations. And it is defined by its ability to foster continuity and impersonality even in the face of interpretive disagreements. That function is no more important in the statutory context than in the constitutional context.

One might wonder whether the argument should go further, foreclosing the prospect of any deference to erroneous statutory decisions. If a Supreme Court Justice believes that a given statute is most accurately understood in a particular way, why should she entertain the option of abiding by a prior interpretation of the statute that comes out differently? The answer begins with recognizing each Justice as part of an enduring judicial institution charged with (among other things) interpreting legislative enactments over time. A Justice may defer to a prior judicial interpretation, even if she finds it unconvincing, because it was issued by the Court to which she now

belongs.[105] Deference to statutory precedents contributes to legal continuity, predictability, and impersonality—promoting ideals reflected in the Constitution's creation of a judiciary whose members are insulated from official and electoral control[106]—and limits the extent to which changes in prevailing interpretive practices lead to shifting legal rules. Flawed statutory decisions remain subject to reconsideration in the presence of a "special justification" beyond disagreement on the merits, just as flawed constitutional decisions remain subject to reconsideration for similar reasons.[107] Absent such a justification, adherence to statutory precedents promotes the stability of the law and the institutional identity of the Supreme Court.

II. Interpretive Methodologies

The previous Part examined the application of stare decisis to judicial interpretations of statutes. Under existing law, there is no question that such interpretations receive some amount of deference, though I have contested the view that deference to statutory precedents ought to exceed deference to constitutional precedents.

When we move from interpretations to methodologies, the calculus changes. If we understand interpretation as the application of a particular statutory provision to a discrete fact pattern, we can think of methodologies as residing at the opposite end of the continuum. A methodology does not tell us what a statute (or other legal source) means. It tells us which processes and techniques are appropriate in *determining* that meaning. Prominent methodologies in the field of statutory interpretation include purposivism, which focuses on "reading laws to carry out their legislative purpose,"[108] and textualism, which holds that "if the text of the statute is clear, deviation from the clear import of the text cannot be justified on the ground that it better promotes fidelity to legislative purposes."[109] To make matters more concrete,

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105. The fact that Justices may properly defer to prior decisions by the Supreme Court does not necessarily imply that they may properly defer to decisions by other bodies, such as administrative agencies. That is a very different debate. *Cf.* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 218 (2008) (describing the historical roots of the understanding that "the exposition of law belonged to the office of judgment rather than of will, and whether as to the constitution or other law, the opinions of the judges in the exercise of their judgment had the authority of their office").

106. *Cf.* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789 (2017) (arguing that deference to constitutional precedent is consistent with the constitutional blueprint for reasons including the structure of the judicial office).

107. *See generally* Randy J. Kozel, *Special Justifications*, 33 CONST. COMMENT. 471 (2018) (discussing the requirement of a special justification for overruling precedent).

108. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 119.

109. *Id.* at 124; *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762–64 (2010) (comparing textualism and purposivism). There is a great deal of complexity beneath labels like purposivism and textualism. I use them here simply as illustrative generalities.

we can also think in terms of specific directives, such as rules governing the relevance of a statute's legislative history.[110]

Asking a Justice to defer to a particular interpretation of a given statute is very different from asking her to defer to a methodology that sweeps across contexts and establishes a metarule of legal interpretation.[111] My claim in this Part is that the doctrine of stare decisis should respond in kind.

A. Methodological Deference and the Goals of Stare Decisis

As we have seen, it is well established that statutory interpretations receive deference under prevailing principles of stare decisis. The status of interpretive methodologies is more complicated. In her analysis of the relationship between precedent and statutory methodology, Abbe Gluck contends that while methodological stare decisis "appears to be a common feature of some states' statutory case law," it is "generally absent from the jurisprudence of mainstream federal statutory interpretation."[112] Aaron-Andrew Bruhl responds that stare decisis is more prevalent than is commonly appreciated within the federal judiciary, especially in the lower federal courts.[113]

My project is not to take sides on this debate, but rather to focus on the question whether interpretive methodology should receive precedential effects as a normative matter. To the extent the doctrine is meant to promote continuity, deferring to wide-ranging methodologies would seem to have considerable appeal. Treating the law of interpretation as settled could add stability to the legal backdrop.[114] And "a consistent approach would increase predictability and systemic coordination for the many parties involved in statutory interpretation," creating additional benefits for Congress, courts, and individuals.[115]

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110. *See* Bruhl, *supra* note 11.

111. *Cf.* Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 2009 (2017) (noting the argument that methodological rules are distinct because they serve to generate other rules used to resolve disputes).

112. Gluck, *supra* note 109, at 1754; *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1875 (2008) (observing that the Supreme Court does not give stare decisis effect to statutory methodology); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 218 (2015) (observing that federal courts generally do not give stare decisis effect to statutory methodology).

113. *See* Bruhl, *supra* note 11. For a different approach emphasizing the importance of "interpretive perspective," see Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197, 1218 (2014).

