STARE DECISIS AS AUTHORITY AND ASPIRATION

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The doctrine of stare decisis remains a defining feature of American law despite challenges to its legitimacy and efficacy. Even so, there is space between the role that stare decisis currently plays and the potential that it offers. The gap is evident in the jurisprudence of the U.S. Supreme Court. Though the Justices continue to underscore the fundamental status of stare decisis, the Court's opinions sometimes seem quick to depart from precedents whose reasoning has fallen out of favor.

Using Bivens v. Six Unknown Named Agents *as a case study, this Article explains how the Court can invigorate the doctrine of stare decisis in pursuit of a stable and impersonal rule of law. Viewed against the backdrop of modern interpretive philosophy,* Bivens *might well be anachronistic. Yet by committing themselves to precedents of precisely that sort, the Justices can demonstrate that changes in judicial personnel—and attendant shifts in the prevailing winds of legal theory—do not always translate into changes in the law.*

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INTRODUCTION

Whenever the next prospective Justice is nominated to the U.S. Supreme Court, we can count on one thing: senators will ask about the nominee's attitude toward precedent. We have witnessed these colloquies before,[1] and we will witness them again. In uncertain times marked by pitched disagreement, the importance of judicial views on precedent is the rare patch of common ground.[2]

Notwithstanding this attention, legal academics and political scientists have challenged the relevance of precedent to Supreme Court decisionmaking. They acknowledge that the Justices routinely *talk* about the importance of precedent. Yet when push comes to shove, the argument goes, the rhetoric of stare decisis gives way to the reality of overruling.[3] Scholars debate whether the Supreme Court has "narrowed" precedent as opposed to "repudiating" it,[4] and whether the Court has jettisoned precedent overtly or rather

1 *See, e.g.*, *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 74 (2017) [hereinafter *Gorsuch Hearing*] (recognizing the "heavy, heavy presumption in favor of precedent"); *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 195 (2010) [hereinafter *Kagan Hearing*] (referring to stare decisis as a "doctrine of humility, and . . . a doctrine of constraint, a doctrine that binds courts and judges to the law"); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144 (2005) [hereinafter *Roberts Hearing*] (referring to the overruling of precedent as a "jolt to the legal system" that is in tension with "principles of stability" but that nonetheless is sometimes required).

2 *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 314 (observing that "[t]he Supreme Court's commitment to precedent has become a central topic of both legal theory and legal politics").

3 *See* Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 129 (describing stare decisis as "a virtue . . . that is far more often preached than practiced"); *see also* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1111–12 (2008).

4 *Compare* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1868 (2014) (discussing the narrowing of precedent), *with* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 875–77 (2019) (drawing distinctions between repudiating, overruling, and confining precedent).

by "stealth."[5] On the most bracing account, the doctrine of stare decisis is taken seriously only by "suckers."[6]

It is not just the efficacy of stare decisis that has come under fire. The doctrine also faces questions of legitimacy. A provocative body of scholarship, much of it proceeding from the originalist school of interpretation, has challenged the lawfulness of deferring to flawed constitutional precedents. Some scholars contend that upholding mistaken precedents violates the judicial duty of fidelity to the Constitution,[7] while others depict precedent as a lesser form of law that cannot supplant the Constitution's meaning as properly understood.[8] Among the critics is Justice Thomas, who contends that overruling "demonstrably erroneous" precedents is not simply a good idea, but a constitutional imperative.[9]

This Article contends that things are not so bleak for stare decisis. By and large, the Justices continue to reaffirm the centrality of stare decisis to the legal order. This commitment to the "rhetoric"[10] of precedent carries important ramifications for the doctrine's impact. When the Supreme Court confirms the foundational status of stare decisis, it sends a message to the lower courts and to the legal system more broadly. It also ensures that the doctrine remains salient and available to future Justices for invocation. The authority of precedent remains intact, notwithstanding the occurrence of occasional overrulings. Stare decisis does not purport to forbid overrulings altogether.[11] The power of the doctrine is in furnishing a framework for determining how and when overrulings may occur.

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5 Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 14 (2010); *see also* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781 (2012) (identifying various mechanisms through which the law changes).

6 *See* Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., 952 F.3d 591, 603 (5th Cir.) (Smith, J., dissenting), *vacated and reh'g en banc granted*, 953 F.3d 381 (5th Cir. 2020). For merchandise offered by a popular legal podcast to similar effect, see *Stare Decisis Is for Suckers*, STRICT SCRUTINY PODCAST SHOP, https://strict-scrutiny-podcast-shop.myshopify.com/collections/stare-decisis-is-for-suckers (last visited March 15, 2021).

7 *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

8 *See* Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 419 (2018).

9 *See* Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

10 Schauer, *supra* note 3, at 135; *cf.* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 196 (Peter Brooks & Paul Gewirtz eds., 1996) (defining rhetoric in terms of the effectiveness of language at evoking a particular response in a particular audience).

11 I am referring here to the operation of stare decisis in the United States. The experience in other jurisdictions has been different. As a point of comparison, see, for example, NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 125–27 (2008) (describing evolving attitudes toward precedential strength in the United Kingdom during the twentieth century).

Stare decisis accordingly can foster stability even as the Court departs from precedent in certain cases. But the doctrine has not realized its potential. At its best, stare decisis provides a mechanism not only for promoting continuity and protecting expectations, but also for increasing the conceptual distance between the identity of the judge and the content of the law. A Supreme Court that gives meaningful deference to prior decisions—even decisions that are flawed—confirms its status as an enduring institution. This is particularly evident when a decision reflects an analytical approach that today's Justices might not favor. Deference in the face of methodological disagreement is the epitome of humility and impersonality. For stare decisis to play the pivotal role the Justices have set out for it, there must be no doubt that decisions retain their viability even when they embody interpretive philosophies that have fallen out of fashion.

To illustrate the dynamics of precedent as well as the path to a more robust doctrine of stare decisis, I consider the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[12] whose fifty-year anniversary is the occasion of this Symposium. *Bivens* faces challenge in some quarters as a decision in need of reconsideration. My question is not whether *Bivens* was correct to imply a cause of action for damages against federal officers based on certain constitutional violations. Irrespective of whether *Bivens* was right when it issued, I view it as a strong case for stare decisis.

Bivens does not rest on factual premises that have eroded over time. It has not proved unworkable as a procedural matter. And it is not the kind of exceptional, disastrous ruling whose consequences are so dire as to demand reconsideration for that reason alone. If there is cause for overruling *Bivens*, it arises from the decision's willingness to imply rights of action without a clear textual hook, which is a mode of analysis that raises concerns among some Justices. Far from providing a "special justification" for overruling,[13] this consideration points toward the importance of deference. By upholding a prior decision notwithstanding variations in methodological approaches over time, the Justices can give effect to the recognition that stare decisis promotes the rule of law by separating the content of legal rules from the interpretive inclinations of those who currently occupy the bench. The *Bivens* example is thus significant both in its own right and as a microcosm of the interplay between precedent and interpretive philosophy.

This Article begins by exploring the doctrine of stare decisis as a general matter before proceeding to its implications for *Bivens*. Part I examines some of the leading challenges to stare decisis in recent years. Part II

12 403 U.S. 388 (1971).

13 *E.g.*, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (finding special justifications for overruling a precedent based on its unworkability, its inconsistency with other decisions, and the erosion of its "underpinnings" over time); *see also* Randy J. Kozel, *Special Justifications*, 33 CONST. COMMENT. 471, 473–76 (2018) (discussing various possibilities for understanding the requirement of a special justification for overruling).

responds to the first of these challenges by defending the doctrine's legitimacy. In Part III, I move from legitimacy to efficacy, explaining the ways in which precedent influences the trajectory of the law—even when a decision ultimately is overruled.

Part IV applies these lessons to *Bivens*. That decision is a powerful candidate for reaffirmance under the doctrine of stare decisis. Moreover, ongoing challenges to *Bivens* afford the Court a unique opportunity. If there is a problem with *Bivens*, it is that the case reflects an interpretive approach that has fallen out of favor. By upholding *Bivens* as precedent notwithstanding its failings by today's standards, the Court can demonstrate that shifts in the prevailing winds of interpretive philosophy do not justify revisiting precedent. In committing itself to that principle, the Court can clarify the status of *Bivens* while revitalizing the doctrine of stare decisis more generally, taking a step toward fulfilling the "promise of precedent."[14]

I. Challenging Stare Decisis

Recent challenges to the doctrine of stare decisis have tended to proceed on two fronts. One claim is that deference to flawed precedents is illegitimate, at least in certain circumstances, because it leads judges to act in ways that exceed their lawful authority.[15] The second claim is that, questions of legitimacy aside, the doctrine of stare decisis is just not very important to the Supreme Court's resolution of constitutional disputes.