114. *See* Foster, *supra* note 112, at 1894 (discussing the benefits of predictability); *see also* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1590–91 (2014) (noting the relationship between uniform rules, consistency, and legitimacy).

115. Gluck, *supra* note 109, at 1851; *see also* Foster, *supra* note 112, at 1889.

Professor Gluck reasons that "[w]ithout a consistent methodology it will not be possible for litigants (or legislatures) to predict which interpretive approach will be used in a particular case in the lower courts."[116] The resulting uncertainty also dilutes the "symbolic, legitimacy-enhancing benefits" that might otherwise arise from ensuring that judges resolve cases by reference to established methodological principles.[117]

In addition, methodological stare decisis could promote the ideal of impersonality. Given that prevailing interpretive approaches can shift as judges come and go, it might be better for a court to commit itself to an interpretive methodology at the institutional level, so as to enhance the consistency and predictability of judicial techniques as well as case-specific results.[118]

On the other hand, methodologies may not implicate individual reliance interests in the same way that concrete decisions do. Reliance interests play a significant role in the Supreme Court's stare decisis jurisprudence, reflecting the Court's dedication to ensuring that people's reasonable expectations are not lightly disrupted.[119] It is easy enough to see how this reasoning applies to, say, decisions that alter the rules of property ownership or contractual obligation.[120] It is harder to apply the reasoning to interpretive methodologies.[121] Methodologies theoretically might lead to reliance by judges and even legislators,[122] but they are more attenuated in their connection to the discrete, individual reliance interests that have seemed so important to the Court. Professor Gluck is surely correct that "judicial *opinions* matter."[123] It is unclear, however, whether the reasoning they contain engenders as much reliance as the rules they yield.

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116. Gluck, *supra* note 109, at 1852.

117. *Id.* at 1854; *see also* Foster, *supra* note 112, at 1887 ("Interpretive regimes further rule-of-law values because they make the law more predictable to citizens and help to limit judicial discretion.").

118. *See* Gluck, *supra* note 109, at 1854 ("Litigants are entitled to expect that substantially similar cases will be decided using the same governing legal rules and it matters—not only for fairness perceptions but also for the development of law itself—when they aren't.").

119. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2410 (2015) ("So long as we see a reasonable possibility that parties have structured their business transactions in light of [the relevant precedent], we have one more reason to let it stand.").

120. *See id.* (noting the importance of stare decisis in cases involving property or contract rights).

121. Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1809 (2010) (questioning the use of reliance interests to support stare decisis for methodological rules).

122. *See id.* (noting and challenging this argument).

123. Gluck, *supra* note 109, at 1855.

B. Methodological Stare Decisis and Interpretive Choice

Even if the Supreme Court's adoption of a uniform interpretive methodology would enhance predictability and contribute to impersonality, it would do so by constraining future Justices' interpretive choices on a cross-cutting, macro level. That impact exceeds the limits of stare decisis.[124] The doctrine calls upon today's Justices to subordinate their individual judgments to the Court's institutional identity. But the Justices need not go so far as to relinquish their interpretive authority in countless future controversies—including cases of first impression—across multiple substantive domains.[125] Such an approach would give one group of Justices a profound power to settle matters of sweeping and systemic importance. It also would truncate the authority of tomorrow's Justices to reach their own conclusions about how to interpret statutory provisions that have not previously come before the Court.

When a Justice upholds a prior decision she would have resolved differently as a matter of first impression, she promotes the notion of the rule of law prevailing over the rule of individual women and men.[126] Adjudication becomes a cooperative enterprise across time,[127] ensuring that legal rules reflect more than the interpretive tendencies of today's Justices. The interplay between past and present gives stare decisis its force, and it also reveals the limits of the doctrine. Stare decisis calls upon today's Justices to accept some decisions with which they disagree. That is a great deal to ask, and there is a point beyond which the request becomes too much to bear.

A Supreme Court Justice might reasonably be expected to abide by a rule involving, say, the application of the patent laws to royalty agreements.[128] Insisting that she accept an entire methodology of interpretation is a different matter. Consider the position of a Justice who takes her place on the Supreme Court and is asked to defer not simply to the Court's prior interpretations of specific statutes, but also to the Court's

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124. Whether Congress has the power to prescribe rules of statutory construction, perhaps including a *Chevron*-like approach to administrative interpretations, is a separate question. For one account, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2133–39 (2002).

125. *See* KOZEL, *supra* note 11, at 156 ("While deference to precedent properly encompasses results, rules, and frameworks, it stops short of requiring adherence to broader interpretive philosophies. In much the same way, it would be improper to ask a justice to accept a particular method of resolving countless statutory disputes going forward.").

126. *See, e.g.*, Easterbrook, *supra* note 62, at 422 ("Precedent is the device by which a sequence of cases dealing with the same problem may be called law rather than will, rules rather than results.").

127. *See* Waldron, *supra* note 41, at 21 ("[A judge] shares with his fellow judges . . . the responsibility of seeing that cases that come before the court are decided on the basis of the rule of law.").

128. *See* Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015).

favored methodological approach for resolving statutory disputes—whether that approach is textualism, purposivism, or something else. The Justice is still faced with the prospect of subordinating her individual view to the Court's institutional identity, just as she is in concrete disputes. But now the request made of her is far greater. She is urged to apply an interpretive methodology—one she might believe to be ill-advised and deeply problematic—to numerous future disputes across a range of contexts. This is an extraordinary concession to seek from any Justice, and an extraordinary power to grant the Justices who developed the relevant methodology in the first place.[129]

Methodologies are not limited to a single substantive issue. They "spill over into other areas of law."[130] Of course, even a decision interpreting a discrete statutory provision can be wide-ranging and important.[131] But methodologies dictate interpretive choices on a broader scale.

Moreover, the exercise of interpretive choice in expounding the law is at the heart of the judicial role.[132] Allowing today's Court to determine that textualism or purposivism will be the required mode of interpretation going forward confers extensive decisional authority on the precedent-setting Justices at the expense of their successors. And it is not just any type of authority that is transferred; it is the authority to interpret legal provisions in light of one's own deeply held methodological and normative principles. Methodological choices are "frequently intertwined with a judge's most fundamental beliefs and commitments about the rule of law and democracy,"[133] raising concerns about allowing earlier Justices to make those decisions on behalf of later Justices on a cross-cutting basis. Today's Justices give presumptive respect to specific legal outcomes and to the rules that yield them, but the doctrine of stare decisis does not justify the further step of requiring presumptive adherence to methods that control how the interpretive process will unfold.

Not every wide-ranging judicial rule compels an interpretive choice. Consider the operation of abstention doctrines grounded in federalism,

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129. *See* KOZEL, *supra* note 11, at 154 ("Though it is reasonable to urge a justice to subordinate her personal views within the context of particular cases, it is unreasonable (and unrealistic) to request that she adopt, for all intents and purposes, an interpretive methodology that is not her own.").

130. Criddle & Staszewski, *supra* note 114, at 1592.

131. *See id.*

132. *Cf.* HAMBURGER, *supra* note 105, at 548 (arguing that during the Founding era, American "judges had authority to expound the law, including constitutions, within their office of deciding cases"); *id.* at 226 ("Defined in contrast to lawmaking, which was an exercise of will in imposing general rules, the office of judging seemed at its core to involve the exercise of judgment in particular cases, and these therefore became the circumstances in which judges could expound the law, including the constitution, with the authority of their office.").

133. Criddle & Staszewski, *supra* note 114, at 1593.

comity, and the avoidance of constitutional questions.[134] The standards that govern the application of those doctrines are broad in their application, but they do not prevail upon an individual Justice to relinquish the authority to consult her own interpretive theory in elucidating the meaning of a contested legal provision.

Much the same is true of the standard for granting a preliminary injunction, which requires the assessment of factors such as the prospect of irreparable harm and the balance of equities, but without telling future jurists how to read disputed legal enactments.[135] Or consider the Supreme Court's former insistence that when addressing questions of qualified immunity, courts must determine not only whether a constitutional right was clearly established but also whether the relevant right was violated.[136] Irrespective of whether that rule was sound, it did not require future jurists to interpret disputed legal provisions in any particular way. Instead, it demanded that they reveal their belief about the proper interpretation even if they also concluded that the relevant right was not clearly established. Decisions of this sort are broad and wide-ranging, and the Justices should be mindful of their sweep—as well as the possibility that they might create unforeseen problems. Even so, those doctrines avoid telling future jurists which processes they may (and may not) use in reading the law.

Today's Justices do not exercise unchecked power to infuse legal propositions with presumptive force in future cases. Judges may opine on whatever they wish, but they may opine with legal effect only on matters actually before them.[137] Hence the familiar distinction between binding holdings, which involve the application of discrete legal provisions to disputed facts, and nonbinding dicta.[138] The boundary between holding and dicta is not always clear. But the very existence of the distinction suggests the importance of certain lines that the Justices may not cross in defining the scope of precedent.

Those lines are based in part on the dangers inherent in trying to cover too much, too fast. They also reflect the need for balance between past and present. While the Court's history is important, space for the individual Justice must remain. There is a limit on the amount of power that should be allocated to prior Justices at the expense of later ones. Likewise, there is a limit on how far we can expect today's Justices to go in subordinating their

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134. *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722–23 (1996) (discussing the relationship between abstention, federalism, and comity).

135. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

136. *See* Pearson v. Callahan, 555 U.S. 223, 232 (2009) (discussing, and eventually overruling, Saucier v. Katz, 533 U.S. 194 (2001)).

137. *See* U.S. CONST. art. III § 2 (extending the judicial power to cases and controversies). For more on the connection between Article III and the scope of judicial precedent, see KOZEL, *supra* note 11, at 90–91 and Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

138. *See* KOZEL, *supra* note 11, at 74–76.

own interpretive discretion to the Court's institutional past. The established practice of requiring deference to targeted expositions of the law in concrete disputes represents an effort to protect institutional prerogatives at the expense of interpretive autonomy, but only in a narrow and defined sphere.