A. Legitimacy

Supreme Court Justices interpret the Constitution. When flawed precedents furnish a mistaken account of the Constitution's meaning, the argument goes, Justices may not perpetuate the error in the name of stare decisis. Instead, they must construe the document correctly, even if that means departing from prior decisions.[16] Whether the position is grounded in the judicial oath, the nature of the Constitution, the institution of judicial review, or some combination of these factors,[17] its upshot is the same: there is a zone

14 Randy J. Kozel, Settled Versus Right: A Theory of Precedent 176 (2017).

15 Richard Fallon helpfully insists on precision in using the term "legitimacy" in constitutional argument. *See generally* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787 (2005). This Article focuses on legitimacy as "gauged by legal norms." *Id.* at 1790. As Professor Fallon suggests, however, some theories treat legal legitimacy as overlapping in certain respects with sociological legitimacy and moral legitimacy. *See id.* at 1791.

16 *E.g.*, Lawson, *supra* note 7, at 27–28; Paulsen, *supra* note 7, at 289–90; *see also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Const. Comment. 257, 259 (2005) ("Accepting that judicial precedent can trump original meaning puts judges above the Constitution they are supposed to be following, not making.").

17 *See* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 237 (2012) (noting that the Constitution "explicitly and self-referentially obliges all officials to swear oaths to itself, not to conceded misinterpretations of it"); Gary Lawson, *Rebel Without a Clause: The Irrelevance of Article VI to Constitutional Supremacy*,

where deference to flawed constitutional precedents is not only ill-advised, but illegitimate.

Commentators who raise concerns about stare decisis vary in the extent to which they would permit the retention of flawed precedents. For some, paramount fidelity to the Constitution is consistent with deference to precedents that have engendered significant reliance.[18] For others, deference to a flawed precedent may be lawful on a limited-time basis to ensure that the law evolves at a gradual pace.[19] A precedent might also warrant deference if it reflects a plausible, longstanding interpretation of an uncertain provision, reflecting a theory of constitutional "liquidation" often associated with James Madison (and to which I will return below).[20] Notwithstanding these exceptions, the Constitution's true meaning—as perceived by today's Court—generally must prevail over precedent when the two are at odds. It follows that there is a domain of constitutional adjudication in which deference to erroneous precedents is impossible to square with the judicial role as properly understood.[21]

B. Efficacy

Apart from challenges to the legitimacy of stare decisis, there are also questions about the doctrine's efficacy. The salience of these questions owes to the confluence of two factors. First, the Supreme Court remains willing to reconsider and overrule its prior decisions. Second, the Court has not offset its overrulings with many reaffirmances of precedent on stare decisis grounds. While legal scholars and political scientists have challenged the efficacy of stare decisis for decades,[22] the Court's engagements with prece-

110 MICH. L. REV. FIRST IMPRESSIONS 33, 36 (2011) (focusing on the nature of the Constitution and connecting it with the basis for judicial review); *id.* at 37 ("[O]n a purely textual level, the Constitution specifically prescribes that officials swear oaths to uphold it."); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2731 (2003) ("If *Marbury* is right, the judicial doctrine of stare decisis . . . is wrong.").

18 *See* AMAR, *supra* note 17, at 239–40; *see also* Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (connecting stare decisis with stability, predictability, and reliance).

19 *Cf.* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 465 (2018) (book review) (describing the endorsement of nonoriginalist precedent as "an originalist second best").

20 *See infra* Section II.A.

21 A related, but distinct, strand of commentary posits that judicial precedent is a lesser form of law than the Constitution's true meaning as properly understood. *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 561 (2019) (characterizing stare decisis as treating a prior judicial decision "*as if* it were law").

22 *See* Fallon, *supra* note 3, at 1111 (describing "acidly skeptical writing" challenging the impact of stare decisis at the Supreme Court). For prominent examples, see generally THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006), and JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

dent over the past few years furnish additional evidence toward the same conclusion.[23]

It is important to note that debates about the efficacy of stare decisis at the Supreme Court do not bear on the impact of precedent as a vertical matter. The Court remains insistent on the bindingness of its decisions within the lower courts.[24] Likewise, decisions of federal appellate courts are binding on district courts within their circuits.[25] Judges are permitted to criticize and doubt the superior-court precedents that bind them, but they remain bound nonetheless.

The role of precedent is more complicated in horizontal operation. Again, it is crucial to draw distinctions among courts. The federal courts of appeals treat their respective precedents as presumptively binding, albeit while adopting different approaches to how and why circuit law may be revised.[26] Most district courts operate differently, giving little or no regard to district precedent beyond its persuasive value.[27] As for the Supreme Court, the Justices continue to emphasize that the Court's prior decisions are presumptively binding. Yet the Justices also reserve the right to overrule prior decisions when there is a special justification for doing so. The Court has found such justifications to be present in multiple cases in recent years, on issues such as the funding of public sector labor unions,[28] the taxation of internet sellers,[29] states' immunity from lawsuits brought in other states' courts,[30] and procedures for litigating cases under the Fifth Amendment's Takings Clause.[31]

These overrulings are made more resonant by the relative dearth of counterexamples. The Justices regularly decline invitations to revisit their constitutional precedents when reconsideration is unnecessary to the disposition of the case before them.[32] They occasionally go further by reaffirming a decision while expressing doubts about its rationale, or even by invoking

23 *See* Schauer, *supra* note 3, at 135–39.

24 *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

25 *See, e.g.*, BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 491 (2016).

26 For example, some circuits allow three-judge panels to overrule circuit law provided that they follow certain preliminary steps to ensure no objection from the off-panel judges. *See* 7TH CIR. R. 40(e); Oakey v. US Airways Pilots Disability Income Plan, 723 F.3d 227, 232 (D.C. Cir. 2013) (noting the mechanism for a three-judge panel to overrule circuit law after circulating the proposed opinion to off-panel judges).

27 *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 801–02 (2012).

28 *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018).

29 *See* Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992).

30 *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019).

31 *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019).

32 *E.g.*, McCutcheon v. FEC, 572 U.S. 185, 199 (2014) (plurality opinion) (constitutionality of limits on campaign contributions); McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) (plurality opinion) (incorporation of rights against the states via the Fourteenth Amendment's Due Process Clause).

stare decisis expressly as a reason for leaving matters settled.[33] Even so, as Professor Schauer suggests,[34] there is a familiar pattern to many of the Supreme Court's engagements with precedent. The Court begins by emphasizing the importance of continuity and applying the conventional stare decisis factors. But at the end of the day, it often concludes that the arguments in favor of overruling are just too powerful, and the arguments in favor of staying the course are just too weak. The result is a notable "rhetoric" of stare decisis but an actual decision-making norm that is, in Professor Schauer's view, "tissue-thin."[35]

II. PRECEDENT'S LEGITIMACY

Part I introduced challenges to stare decisis on grounds of constitutional legitimacy and practical efficacy. In this Part and the next, I offer historical, theoretical, and doctrinal context that suggests a competing account.

I begin with the issue of legitimacy. Academic challenges to the legitimacy of stare decisis are formidable.[36] Still, those challenges have not made many inroads at the Supreme Court. Even in the course of overruling its precedents, the Court consistently reaffirms the fundamental role of stare decisis. This practice both reflects and reinforces the doctrine's deep roots.

A. Historical Backdrop

A wealth of insightful commentary has examined the path of precedent from the Founding to the modern era. The historical analyses offer distinctive accounts of, for example, common-law understandings of the judicial power[37] and the relationship between constitutional and statutory precedent.[38] My aim is to emphasize what the historical accounts have in common at a general level. In short, numerous commentators have recognized a longstanding judicial attitude of respect for precedent. The key question has been—and continues to be—when that respect should yield.

Over two centuries ago, when Blackstone offered his influential description of judicial practice at common law, he noted the crucial role of prece-

33 *See infra* Section III.A.

34 *See* Schauer, *supra* note 3, at 135.

35 *Id.* at 132.

36 *See supra* Section I.A.