Beyond these sources of conceptual tension, there are also practical problems with characterizing interpretive methodologies as entitled to deference. The most obvious concern is that Justices who are inclined to accept stare decisis in a more measured form would reject the doctrine if it carried an obligation to defer to sweeping methodological precedents. A Justice might be willing to reaffirm a given statutory precedent decided on textualist (or purposivist, etc.) grounds even if she is not willing to consider herself presumptively bound by textualism (or purposivism, etc.) in all future cases. The impact of stare decisis depends on the Justices' acceptance of the doctrine, and requiring deference to prior methodological choices might strike some Justices as overreaching.[139]

It is worth noting that refusal to attach precedential effect to an interpretive methodology does not change the fact that decisional *rationales* are entitled to deference. The distinction is important, though it can be slippery at times. In the constitutional context, I have argued in prior work that it would go too far to treat as binding a process for interpreting the entire Constitution, or even a process for resolving all future disputes involving a provision such as the First Amendment.[140] By comparison, I have argued that the protocol for resolving more specific issues—for instance, determining which types of speech represent categorical exceptions to First Amendment protection—may be entitled to deference as a decisional rationale.[141] A similar analysis applies to statutory decisions. Difficult cases will arise, to be sure. The touchstone remains balance.

Just as the strength of precedent is not absolute, the scope of precedent is not boundless. Legal rules that arise out of concrete disputes and are directly tethered to specific enactments or controversies are entitled to stare decisis effect. But interpretive methodologies that sweep across topics and dictate fundamental interpretive choices do not warrant deference via the doctrine of stare decisis. While a Justice should deem herself presumptively bound to follow a given interpretation of a statutory provision, she need not accept the methodology that yielded it. A Justice might adopt the prevailing methodology because she finds it appealing on the merits. Yet the power to thrust an entire methodology upon new generations of Justices is too great to give to any iteration of the Court. Asking a Justice to embrace a sweeping methodology represents a far greater sacrifice than asking her to accept specific interpretations absent a special justification for overruling.

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139. *See id.* at 154.

140. *See id.*

141. *See id.* at 148–49 (providing examples).

Dispensing with stare decisis for judicial interpretations of statutes would tip the scales too far in favor of present over past and individual over institution. But giving precedential effect to wholesale methodologies of interpretation would move too far in the other direction.

III. Administrative Interpretations

So far I have considered two questions at the intersection of stare decisis and statutory interpretation: How much deference should attach to judicial interpretations of statutes? And how much deference should attach to interpretive methodologies? In examining these questions, I have emphasized the role of precedent in stabilizing the law and in mediating disagreements to allow the Supreme Court to transcend the identities of its individual members while ensuring that each Justice has room to consult her own interpretive philosophy.[142]

The Executive Branch also plays a key role in the interpretive process. Administrative agencies interpret statutes. And they interpret their own regulations crafted in the course of carrying out their statutory directives. Under current law, judicial review of those administrative interpretations is marked by a substantial degree of deference.[143]

If the Supreme Court were to reconsider the amount of deference that agency interpretations receive, what role should stare decisis play in the analysis? Consider first the *Chevron* doctrine, which generally requires upholding an agency's interpretation of an ambiguous statute so long as it is reasonable.[144] In 2015, Justice Thomas noted "serious questions" about the Court's practice of deferring to administrative interpretations of statutes.[145] He worried that deference could threaten to "wrest[] from Courts the ultimate interpretative authority to 'say what the law is.'"[146] He also described the Court as "straying further and further from the Constitution without so much as pausing to ask why."[147] Shortly before his retirement, Justice Kennedy

142. *Cf.* Barrett, *supra* note 2, at 1711 (noting that stare decisis sometimes "functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution").

143. *See infra* subparts III(A), (C).

144. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

145. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

146. *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (noting the argument that Chief Justice "Marshall's grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation, and taken at face value seemed to condemn the now entrenched practice of judicial deference to administrative construction of law"). *But see id.* at 6 ("A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency.").

147. *Michigan*, 135 S. Ct. at 2714 (Thomas, J., concurring).

likewise stressed the need to reconsider "the premises that underlie *Chevron* and how courts have implemented that decision" to ensure the preservation of "constitutional separation-of-powers principles."[148] Notwithstanding concerns like these, the *Chevron* doctrine is still in effect.[149] The Court observed just last Term that "whether *Chevron* should remain is a question we may leave for another day."[150]

Or consider the *Auer* doctrine, which generally requires upholding agencies' reasonable interpretations of their own regulations.[151] The defensibility of *Auer*, like the defensibility of *Chevron*, continues to be a topic of discussion at the Supreme Court, which granted certiorari in 2018 to address the issue.[152] That makes it important to ask whether the doctrine is entitled to stare decisis effect even if a majority of Justices determine that it is flawed on the merits.

In Justice Thomas's view, the Supreme "Court has appeared to treat our agency deference regimes as precedents entitled to *stare decisis* effect."[153] Professor Gluck makes the same point.[154] There is some dispute here, with William Eskridge and Connor Raso countering that in practice, the Justices do not treat administrative-deference regimes like *Chevron* as binding precedents.[155]

Again, my focus is on the normative question whether administrative-deference regimes ought to receive stare decisis effect. Those regimes bear little resemblance to the specific interpretations of particular statutory provisions discussed in Part I. Yet they do not sweep as widely as the interpretive methodologies discussed in Part II. *Chevron* and *Auer* have an extensive scope, but it is not nearly so broad as, say, textualism or purposivism. As Kevin Stack explains, a Justice who attempts to follow *Chevron* or *Auer* must still adopt some methodology of interpreting statutes or regulations, respectively.[156] Even if we are confident that judicial

148. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

149. *See id.* at 2129 (Alito, J., dissenting) ("[U]nless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.").

150. SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (raising concerns about the *Chevron* approach); Walker, *supra* note 10, at 104 (noting "a growing call from the federal bench, on the Hill, and within the legal academy to rethink" administrative deference doctrines).

151. Auer v. Robbins, 519 U.S. 452, 461–63 (1997).

152. *See* Kisor v. Wilkie, 139 S. Ct. 657 (2018) (granting cert.).

153. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1214 n.1 (2015) (Thomas, J., concurring in the judgment).

154. *See* Gluck, *supra* note 109, at 1817 (contending that the Supreme Court applies "methodological stare decisis" in the context of deciding when to "defer to agency interpretations of federal statutes").

155. Raso & Eskridge, *supra* note 121, at 1733–34.

156. Stack, *supra* note 6, at 671.

interpretations of statutes warrant deference, and even if we are equally confident that interpretive methodologies do not warrant deference, conceptual uncertainty surrounds the precedential effect of administrative-deference regimes. Nevertheless, though issues of statutory interpretation take on their own, unique complexion within the Executive Branch, I will suggest that the same principles of stare decisis that inform the treatment of judicial interpretations and broad methodologies also point the way toward the precedential status—or lack thereof—of administrative-deference regimes like *Chevron* and *Auer*.

A. Generality and Interpretive Choice in Chevron

Chevron involved a dispute over the interpretation of the Clean Air Act.[157] The Supreme Court ultimately accepted the Environmental Protection Agency's argument about how the Act applied to pollution-emitting devices.[158]

But *Chevron* is better known for its analytical approach than its result. The Supreme Court described the threshold inquiry as whether Congress clearly addressed the point at issue.[159] Where the answer is yes, Congress's instructions are dispositive. Where the answer is no, a court must ask whether the agency's interpretation is reasonable—not whether it reflects the best reading of the statute in question.[160] Administrative interpretations of statutes don't need to be right; they just can't be clearly wrong.[161]

The *Chevron* Court cast its approach as a reflection of congressional intent, based on the assumption that when Congress does not clearly resolve an issue, it likely intends for an administrative agency (rather than a court) to fill the gap.[162] That argument can be understood as inferring a delegation on the part of Congress to the relevant agency—a delegation that might be based on the expertise that agencies possess[163] or their political responsiveness.[164]

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157. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

158. *See id.* at 866 (holding that the EPA's definition of the term "source" was a "permissible construction" of the Clean Air Act).

159. *Id.* at 842.

160. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("*Chevron* is rooted in a background presumption of congressional intent."). Daniel Hemel and Aaron Nielson argue that there exists an intermediate step, not directly relevant to the analysis here, whereby some courts ask "whether the agency itself recognized that it was dealing with an ambiguous statute." Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760 (2017).

161. *See, e.g.*, Caleb E. Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 6 (2001).

162. *See Chevron*, 467 U.S. at 844.

163. *See id.*

164. *See id.* As Peter Strauss notes, other potential justifications for the *Chevron* approach include the uniformity that arises from centralizing interpretive authority in a single agency rather than scores of federal courts. *See* Strauss, *supra* note 10, at 1121; VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 9, at 208. Richard Pierce adds more potential grounds for justifying

The *Chevron* Court also appealed to precedent, drawing on the Court's prior cases involving Executive Branch interpretations.[165]

As noted above, there is some basis for believing that the Supreme Court views *Chevron* as warranting stare decisis effect, even though the Court has not engaged in much discussion of the matter. If this is indeed the Court's position, one possible explanation is that on the continuum between specific interpretations and general methodologies, *Chevron* is closer to the former than the latter. On that understanding, it makes perfect sense that *Chevron* would receive deference as something akin to a targeted doctrinal framework but short of a full-blown interpretive theory.[166] The Court commonly treats doctrinal frameworks with what appears to be precedential effect, for example by taking as given the multipart analysis for certain statutory hostile-work-environment claims[167] and the strict scrutiny analysis for content-based restrictions on speech.[168] *Chevron* could be viewed in the same way.