37 *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 168 (2013) (developing an originalist argument that defines "the judicial power to include a minimal concept of precedent, which requires that some weight be given to a series of decisions").

38 *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 713–14 (1999) (challenging the relevance of a precedent's constitutional, as opposed to statutory, nature as described in DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 (1985), and William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988)).

dent.[39] On Blackstone's account, respect for precedent helps to steady the path of the law, resolving what once "was uncertain."[40] Stare decisis also goes hand in hand with the pursuit of judicial impersonality. Respect for precedent helps to ensure that a judge does not alter the law "according to his private sentiments" and that legal principles do not "waver with every new judge's opinion."[41] At the same time, Blackstone recognized that precedent is not absolute. While "precedents and rules must be followed," departures are permitted when prior decisions are "flatly absurd," "unjust," or "contrary to the divine law."[42] We can understand Blackstone as recognizing a baseline presumption of respect for precedent, which is rebutted if a decision is especially problematic in its reasoning or results.

Madison likewise appreciated the role of precedent. He noted the need for legal provisions to be "liquidated," or settled, through practice.[43] Once the process of liquidation had occurred, rules that previously were murky would have clearer content, and they accordingly would receive some insulation from revision. Like Blackstone, Madison emphasized both stability and impersonality, responding to concerns about "disturb[ing] the established course of practice" or allowing a single judge to give too much "effect to his own abstract and individual opinions."[44] Madison also acknowledged situations in which precedent should yield: namely, when a decision crosses the line between interpreting a law and "repeal[ing] or "alter[ing]" it.[45] Caleb Nelson characterizes Madison as recognizing the importance of stare decisis in the face of reasonable disputes over the content of the Constitution, but as

39 Though Blackstone's work was salient during the Founding, as reflected in part by Hamilton's citations in *The Federalist Nos. 69* and *84*, discussions of precedent at common law by no means began with his *Commentaries*. For an analysis of earlier thinking, with special attention to the relationship between constancy and change, see Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 580 (2006).

40 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

41 *Id.*

42 *Id.* at *69–70; *see also id.* at *69 (recognizing an exception to stare decisis for decisions that are "evidently contrary to reason").

43 THE FEDERALIST NO. 37, at 182 (James Madison) (Ian Shapiro ed., 2009) ("All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); *see also* Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 359, 361 (Marvin Meyers ed., rev. ed. 1981) ("It . . . was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . .").

44 Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER, *supra* note 43, at 390, 391–92.

45 Letter from James Madison to N.P. Trist (Dec. 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 204, 211 (Philadelphia, J.B. Lippincott & Co. 1865) ("None will deny that precedents of a certain description fix the interpretation of a law. Yet who will pretend that they can repeal or alter a law?"); *see also id.* (noting the distinction between "expound[ing]" the Constitution and "alter[ing]" it); Lee, *supra* note 38, at 665–66 (discussing this distinction).

supporting overrulings where precedents are "demonstrably erroneous" in their interpretation of the law.[46]

Placing Blackstone and Madison side by side reveals important similarities. For both, stare decisis is the rule, yet overrulings are permitted in light of special circumstances—for example, if a decision is "most evidently contrary to reason"[47] (on Blackstone's account) or incompatible with the clear text of a legal provision (on Madison's account).[48] The same spirit animates Hamilton's statement in *The Federalist No. 78* that "strict rules and precedents" help "[t]o avoid an arbitrary discretion in the courts."[49] His account suggests a conception of judicial precedents as fostering impersonality and constraint, even while remaining subject to reconsideration under appropriate circumstances.

In its essential structure, the Supreme Court's jurisprudence of precedent is consistent with the vision set forth by the likes of Blackstone, Madison, and Hamilton. In case after case, the Court has announced that prior decisions warrant presumptive respect, but that any decision can be overruled in the face of a "special justification."[50] Areas of disagreement remain, including whether a decision's faulty logic establishes a prima facie case for overruling or whether there must be some affirmative problem with a decision over and above its wrongness.[51] Moreover, when describing the role of precedent, different Justices have provided different emphases. Justice Brandeis noted the Supreme Court's duty to correct its own constitutional mistakes.[52]

46 Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 14 (2001) ("If a past decision was demonstrably erroneous . . . it lacked the binding force of true liquidations.").

47 *See* 1 BLACKSTONE, *supra* note 40, at *70.

48 *See* Letter from James Madison to N.P. Trist, *supra* note 45, at 211.

49 THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Ian Shapiro ed., 2009).

50 *See* Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (instructing that "any departure from the doctrine of *stare decisis* demands special justification"). For recent invocations, see, for example, Gamble v. United States, 139 S. Ct. 1960, 1969 (2019); Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014); Alleyne v. United States, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring); Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring).

51 *Cf.* AMAR, *supra* note 17, at 235 (contending that "absent special countervailing considerations . . . today's Court may properly overrule yesterday's case simply because today's Court believes the old case incorrectly interpreted the Constitution"). *Compare Janus*, 138 S. Ct. at 2479 (considering "the quality of [a precedent's] reasoning"), *with id.* at 2497 n.4 (Kagan, J., dissenting) (describing the assessment of a precedent's reasoning as duplicative of the threshold determination that it is flawed).

52 *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (recognizing that while "[*s*] *tare decisis* is usually the wise policy," the Supreme "Court has often overruled its earlier decisions" in constitutional cases, "where correction through legislative action is practically impossible"). Justice Brandeis's view is perhaps unsurprising in light of his statement (according to Holmes) responding to the American Law Institute's project of producing restatements of the law: "Why I am restating the law every day." PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 50

By contrast, Justices Stewart[53] and Harlan[54] focused on the value of distance between the membership of the Court and the content of legal rules.

Dueling sentiments sometimes appear within the confines of a single opinion. For example, in a recent dispute over the constitutionality of sentencing procedures, Justice Sotomayor echoed Hamilton's description of precedent as a check against "an arbitrary discretion" within the judiciary.[55] At the same time, she acknowledged that fidelity to precedent may yield to a special justification for overruling—such as the "ero[sion]" of a precedent's "underpinnings."[56] Years earlier, Justice Scalia observed that stare decisis would be "no doctrine at all" if mere disagreement were enough to depart from precedent,[57] while also identifying a decision's "unacceptable consequences"[58] or "egregious[ ]" wrongness[59] as potentially sufficient to rebut the presumption of deference.

Whichever way one resolves debates about the operation of stare decisis, and whatever one believes should be the fate of a given decision that has come under challenge, respect for the role of precedent is an established phenomenon that maintains its currency today. A declaration that stare decisis violates the Constitution would be a novelty.

B. Endorsement

Few doctrines receive loftier praise from the Supreme Court than does stare decisis. Justices describe precedent as fundamental to the rule of law[60] and "a vital rule of judicial self-government."[61] They invoke Hamilton in characterizing precedent as a bulwark against judicial decisionmaking based on "an arbitrary discretion."[62] They connect precedent with the essential stability and integrity of the American legal regime.[63] They depict respect for

(1982) (quoting AM. L. INST., THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 276 (2d ed. 1973)).

53 *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (criticizing overrulings that are based on "a change in our membership").

54 *See* Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting) (contending that "altered disposition, or subsequent membership on the Court," is not "warrant for overturning a deliberately decided rule of Constitutional law").

55 Alleyne v. United States, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888))).

56 *Id.* at 119 (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

57 Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

58 *Id.*

59 Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

60 Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014).

61 Johnson v. United States, 576 U.S. 591, 606 (2015).

62 Alleyne v. United States, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).

63 *See Payne*, 501 U.S. at 827.

precedent as a means of bolstering impersonality by ensuring that disagreements do not translate into constant vacillation.[64] As Allison Larsen notes, these depictions of stare decisis cohere with a broader commitment to impersonality as a defining legal norm.[65]

The same conception of precedent is reinforced by the Justices' statements while awaiting confirmation. Chief Justice Roberts explained that it takes more than disagreement to justify departing from a prior decision.[66] He and other nominees have linked fidelity to precedent with the humility of the individual Justice and respect for the Court as an institution.[67]

Animating these sentiments is a worry that, in a world without respect for precedent, the Constitution could become "nothing more than what five Justices say it is."[68] That effect might be diluted to the extent that a given Justice believes reliance implications to be legally relevant, such that the correct answer to today's legal problem must take into account the impact of yesterday's decisions.[69] Yet not every judicial philosophy will accord the same import to reliance in the face of a perceived interpretive mistake, leaving open the possibility that shifts in constitutional understanding could manifest themselves in short order as changes in the governing rules.[70]

The Justices hold up stare decisis as a remedy for this problem. That function, in turn, informs the manner in which the doctrine operates. To return to Justice Scalia's phrase, stare decisis is "no doctrine at all" if it is overcome by simple disapproval of a decision on the merits.[71] The path of the law should depend on more than the "present doctrinal disposition[s]" of those who currently occupy the bench.[72] In standing by decisions of the past, today's Justices both ensure and demonstrate that constitutional law

64 *See* Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986).

65 *See* Allison Orr Larsen, *Supreme Court Norms of Impersonality*, 33 CONST. COMMENT. 373, 373–74 (2018).

66 *See Roberts Hearing*, supra note 1, at 144.

67 *Gorsuch Hearing*, *supra* note 1, at 76 (referring to excessive willingness to overrule as reflecting "hubris inappropriate to the judicial role"); *Kagan Hearing*, *supra* note 1, at 163 (noting that judges "should view prior decisions with a great deal of humility and deference"); *Roberts Hearing*, *supra* note 1, at 158 (connecting "humility" with "respect for precedent that forms part of the rule of law"); *cf.* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–92 (1996) (urging caution before disrupting settled interpretations).

68 Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16.

69 *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 7–8 (1989) (explaining how reliance interests can affect perceptions of the correct result under some theories of judging).

70 *E.g.*, Solum, *supra* note 19, at 461 (considering the legitimacy of adhering to precedent during the transition between interpretive regimes); *cf.* Corinna Barrett Lain, *Mostly Settled, But Right for Now*, 33 CONST. COMMENT. 355, 372 (2018) (discussing the use of precedent to lend stability while remaining open to updating in light of considerations such as social change).

71 Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

72 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

doesn't constantly transform itself as competing judicial philosophies fight for primacy at the Court. Instead, stare decisis takes the resolution of constitutional disputes out of time. It embodies the view that the law ought not undergo dramatic shifts based on election returns and attendant changes in judicial personnel. Irrespective of whether the dominant interpretive philosophy of today matches the dominant interpretive philosophy of the past, there must be continuity that transcends identity.[73]

Maintaining continuity does not require standing by every mistake. Stare decisis allows departures from precedent based on special justifications, including factual changes and workability problems.[74] Nor does deference to precedent mean every utterance in a judicial opinion is entitled to stare decisis effect. The Justices continue to recognize that there are some judicial propositions, such as ancillary observations disconnected from the facts of a given case, that do not warrant deference going forward.[75]

What stare decisis demands is the possibility of reaffirming a prior decision despite one's conviction that it is mistaken. Numerous Justices have expressed, and continue to express, the belief that it takes more than disagreement to justify an overruling.[76] A robust norm of stare decisis means personnel changes will not matter quite as much, because a newly arriving Justice will sometimes (not always) defer to precedent regardless of her individual perspective on the law. That furnishes a response to Justice Marshall's concern about "[p]ower" rather than "reason" serving as the "currency of

73 *See* KOZEL, *supra* note 14, at 105. This conception of stare decisis departs from arguments that judicial treatment of precedent should ebb and flow depending on prevailing jurisprudential approaches. On the latter point, see Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2243 (2006) (defending the view that judicial approaches to precedent should change over time).

74 *E.g.*, Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (rejecting an absolutist view of stare decisis); *id.* at 408 (Stevens, J., concurring in part and dissenting in part) (same). I am referring here to the Supreme Court's approach to its own precedents via the doctrine of horizontal stare decisis. Vertical stare decisis plays by different rules. *See, e.g.*, GARNER ET AL., *supra* note 25, at 155. In domains outside the Supreme Court, precedent often binds in a far more stringent fashion. *See id.* at 491; Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017 (2003). Of course, the Article V amendment process always remains available if the people wish to correct the Justices' perceived mistakes directly. *Cf.* Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 665 (2010) (describing the power of amendment as "giving citizens the key to unlock their constitutional handcuffs").

75 Examples include hypotheticals and asides, which fit the conventional definition of nonbinding dicta. *See* KOZEL, *supra* note 14, at 74–76; *cf.* Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1951 (2017) (defining propositions' forward-looking effect by focusing on the rule set forth by the issuing court).

76 *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting); Alleyne v. United States, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring); Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992); Arizona v. Rumsey, 467 U.S. 203, 212 (1984); *Roberts Hearing*, *supra* note 1, at 144. For an argument challenging this position, see AMAR, *supra* note 17, at 235.

th[e] Court's decisionmaking."[77] Even if stare decisis is not absolute, and even if different Justices reach different conclusions about how it applies, the doctrine's very existence increases the chances that a given precedent will survive regardless of whether there are five Justices who agree with it.

This, at least, is what the Justices *say* about stare decisis. How can we be sure they mean it? One answer is that we should presume the sincerity of the Justices' statements about their reasons for action. But for those who are skeptical, there is another reason to conclude that the Justices are being genuine and serious in their discussions of the doctrine. It is here that the scholarly challenges to the legitimacy of stare decisis play an important role. As we have seen, there are sophisticated and intellectually respectable arguments for sharply limiting the role of stare decisis on grounds of legitimacy. Those arguments have been available in the academic literature for decades, and they have developed further over time.[78] Given the robust debate over the relationship between precedent and legal interpretation, a Justice who harbors doubts about stare decisis has no reason to pay the doctrine lip service. The Justice could simply set forth the legal basis of those doubts—precisely as Justice Thomas has done.[79] When the Justices instead reiterate their commitment to stare decisis as integral to impersonality, continuity, and the rule of law, we may reasonably conclude that they believe what they say.

Stating a principle is not the same as applying it, and Professor Schauer is surely right to point out tension between what the Justices say about precedent and what they do with it.[80] But perhaps the problem is more operational than philosophical. Perhaps, that is, the Court would give more respect to precedent if the rules of the game were better understood and more clearly defined. That project begins with unpacking, in basic terms, the legal rationale for deferring to certain precedents notwithstanding their flaws.

C. Theoretical Foundations

Though the Supreme Court consistently depicts stare decisis as legitimate even when it departs from a given decision, it has declined to offer a deep theoretical account of that legitimacy. The Court has referred to stare decisis as a "principle of policy,"[81] but in doing so it has not indicated that the doctrine lacks a basis in law.[82] Instead, it has juxtaposed the "principle of

77 Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

78 *See supra* notes 16–20 and accompanying text.

79 *See* Gamble v. United States, 139 S. Ct. 1960, 1980–81 (2019) (Thomas, J., concurring).

80 *See* Schauer, *supra* note 3, at 135.

81 Helvering v. Hallock, 309 U.S. 106, 119 (1940); *see also, e.g.*, Citizens United v. FEC, 558 U.S. 310, 363 (2010) (quoting *Helvering*, 309 U.S. at 119).

82 *See* Richard H. Fallon, Jr., Essay, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 581–82 (2001) (interpreting the "principle of policy" language to mean that "stare decisis, like many principles of constitutional stature, is capable of being overridden").

policy" against a "mechanical formula of adherence to the latest decision."[83] That tells us deference to precedent is defeasible, but it does not explain where the doctrine comes from or how it fits into the constitutional design.

The academic literature, by comparison, offers theories of legitimacy that draw on a range of methodological and normative premises. On some of those accounts, the case for stare decisis is straightforward. For example, to the extent one takes a positivist approach to the law, the lawfulness of stare decisis flows from its acceptance.[84] The validity of deferring to precedent is legitimized by judges' and Justices' repeated affirmations of the fundamental role of stare decisis.[85] In light of the doctrine's well-established position, judicial opinions retain their presumptive validity and authority even when a new generation of judges perceives them as flawed, and irrespective of whether perceived flaws relate to inconsistency with original meanings, failure to reflect contemporary understandings, or something else.[86] The prevailing practice is one that requires a special justification for overruling, while permitting departures when such a justification is present.

The validity of stare decisis likewise is clear from the standpoint of common-law constitutionalism, which emphasizes the development of constitutional principles through a common-law style of interpretation that infuses judicial decisions with binding (though rebuttable) effect.[87] The same is true of pragmatism, characterized by its focus on the costs and benefits of selecting one legal rule over another.[88]

The legitimacy of stare decisis becomes more contested if one gravitates toward certain strands of originalism. This has been true for decades,[89] but the tension has become increasingly evident following Justice Thomas's argument that the Constitution prohibits judicial adherence to demonstrably

83 *Helvering*, 309 U.S. at 119; *see also Citizens United*, 558 U.S. at 363 (quoting *Helvering*, 309 U.S. at 119).