Yet there is an important distinction. It turns on whether a precedent deals with a discrete statute or rather applies across a wide range of provisions. Particular interpretations of the Clean Air Act, the Sherman Act, and the Patent Act are confined to limited substantive domains. By requiring deference to those interpretations, the doctrine of stare decisis promotes legal continuity while leaving room for today's Justices to apply their own interpretive methodologies to other statutes. By contrast, *Chevron* is not limited to any substantive context; it is wide-ranging and cross-cutting.

It is not always easy to draw the line between doctrinal frameworks that warrant deference and interpretive methodologies that do not.[169] And it is certainly true that precedents can be defined at different degrees of generality. We could call a decision a statutory precedent, or a Sherman Act precedent, or a "resale price maintenance" precedent,[170] and so on. But the presence of some complexity does not change what is clear about *Chevron*: given the

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Chevron, including "defin[ing] the constitutionally permissible place of agencies in government," among others. Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2229 (1997).

165. *See Chevron*, 467 U.S. at 844.

166. *See* KOZEL, *supra* note 11, at 76–80, 146 (discussing the precedential effect of doctrinal frameworks).

167. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); *see also* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS L. REV. 859, 868 (2012) (noting the Supreme Court's creation of a multipart test to govern harassment claims).

168. *See* KOZEL, *supra* note 11, at 146.

169. *Cf.* Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation* (noting that the "familiar tiered-scrutiny framework" could be described as a methodology), *in* PRECEDENT IN THE UNITED STATES SUPREME COURT, *supra* note 36, at 135, 147.

170. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

Chevron regime's capacious scope and trans-substantive sweep, infusing it with stare decisis effect would dictate (presumptively) the interpretive approach that future Justices must adopt in countless cases involving a wide range of statutes and agencies.

There is more to the story than simply breadth. As noted in Part II, courts commonly rely on broad rules to bring predictability and consistency to their operations, and for now I am leaving open the possibility that some such rules may be entitled to stare decisis effect. The crucial feature of *Chevron*, which is likewise characteristic of interpretive methodologies, is the combination of cross-cutting rules with impositions on judicial authority to interpret the law. Like methodologies such as textualism or purposivism, *Chevron* dictates an interpretive choice.[171] The doctrine is founded on the premise that when Congress leaves an ambiguity in a statute, judges must interpret that ambiguity as an implicit "legislative delegation to an agency," such that a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator."[172] The interpretive choice is made as a categorical matter, disconnected from the facts and context of any particular dispute. That brings *Chevron* close enough to the status of an interpretive methodology to deny it stare decisis effect.

The law of precedent contemplates the constraint of interpretive choice in a more targeted fashion, as reflected in the conventional distinction between binding holdings and dispensable dicta.[173] So long as *Chevron* is understood as defining interpretive processes on a macro, cross-cutting level, it should rise or fall on its merits.[174]

None of the foregoing suggests that *Chevron* should be abandoned. Maybe the Justices are well served to abide by *Chevron* because it is correct.

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171. *Cf.* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 942 (2018) ("[W]hen a court interprets an administrative statute, finds it to be ambiguous, and defers to an agency's reasonable construction of the statute, the court is fully exercising its power and duty to interpret the statute . . . .").

172. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); *see also* United States v. Mead Corp., 533 U.S. 218, 229 (2001); Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 615–16 (2009) (noting that an administrative interpretation may be permissible under *Chevron* because it "falls within the scope of agency discretion that is accorded by statutory ambiguity"); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012) (describing the application of *Chevron* as based on "a finding of law that Congress has validly allocated authority to a noncourt body").

173. *See, e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "holding" as "[a] court's determination of a matter of law pivotal to its decision," and "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").

174. *Cf.* HAMBURGER, *supra* note 8, at 52 (noting that "[a]t common law," judges' office "required them to discern and expound the law in cases, and although this was not all they did, it increasingly seemed the core of their office"). This understanding, Professor Hamburger concludes, was preserved by the U.S. Constitution. *See id.* at 316.

I take no position on such possibilities, save to note that respect for precedent is but one component of the judicial duty.

B. Reimagining Chevron

What if *Chevron* were reconceptualized? What if, for instance, the Supreme Court had expressly adopted the doctrine as a standard of review for invalidating executive action?[175] Or as a remedial scheme that allows today's Justices to interpret statutes in light of their own methodological preferences but limits the situations in which relief can be granted?[176] Or as a judicial voting rule requiring a supermajority vote in order to reject an agency's proffered interpretation?[177]

In circumstances like these, it is possible that the stare decisis effect of *Chevron* might be different. That is, there may be ways to implement something like the *Chevron* approach without dictating future Justices' interpretive choices. If that enterprise were successful—and if the measures of pursuing it were lawful, which is a matter on which I express no opinion—*Chevron* might be converted from something like a rule of interpretation into a rule of judicial administration. Such a reformulated rule might arguably warrant stare decisis effect if it avoided intruding on the province of future Justices' interpretive choices.

In its current formulation, however, the *Chevron* rule tells future Justices how to read scores of statutes based on categorical assumptions about what Congress meant. That is too much to demand of Justices with their own philosophies of interpretation.

C. Generality and Interpretive Choice in Auer

The foregoing analysis applies in large measure to the Supreme Court's decision in *Auer*,[178] another hot topic in recent debates about the future of administrative law. As a legal doctrine, *Auer* speaks to the interpretation of regulations that agencies craft in carrying out their statutory duties. As an actual case, *Auer* dealt with uncertainty about exemptions from overtime pay under the Fair Labor Standards Act. Among the questions before the Court was whether the Secretary of Labor had lawfully interpreted regulations for determining exempt status. Relying on its earlier decision in *Bowles v. Seminole Rock & Sand Co.*,[179] the Court reasoned that an agency head's

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175. *Cf.* Stack, *supra* note 6, at 671 (describing *Chevron* and *Auer* as operating like standards of review).

176. *See generally* F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. REV. 1 (2018).

177. *See generally* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007).

178. Auer v. Robbins, 519 U.S. 452 (1997).

179. 325 U.S. 410 (1945).

interpretation must control unless it is plainly incorrect or inconsistent with the relevant regulation.[180]

One explanation for the *Auer* regime is that expert agencies possess "special insight" into the meaning of regulations they crafted.[181] Understood in this way, *Auer* dictates the interpretive inferences that future Justices must draw. Even if they think a regulation is best understood as carrying a particular meaning, the Justices presumptively must conclude—so long as the regulation is unclear, and so long as the agency's interpretation is within reason—that their reading is actually incorrect. The special-insight rationale reflects the belief that the agency's interpretation must govern "even when other indicia (including the text) tend to point in another direction."[182] If today's Justice disagrees with the agency's reading, she must reconcile herself with the fact that she is mistaken. The effect of *Auer*, like the effect of *Chevron*, is to dictate an interpretive choice across a range of cases and contexts.

A second justification for *Auer* deference is that it ensures the agency's authority to interpret ambiguous regulations as informed by its own pragmatic and policy judgments.[183] Such authority, the argument runs, ultimately traces back to a congressional choice: "[T]he power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[184] This rationale dictates another interpretive choice: future Justices must accept a particular assumption about what Congress intended to do. Again, to dictate this choice on a cross-cutting, macro level is to exceed the limits of stare decisis. One iteration of the Supreme Court can tell another how to read a particular statute or regulation. What it cannot do is insist upon the interpretive inferences that future Justices must draw in construing statutes and regulations that the Court has never engaged. In transgressing that limit, *Auer* puts itself beyond the purview of stare decisis—though I hasten to add that this analysis does not speak to whether *Auer* ought to be retained on the merits, nor does it resolve the

180. *See Auer*, 519 U.S. at 461.

181. *E.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011).

182. Stephenson & Pogoriler, *supra* note 181, at 1454.

183. *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991).

184. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991); *see also* Stephenson & Pogoriler, *supra* note 181, at 1457 (noting the "presumption that when Congress delegated the agency the authority to make rules with the force of law, it implicitly delegated to the agency the authority to clarify those rules with subsequent (reasonable) interpretations . . . .").

question whether *Auer* could be reformulated to avoid intruding on the province of interpretive choice.[185]

D. *The Role of Congressional Intent*

I have been analyzing *Chevron* and *Auer* essentially as common-law doctrines rather than applications of the Administrative Procedure Act (APA). *Auer* did not tether its analysis to the APA, and its predecessor case, *Seminole Rock*, was decided before the APA was enacted. Nor did the *Chevron* Court frame its inquiry as flowing from the APA. Hence Justice Scalia's statement in 2015 that *Chevron* and *Auer* are "[h]eedless of the original design of the APA."[186]

The stare decisis analysis might be different if *Chevron* and *Auer* had emerged from a deep dive into the APA's meaning. Suppose that in those two cases, the Supreme Court had read the APA as instructing that in the face of statutory ambiguity, administrative interpretations must be upheld so long as they are reasonable. The Court's decisions certainly would be applied to future cases involving the provision of the Clean Air Act at issue in *Chevron* and to the labor regulation at issue in *Auer*. They might also go further. If we assume that the Court can issue wide-ranging precedential decisions in the course of interpreting a legislative enactment that Congress intended to be cross-cutting, there is an argument that *Chevron* and *Auer* would be entitled to deference had they emerged from a deliberate engagement with the APA. That scenario, though, is hypothetical. Whatever the precise origins of *Chevron* and *Auer*,[187] they do not reflect a careful parsing of the APA.[188]

E. *Deference Doctrines Versus Specific Applications*

Even if *Chevron* and *Auer* do not warrant stare decisis effect for their respective deference regimes, there remains the question of how to treat

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185. *See supra* subpart III(B) (discussing the possible stare decisis implications of reconceptualizing *Chevron*).

186. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment); *see also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 918 (2017) (arguing that the "APA's text, drafting history, and early scholarly interpretations all . . . suggest that Congress sought to cabin the discretion that the [Supreme] Court had recently granted administrative agencies"); Siegel, *supra* note 171, at 985 (observing that § 706 of the APA is "suggestive of a de novo standard," even if not "completely inconsistent with deferential review").