84 *See* H.L.A. HART, THE CONCEPT OF LAW 110 (2d. ed. 1994) (discussing the relevance of the "practice of the courts, officials, and private persons in identifying the law by reference to certain criteria"); *cf.* FREDERICK SCHAUER, THE FORCE OF LAW 79 (2015) (describing Hart's view as treating the Constitution as valid "simply by virtue of its acceptance," which is "a matter of social fact"); Fallon, *supra* note 3, at 1113.

85 *See supra* Section II.B.

86 *See* Fallon, *supra* note 3, at 1122–23 (arguing that precedents are valid because they are "accepted as such within current practices of law and adjudication").

87 *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 33–36 (2010); *cf.* JACK M. BALKIN, LIVING ORIGINALISM 121–22 (2011) (defending the common-law development of precedent as consistent with the constitutional framework).

88 *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 149 (2010) ("[T]he judge must make a pragmatic decision, weighing the harms and benefits of stability against change."); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 925–26 (2007) (Breyer, J., dissenting) (describing ways in which overruling a precedent could affect reliance interests); *see also* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

89 *See, e.g.*, Lawson, *supra* note 8; Paulsen, *supra* note 8; *see also* KOZEL, *supra* note 14, at 106–07 (describing the tension between originalism and stare decisis in the view of some scholars).

erroneous precedents.[90] Even so, possibilities exist for harmonizing originalism and precedent across a wide swath of cases.

The Constitution does not expressly authorize fidelity to precedent. If stare decisis has an implicit textual font, a leading possibility is Article III's reference to the "judicial Power."[91] Perhaps the judicial power was originally understood as including some degree of respect for precedent.[92] Hence the argument of John McGinnis and Michael Rappaport that the judicial power encompasses a limited doctrine of stare decisis and that the Constitution empowers judges to develop supplemental rules of precedent.[93]

An alternative approach (which I have developed in prior work) looks not to the judicial power of Article III, but to broader principles of constitutional structure.[94] The structural argument begins with Article III's depiction of the judiciary as different in kind from the other branches of government.[95] Unlike the Executive and the Legislature, the Judiciary is a continuous body. The grant of life tenure and salary protection means federal judges are insulated from official and electoral control.[96] Moreover, while judges on the inferior federal courts must confront the prospect of Supreme Court review, there is no tribunal superior to the Supreme Court. If the Justices are to face constraints on their decisionmaking, those constraints must come from somewhere else.

The most obvious constraining force is the Constitution's text, which compels certain choices and takes other options off the table. But the Constitution contains its share of generalities that complicate the ability of the text to dictate concrete outcomes through its sheer, literal force. That explains Madison's observation that the political and judicial branches would have work to do in settling the meaning of uncertain provisions.[97]

Areas of textual uncertainty raise concerns about leaving the Justices without a meaningful source of constraint. Precedent offers a response. A norm of deference to precedent makes it more difficult for the Justices to cast votes in light of their personal philosophies without regard for the systemic effects of legal change. Stare decisis creates an "argumentative bur-

90 *See* Gamble v. United States, 139 S. Ct. 1960, 1980–81 (2019) (Thomas, J., concurring); *id.* at 1985 ("[M]y view of *stare decisis* requires adherence to decisions made by the People—that is, to the original understanding of the relevant legal text—which may not align with decisions made by the Court.").

91 U.S. CONST. art. III, § 1.

92 For a different argument that draws on Article III's reference to the judicial power as part of the justification for stare decisis, see Fallon, *supra* note 82, at 588.

93 *See* MCGINNIS & RAPPAPORT, *supra* note 37, at 168–70; *cf.* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447 (2006) (contending that "by 1787–1789, the concept of judicial power included significant respect for precedent").

94 *See generally* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789 (2018).

95 *See id.* at 804–07.

96 *See id.*

97 *See* Nelson, *supra* note 46, at 11–12.

den" that future Justices must carry in explaining their decision to break from settled law.[98] Against this backdrop, we might understand a judicial promise to support the Constitution as encompassing not only the document's text, but also interpretations issued by the Supreme Court in the exercise of its lawful authority under Article III.[99]

One need not embrace this structural argument in order to accept stare decisis as lawful and legitimate. Indeed, my point is that powerful arguments for the legitimacy of stare decisis are available from a variety of perspectives and across a range of interpretive philosophies. For those who endorse theories such as positivism, common-law constitutionalism, or pragmatism, the legitimacy of deferring to precedent is difficult to dispute. And there are even arguments for harmonizing stare decisis with fidelity to the Constitution's original meaning. Just as the commitment to precedent transcends matters of judicial identity and judicial philosophy, so, too, do the arguments for the legitimacy of stare decisis.

III. Precedent's Efficacy

As we saw in Part I, some judges and scholars have challenged the relevance of horizontal stare decisis by pointing to the Supreme Court's willingness to reconsider its decisions. Those challenges draw support from the Court's recent overruling of precedents on issues including labor union financing, internet selling, state sovereign immunity, and takings of private property.[100]

Yet counterpoints do exist. In addition, stare decisis can exert meaningful force on the trajectory of the law and the structure of legal opinions notwithstanding the occurrence of overrulings. Finally, the Justices continue to emphasize the importance of stare decisis even as they depart from particular decisions. This rhetoric has independent force, helping to ensure that the doctrine remains intact and that arguments for deferring to precedent stay close at hand.

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98 Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 580 (1987).

99 Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299, 304 (2016) (linking the promissory content of an oath to the "contemporaneous meaning of its terms").

Fidelity to precedent need not rise to the level of fidelity to clear text. A judge could deem herself strictly bound to follow the Constitution's express commands while recognizing that deference to judicial precedent is rebuttable rather than absolute. In other words, the judge could acknowledge constitutional text as paramount but adopt an "understanding of the Constitution that supplements the bare text with prior judicial opinions." Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 Harv. J.L. & Pub. Pol'y 45, 51 (1994).

100 *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019); Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018).

A. Where Precedent Does Its Work

Despite its willingness to reconsider its prior pronouncements, the Supreme Court continues to reaffirm the importance of precedent in meaningful ways. One way is the Justices' insistence on a strict doctrine of vertical precedent, as noted above.[101] The Court has left no doubt that lower courts are rigidly bound by its decisions.[102] This is true even of decisions the Justices themselves seem to have undercut.[103] Unless and until the Court takes the unequivocal step of overruling itself, the lower courts must abide by what it previously held. That rule ensures the centrality of Supreme Court precedent in the lower courts, which decide many more cases than the Supreme Court each year.[104]

The Supreme Court's limited docket is notable in another respect. The Court grants only a small fraction of the petitions for certiorari it receives. In deciding which cases to hear, the Court presumably gives some regard to precedent. That is, the Justices may deny certain petitions for certiorari on the rationale that the relevant doctrines are settled and there is no sense in disrupting them even if their reasoning has some weaknesses.[105] The extent of this phenomenon is unclear, but to discount it entirely would be a mistake.[106]

These two factors—the strict doctrine of vertical precedent and the Supreme Court's certiorari practice—are mutually reinforcing. Among the most important questions the Court asks in exercising its certiorari power is whether there is a split of authority among the federal courts of appeals.[107] Splits are relatively likely to attract the Justices' attention, while issues that have not generated sharp disagreement face a more onerous path to the Supreme Court's docket.[108]

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101 *See supra* notes 24–25 and accompanying text.

102 *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

103 *Id.* at 480–81, 484.

104 *See* Adam Feldman, *Final Stat Pack for October Term 2018*, SCOTUSBLOG (June 28, 2019, 5:59 PM), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf (noting that during the October 2018 Term, the Supreme Court issued seventy-two merits opinions).

105 Professor Schauer notes this point in raising the possibility that "[i]f a strong stare decisis norm exists, the cases controlled by it will not be disputed, or litigated, or appealed, or selected by the Supreme Court for decision." Frederick Schauer, *Stare Decisis and the Selection Effect*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 124, 128 (Christopher J. Peters ed., 2013); Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 400 n.76 (2007).

106 *Cf.* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1942 (2017) (recognizing the importance of "agenda control" in understanding the role of stare decisis).

107 *See* SUP. CT. R. 10(a) (noting the relevance of whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

108 *See* Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1359–60 (2018).