187. *E.g.*, VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 9, at 208 ("[C]andid observers, on all sides, acknowledge that Congress has not authoritatively required or forbidden the *Chevron* principle."); Bamzai, *supra* note 186, at 987 ("[W]hen Congress enacted the APA . . . [i]t did *not* . . . incorporate the rule that came to be known as *Chevron* deference . . . .").

188. *E.g.*, United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act . . . , which it did not even bother to cite.").

particular applications of those doctrines. In *Chevron*, the Supreme Court did more than articulate an interpretive approach; it also ruled that the EPA's reading of the relevant statute was lawful.[189] Likewise, the Court concluded in *Auer* that the Secretary of Labor's reading of certain regulations involving overtime pay was lawful.[190] The status of those rulings presents a separate issue for purposes of stare decisis.

A judicial decision upholding an agency's interpretation of a statute governing air pollution or a regulation governing employee wages reflects the targeted application of law to fact within the confines of a concrete dispute. Whether or not the interpretive approaches of *Chevron* and *Auer* are retained, specific applications of those doctrines do not raise concerns about taking interpretive choices away from future Justices on a macro level. Accordingly, a judicial finding that a particular administrative interpretation is lawful should be entitled to stare decisis effect regardless of whether the analytical approaches of *Chevron* and *Auer* are reconsidered.

In applying *Chevron*, for example, the Supreme Court might conclude that a given interpretation "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[191] Under those circumstances, there would be no basis for denying stare decisis effect to the Court's decision. The more difficult question is how to handle decisions that reflect the other teaching of *Chevron* and *Auer*: in the face of ambiguity, the Court may deem an agency's interpretation to be reasonable without going further to declare it the best available reading. In such cases, one might contend that a renewed challenge to the agency's determination should proceed irrespective of the doctrine of stare decisis, because the Court has never determined what the relevant statute or regulation really means. In a post-*Chevron* and post-*Auer* world, the argument goes, the Court would simply be asked to interpret—to truly *interpret*—the statute or regulation for the first time.[192]

This position, I submit, reflects an unduly narrow vision of the role of precedent in federal adjudication. When the Supreme Court deems an agency's reading of a statute or regulation to fall within the bounds of permissible discretion, the Court establishes the lawfulness of the agency's interpretation. A subsequent challenge to that interpretation necessarily takes issue with the Court's prior ruling. It is certainly possible to argue that something the Court previously treated as lawful is, in fact, unlawful. But

189. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

190. Auer v. Robbins, 519 U.S. 452, 461 (1997).

191. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

192. This analysis proceeds in the same fashion regardless of whether *Chevron* is understood as setting forth two discrete, sequential steps or rather a single inquiry into "whether the agency's construction is permissible as a matter of statutory interpretation." Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

such arguments implicate the doctrine of stare decisis by seeking to alter the adjudicated validity of legal rules. The Court has noted that "[p]rinciples of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same."[193] The same goes for changing perspectives on the amount of deference to which administrative interpretations are entitled.[194] Concrete applications of *Chevron* and *Auer* carry a presumption of durability independent of the decision-making approaches that yielded them.

Conclusion

The distinction between statutory and constitutional precedents is prominent in the Supreme Court's discussions of stare decisis. This Article has emphasized a different distinction, grounded in a judicial proposition's scope rather than its statutory or constitutional genesis. I have argued that specific judicial interpretations are entitled to deference, but that general methodologies do not warrant stare decisis effect. As for administrative-deference regimes such as *Chevron* and *Auer*, I have suggested that so long as those regimes are framed as dictating interpretive choices across a wide range of cases and contexts, they exceed the limits of stare decisis.

Throughout the Article, I have emphasized the role of precedent in balancing the tension between past and present. Fidelity to precedent helps to make the Supreme Court more than the sum of its parts. Even so, those parts—that is, the Justices who have gone through the nomination and confirmation process based on their individual attributes and accomplishments—must have space to bring their own philosophies to bear. There are no easy answers here, but there is a clear aspiration: being true to one's foundational interpretive commitments while respecting the institution to which one belongs.

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193. CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457 (2008); *cf.* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 489 (2012) ("It may be that judges today would use other methods to determine whether Congress left a gap to fill. But that is beside the point.").

194. The Supreme Court's acceptance of an administrative interpretation as reasonable does not preclude a fresh look by the agency itself. For example, if the Court has upheld an administrative interpretation without declaring a statute's clear meaning, the agency may change its position without facing heightened scrutiny. *Cf.* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."). For an argument challenging this approach as applied to agency reversals that are grounded in interpretive judgments as opposed to policy judgments, see generally Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112 (2011). In all events, under existing law a judicial determination that an administrative interpretation is reasonable "does not 'fix' the meaning of the statute in any definitive sense" with respect to the agency. GARY LAWSON, EVIDENCE OF THE LAW 131 (2017).

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