For legal questions the Supreme Court has already addressed, the strict doctrine of vertical precedent makes splits less likely. Every lower court is required to do as the Supreme Court has done, irrespective of whether the relevant precedent seems poorly reasoned, outdated, or harmful. Judges on the lower courts occasionally respond by penning concurrences explaining that their hands are tied but urging the Court to reconsider its approach.[109] Nevertheless, the combination of a strict doctrine of vertical precedent with a preference for cases that have divided the lower courts serves to decrease the chances that issues resolved in the Court's prior decisions will return to its merits docket for reconsideration.

As for the cases the Supreme Court chooses to hear, stare decisis affects them as well. Even if the Court eventually decides to overrule a decision, the Justices' often stretch that process over several years out of reluctance to effect abrupt changes of course.[110] The intervening period provides time for stakeholders to adjust their expectations in anticipation of a possible change.[111]

Occasionally, the Justices invoke precedent not simply to slow the pace of legal change, but to preserve the rule at issue. Two of the most prominent examples are *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[112] which reaffirmed the core holding of *Roe v. Wade*[113] regarding the constitutional right to nontherapeutic abortion, and *Dickerson v. United States*,[114] which reinforced the *Miranda*[115] warnings as constitutional imperatives. Both of these examples are equivocal in some sense: *Casey* retained *Roe*'s core holding but abandoned its trimester framework,[116] and some commentators view *Dickerson* less as a victory for stare decisis than a judicial rebuff of congressional intrusion.[117] Even so, both opinions expressly invoke the doctrine of stare decisis as part of their rationale.[118]

Along similar lines is the Court's recent decision in *Gamble v. United States*, reaffirming that the Fifth Amendment does not prohibit prosecutions by separate sovereigns.[119] The Court was skeptical of the challenge to the relevant precedent on the merits, but it also made clear that stare decisis had

109 *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 959 n.178 (2016).

110 *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018); Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018).

111 *Cf.* Richard M. Re, *Second Thoughts on "One Last Chance"?*, 66 UCLA L. REV. 634, 636 (2019) (noting that by indicating its willingness to reconsider a precedent, the Supreme Court "giv[es] other actors an opportunity to avert or mitigate the Court's decision").

112 505 U.S. 833 (1992).

113 410 U.S. 113 (1973).

114 530 U.S. 428 (2000).

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

116 *See* 505 U.S. at 872–73 (plurality opinion).

117 *See, e.g.*, Schauer, *supra* note 3, at 134 n.72.

118 *See Casey*, 505 U.S. at 845–46; *Dickerson*, 530 U.S. at 443.

119 139 S. Ct. 1960, 1965–66 (2019).

a role to play. Stare decisis, the Court explained, raises the bar for those who propose interpretations that run contrary to the Court's caselaw.[120]

Much the same was true of *Kisor v. Wilkie*, the 2019 decision upholding the *Auer* doctrine of administrative law. Five Justices agreed that, whatever the merits of *Auer*, stare decisis warranted its upholding.[121] By and large, the majority explained, the "arguments about abandoning precedent" were "variants of [the] merits claims."[122] In 2020, Chief Justice Roberts offered similar sentiments in his concurrence in the judgment in *June Medical Services L.L.C. v. Russo*.[123] Voting to follow a precedent that invalidated a requirement governing hospital privileges for physicians who perform abortions, the Chief Justice left no doubt that he viewed the precedent as "wrongly decided."[124] Even so, he distinguished the question whether the decision was correct from the question whether it should be overruled. An overruling, he explained, requires something more than wrongness.[125]

Other cases find the Court declining to reconsider precedents without necessarily reaffirming them. Emblematic is *McDonald v. City of Chicago*.[126] The *McDonald* litigation, which involved the constitutionality of a firearm law, included a request for the Court to revisit its caselaw incorporating the Bill of Rights against the states.[127] The Court noted the extensive criticism of its existing doctrine, which reflects a narrow reading of the Fourteenth Amendment's Privileges or Immunities Clause.[128] Nevertheless, it declined to revisit an interpretation that had been central to its caselaw for decades.[129] A few years earlier, a plurality took a similar stance in response to a request to ramp up the First Amendment protection afforded to campaign contributions, which are easier to restrict than independent expenditures under existing law.[130]

Ultimately, while the Court has departed from significant decisions, it "ordinarily adheres to precedent."[131] Whether by keeping cases off the Court's docket, counseling restraint and caution in reconsidering past deci-

120 *See id.* at 1969.

121 Kisor v. Wilkie, 139 S. Ct. 2400, 2422–23 (2019) ("Of course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent.").

122 *Id.* at 2423.

123 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring in the judgment).

124 *Id.* at 2133.

125 *Id.* ("The question today . . . is not whether [the relevant precedent] was right or wrong, but whether to adhere to it in deciding the present case.").

126 561 U.S. 742 (2010).

127 *Id.* at 752.

128 *See id.* at 756.

129 *See id.* at 758.

130 *See* McCutcheon v. FEC, 572 U.S. 185, 198–200 (2014) (plurality opinion). The Court has also stood by a number of its statutory precedents in recognizing that "[r]especting *stare decisis* means sticking to some wrong decisions." Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015).

131 Ramos v. Louisiana, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part).

sions or, more rarely, sparking an outright reaffirmance, stare decisis exerts steadying, stabilizing pressure on the law. And as explained in the next Section, the Court's discussions of stare decisis are significant in their own right, above and beyond the outcomes they explicate.

B. Rhetoric and Doctrine

The previous Section focused on what the Supreme Court *does* with precedent. What the Court *says* about precedent is also instructive. Part II examined the Court's repeated statements underscoring the fundamental role of stare decisis. I argued that these statements demonstrate the Justices' confidence in the legitimacy of stare decisis. But there is another implication, one that deals with the efficacy of precedent. By continuing to *describe* stare decisis as important, the Court helps to *make it* important.

When today's Justices confront an issue that the Court previously has resolved, they tend to apply the doctrine of stare decisis, which provides that departures from precedent may not occur without special justification. This approach reinforces the doctrine of stare decisis irrespective of whether the Court overrules the specific case under review. The Court has refrained from challenging stare decisis from the outside by calling its foundations into doubt. Instead, the Justices (with the exception of Justice Thomas) generally take the doctrine as given and operate within the established framework, asking whether there is a special justification for overruling and considering factors such as factual change, procedural workability, and reliance. As then-Judge Gorsuch noted during his confirmation hearing, there is "an entire law about precedent," or "[p]recedent about precedent," which guides the Justices' deliberations when they confront a request for overruling.[132]

Viewed from one angle, the Court's expressions of regard for stare decisis might look like empty rhetoric. To the extent those discussions have legal effect, the argument goes, it is to weaken stare decisis by generating a litany of acceptable reasons for departing from precedent in future cases.[133] There is, however, another way of looking at things. The Court has continued to trumpet the respect owed to precedent and the fundamental role of stare decisis in the constitutional order. By leaving the doctrine's infrastructure in place, the Court preserves the possibility that precedent will influence its decisionmaking in the years ahead.

Some onlookers might perceive the Court's discussions of stare decisis as "tactical" language, as opposed to "an effort to communicate genuinely and create a field of common understanding."[134] It is impossible to speak with certainty about the Justices' private motivations. As we have seen, however, there are reasonable and intellectually respectable grounds for challenging

132 *Gorsuch Hearing*, *supra* note 1, at 74.

133 *See* Schauer, *supra* note 3, at 140 (describing "the norm of stare decisis" as having been "weaponized").

134 Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1869 (2009).

the foundations of stare decisis.[135] Justice Thomas has embraced such an argument and signaled his intention to overhaul the Court's jurisprudence of precedent.[136] If other Justices shared his view of stare decisis, it would be a simple matter for them to say so, and to explain their objections in like terms. That the Justices continue to laud stare decisis even when there are reasonable ways to contest it suggests the doctrine's centrality to contemporary constitutional thought.

C. Deference as Checking Twice

When today's Justices are inclined to view a precedent as flawed—and potentially subject to overruling—stare decisis asks them to take another look, just to be sure. That process, which reflects the role of stare decisis in fostering humility and impersonality, is interwoven with the structure of the doctrine. Against this backdrop, we can understand the familiar stare decisis factors as geared toward evaluating a precedent's soundness from a variety of perspectives. The objective is to reserve the extraordinary remedy of overruling for situations in which the course set by precedent is one of "sure error."[137] The Justices must be fully convinced before they will disrupt settled law, and "middling" evidence of a miscue is not enough.[138] This insistence on a double check is another crucial function of stare decisis in modern law.

The stare decisis analysis is, quite naturally, most significant for precedents that a majority of sitting Justices believe to be wrong.[139] A recent treatise describes the correctness of an earlier decision as the "primary and most important factor" in determining whether it should be overruled.[140] There is complexity beneath the surface, for it is not clear that a decision's wrongness ought to be part of the stare decisis calculus at all.[141] Perhaps the analysis of a decision's merits and the application of stare decisis should be kept separate. Consider the position of Justice Kagan, who contends that saying a decision is poorly reasoned is "just more of the same" merits analysis that kicks off the stare decisis inquiry in the first place.[142] The claim is that the merits inquiry is relevant only to the threshold question whether a precedent is wrong—not to the subsequent, and analytically distinct, question whether it ought to be retained despite its wrongness.

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135 *See supra* Section I.A.

136 *See supra* note 90 and accompanying text.

137 Citizens United v. FEC, 558 U.S. 310, 362 (2010). *But cf.* Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent.").

138 Gamble v. United States, 139 S. Ct. 1960, 1969 (2019).

139 *Cf.* Frederick Schauer, Essay, *Authority and Authorities*, 94 VA. L. REV. 1931, 1943 (2008) (distinguishing appeals to authority from persuasion on the merits).

140 GARNER ET AL., *supra* note 25, at 397.

141 *See supra* note 51 and accompanying text.

142 Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2497 & n.4 (2018) (Kagan, J., dissenting).

Notwithstanding this challenge, the Supreme Court frequently has included a precedent's reasoning as part of the stare decisis inquiry.[143] The best way to understand that practice is as a double check. Examining a prior opinion's premises, assumptions, and chain of reasoning helps to confirm the initial impression of wrongness. Today's Court begins by figuring out what it believes to be the best reading of the provision at issue. It then proceeds to evaluate the precedent's reasoning on its own terms.

There is an element of double counting here, as the Court is likely to have confronted some aspects of the precedent's reasoning during its initial inquiry into the merits.[144] Even so, the double check is a way of confirming the Justices' preliminary suspicions. Circling back ensures complete engagement with the rationale that led one's judicial predecessors to a different result. It generates confidence that a precedent truly is incorrect, and that today's Justices fully appreciate all the arguments in its favor.[145] As Hale observed, judges are likely to be "better acquainted with the reasonableness" of their own theories than with the logic of rules announced prior to their tenure.[146] Deference to precedent provides a means of checking this tendency.

Apart from concerns about a precedent's conclusions, a Justice might doubt the integrity of the precedent's factual premises.[147] For example, when the Court overruled its precedents relating to states' taxation authority over out-of-state retailers, it looked not only to those precedents' logic, but also to the dramatic changes in remote selling brought about by the internet era.[148] Not every legal argument depends so heavily on empirical realities

143 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (observing that "when it revisits a precedent this Court has traditionally considered" factors including "the quality of a decision's reasoning" (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019))); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) (quoting *Janus*, 138 S. Ct. at 2478–79); *Hyatt*, 139 S. Ct. at 1499; *Janus*, 138 S. Ct. at 2478–79.

144 *See* Citizens United v. FEC, 558 U.S. 310, 409 (2010) (Stevens, J., concurring in part and dissenting in part) (raising a concern about double counting).

145 *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) ("[The principle of stare decisis] is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them."); AMAR, *supra* note 17, at 234 (discussing the role of precedent in encouraging Justices to reflect on the correctness of their initial impressions).

146 Matthew Hale, Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe, *in* W.S. Holdworth, *Sir Matthew Hale on Hobbes: An Unpublished Ms.*, 37 L.Q. REV. 274, 291 (1921).

147 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (noting the relevance of factual change to the stare decisis analysis).

148 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018). Some Justices have extended this type of analysis to the First Amendment by arguing that changes in the media landscape underscore the need to revisit key precedents dealing with broadcast radio and television. *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring in the judgment); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530–32 (2009) (Thomas, J., concurring).

and assumptions.[149] Sometimes, though, decisional rationales are intertwined with factual premises. When those premises become untenable, it is time for a fresh look. By insisting on such a showing even after finding that the precedent's logic is problematic on its own terms, the Court confirms the import of stare decisis in demanding more than disapproval of a precedent's chain of reasoning.

This double-checking function serves as one more way in which stare decisis exerts influence on the Court's decisionmaking. Even when the Court ultimately departs from a prior decision, the process that it follows can reveal a great deal about the Justices' attitude toward precedent more generally.

IV. PRECEDENT'S PROMISE: *Bivens* as Case Study

I have argued that precedent plays a crucial role in federal adjudication, including at the U.S. Supreme Court. But there is room for improvement. Notwithstanding the variety of ways in which precedent influences the law, the Court sometimes departs too hastily from disfavored decisions. Particularly when a decision rests on reasoning that the Court has since come to doubt, the pull of precedent can seem like an afterthought. A robust doctrine of stare decisis demands something more.

To demonstrate how the invigoration of stare decisis might proceed, I turn to *Bivens* as a case study.[150] This Symposium is dedicated to exploring *Bivens* at fifty. My question is whether *Bivens* should make it to sixty. The answer, I submit, is yes.

At base, the argument for overruling is that *Bivens* reflects a mode of interpretation that several Justices have come to disapprove. In the decades since *Bivens* issued, the Court's willingness to imply rights of action has given way to concerns about unwarranted judicial lawmaking. Far from being a justification for departing from precedent, this development is all the more reason to embrace stare decisis. Reaffirming *Bivens* would furnish tangible evidence of the Court's commitment to precedent even as interpretive philosophies shift. It would bolster the doctrine of stare decisis in pursuit of a stable and impersonal rule of law.

Bivens is indeed the product of another time. But the judiciary is timeless.

149 To return to an example introduced above, the majority's analysis in *Citizens United v. FEC* depended more heavily on political theory than it did on factual changes. *See* 558 U.S. 310, 354 (2010) (grounding a departure from precedent in the pursuit of an unfettered marketplace of ideas).

150 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

A. Doctrinal Trajectory

The controversy in *Bivens* arose from allegations of an unlawful search and arrest carried out by federal narcotics agents.[151] The plaintiff sought damages from the agents for violating the Fourth Amendment.[152] The Fourth Amendment, though, says nothing about damages. It provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[153] Nor was there any federal statute that authorized the recovery. The question became whether the courts should imply a right of action for damages against federal officials.

Bivens said yes. The Supreme Court cited *Marbury v. Madison* and reaffirmed "the right of every individual to claim the protection of the laws, whenever he receives an injury."[154] The Court analogized to the field of statutory interpretation, in which it had implied rights of action notwithstanding the lack of express authorization by Congress.[155] And it observed that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[156]

In the ensuing years, the Court applied *Bivens* to infringements of other constitutional liberties.[157] Its opinions reiterated that "the victims of a constitutional violation by a federal agent have a right to recover damages," unless there are "special factors counselling hesitation" or alternative remedies created by Congress.[158]

The doctrine, though, took a turn. In its statutory cases, the Court retreated from, and then renounced, its prior willingness to imply causes of actions.[159] The Court likewise began to look at *Bivens*'s approach with heightened skepticism, declining to extend the case's framework to new situations.[160] Still, the Court described *Bivens* as "settled law" and disclaimed

151 *See id.* at 389.

152 *See id.* at 389–90.

153 U.S. CONST. amend. IV.

154 *Bivens*, 403 U.S. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

155 *See id.* at 396.

156 *Id.* at 395.

157 *See* Carlson v. Green, 446 U.S. 14, 17–18 (1980); Davis v. Passman, 442 U.S. 228, 230 (1979); James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 570 (2020) ("For the next decade [after *Bivens*], the Supreme Court and lower courts read *Bivens* broadly as creating a general claim for damages caused by constitutional violations . . . .").

158 *Carlson*, 446 U.S. at 18 (quoting *Bivens*, 403 U.S. at 396).

159 Hernández v. Mesa, 140 S. Ct. 735, 741–42 (2020).

160 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)); Pfander et al., *supra* note 157, at 574 (noting that "the Court has turned away *Bivens* claims" for reasons including "a changing conception of the role of federal courts in recognizing judge-made rights to sue").

any effort to "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose."[161]

The Court's most recent engagement with *Bivens* occurred in *Hernández v. Mesa*. That case involved a damages claim against a federal agent who, from the U.S. side of the border, shot and killed a Mexican teenager standing on Mexican soil.[162] The Court declined to permit a damages action based on the cross-border shooting, citing concerns about disrupting the separation of powers on matters of foreign relations and national security.[163] *Hernández* also observed that *Bivens* and the cases extending it "were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated."[164] That era, the Court explained, is over. When faced with a request to apply *Bivens*'s framework to a new context, the Court's "watchword" is now "caution."[165]

Justice Thomas (joined by Justice Gorsuch) went further. He reasoned that the Court's renunciation of its prior approach to implied rights of action in the statutory context had—quite properly, given the respective roles of legislature and judiciary—"repudiated the foundation of the *Bivens* doctrine."[166] The next step, he contended, is to overrule *Bivens* itself.[167]

B. Bivens *as Precedent*

1. Durability of Structural Principles

According to *Bivens*'s most prominent detractors, the decision's cardinal offense is structural: it violates the separation of powers by empowering courts to act as lawmakers in determining whether a private action for damages is available.[168] In evaluating the force of *Bivens* as a precedent, one might wonder whether this objection is enough to end the stare decisis inquiry as soon as it begins. The claim would be that judicial decisions that misconstrue the Constitution's structural safeguards contain the seeds of their own demise.

This position finds some support in the caselaw. The Court occasionally has expressed a sense of urgency about rectifying mistaken interpretations of structural principles.[169] But the Court has discussed other types of decisions

161 Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–57 (2017).

162 *Hernández*, 140 S. Ct. at 740.

163 *Id.* at 739.

164 *Id.* at 741 (quoting *Ziglar*, 137 S. Ct. at 1855).

165 *Id.* at 742.

166 *Id.* at 752 (Thomas, J., concurring).

167 *See id.* at 752–53.

168 *See id.* ("Federal courts lack the authority to engage in the distinctly legislative task of creating causes of action for damages to enforce federal positive law.").

169 *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018) ("If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error.").

in much the same way. It has suggested that precedents are subject to overruling if they permit the improper restriction of speech, facilitate unlawful searches, and so on.[170] Structural precedents, then, are not exactly special. Perhaps the Court is composing a list of various issues—including but not limited to matters of constitutional structure—to which stare decisis has little application. Yet the cases do not seem to warrant that conclusion, which runs counter to the Court's more general statements about the role of stare decisis in promoting the rule of law.[171]

In the end, it is difficult to characterize the Court's identification of certain categories of vulnerable decisions—including decisions on matters of constitutional structure—as a systematic effort to expound the law of precedent. The better understanding is that the Court's statements reflect the natural lawyerly inclination to make arguments of the sort that "if stare decisis ever must yield, surely it must do so *here*." *Bivens*, then, is not subject to overruling based on incompatibility with the separation of powers as properly understood. Even if that charge is valid, it demonstrates only that *Bivens* is wrong. There must be some additional reason to warrant an overruling. In the parlance of the Court, what is required is a special justification above and beyond disagreement with *Bivens* on the merits.[172]

2. Continuity Across Time

Most of the potential justifications for overruling have little purchase when it comes to *Bivens*. The decision does not rest on mistaken or outmoded factual premises.[173] Nor has it been unworkable in application.[174] And its consequences, while detrimental on some accounts, fall far short of causing the type of extraordinary harm that demands alleviation.[175] The recognition of damages claims against federal officials looks nothing like the validation of segregation, the striking down of minimum wage laws, or the authorization of warrantless wiretapping—the types of consequences Chief Justice Roberts has highlighted in explaining why stare decisis must sometimes yield.[176]

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170 *See* Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 483–86 (2017).

171 *See supra* notes 60–64.

172 *See generally* KOZEL, *supra* note 14 (discussing the requirement of a special justification for overruling).

173 *See, e.g.*, *Wayfair, Inc.*, 138 S. Ct. at 2097 (including factual changes as part of the stare decisis analysis).

174 *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792 (2009) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)) (noting the role of workability in the stare decisis analysis).

175 *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part) (noting that "the Court may . . . scrutinize [a] precedent's real-world effects on the citizenry").

176 Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring); *see also Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part) (citing decisions including *Brown v. Board of Education*, 347 U.S. 483 (1954), as supporting the principle that the Court may overrule cases based on their harmful effects). For a discussion of the role of substantive effects in informing the stare decisis analysis, see KOZEL, *supra* note 14, at 121–23.

If there are grounds for overruling *Bivens*, they must be found elsewhere. The basic argument is simple: *Bivens* is the product of another, less enlightened time. Though the Court once was willing to recognize damages claims arising by implication, things have changed dramatically.[177] The Court has refrained from implying rights of action in the statutory context, eroding *Bivens*'s foundation. It has also refused to extend *Bivens* to novel constitutional disputes, generating a growing list of decisions that cast doubt on the premise that damages actions should be implied from constitutional guarantees.[178] At some point in the past fifty years, the sun set on *Bivens*—even if one cannot identify the precise moment.

This type of challenge, which treats precedent as subject to overruling based on developments in related areas of the law, is not unique to *Bivens*. The Supreme Court has accepted versions of it in recent cases like *Janus v. American Federation* (dealing with public-sector labor unions)[179] and *Citizens United v. FEC* (dealing with corporate political speech).[180] But despite its familiarity, the argument is subject to dispute. For starters, even if other lines of cases have moved in a different direction, there still may be good reason to view a precedent as worthy of retention within its own domain.[181] Moreover, the fact that subsequent cases are in some ways inconsistent with a given precedent does not alter the precedent's status as binding law, so long as the Court has left it intact.

Bivens illustrates the point. Even as the Court has declined to extend *Bivens* to new contexts, it has reiterated its commitment to that decision's doctrinal approach, including in its most recent engagement with the doctrine. It is true that *Hernández v. Mesa* rejected the prospect of a damages claim on the facts at hand. But it did so based on an application of *Bivens* itself. Rather than contesting the relevant doctrinal framework, *Hernández* asked the same question *Bivens* asked five decades earlier: are there "special factors" that make a damages claim inappropriate?[182] *Bivens* said no. *Hernández* said yes, citing considerations—namely, implications for national security and foreign relations—that were not present in *Bivens*.

If *Hernández* is sound, these must be convincing reasons for distinguishing *Bivens*. By contrast, if the reasons for distinguishing *Bivens* are unconvincing, *Hernández* is unsound. In neither case is any doubt cast on *Bivens*. And if the argument is that jurisprudential conflict already existed based on

177 *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (describing *Bivens* as "a relic of the heady days in which this Court assumed common-law powers to create causes of action" (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring))).

178 *See* Hernández v. Mesa, 140 S. Ct. 735, 742–43 (2020) ("[F]or almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*.").

179 Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2483–84 (2018).

180 558 U.S. 310, 348–50 (2010).

181 *See* KOZEL, *supra* note 14, at 114–15.

182 *See Hernández*, 140 S. Ct. at 743 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1880 (2017)).

the Court's prior engagements with *Bivens*, the Court's introduction of new distinctions in *Hernández* is difficult to understand. To be sure, the *Hernández* Court did not need to overrule *Bivens* to reach its result. But neither did it need to emphasize national security and foreign relations. That it chose the latter path reflects continuing respect for *Bivens* as law. To overrule *Bivens*, then, would be to act inconsistently with *Hernández*—as well as other cases in which the Court has reiterated its commitment to *Bivens* even while refusing to recognize a damages claim.[183]

There are also practical problems with treating a purported conflict between two lines of cases as sufficient justification for overruling one of them. Doing so creates troubling incentives for the treatment of precedent. It encourages judges to marginalize a disfavored decision as a means of building a record for when the decision finally stands trial. Such an approach supplants a robust commitment to stare decisis with a requirement that overrulings occur in stages. A slow-motion overruling may be preferable to an abrupt one, but neither approach promotes impersonality and continuity to the same degree as the preservation of precedent.

Let us stipulate for the moment that *Bivens* is in tension with later cases refusing to extend it, not to mention cases criticizing implied rights of action in the statutory context. The question remains which line of cases should prevail. The obvious answer is whichever line is correct. But making that determination depends on contested matters of interpretive philosophy—matters that, in the *Bivens* context, relate to the justifiability of implying damages claims in the absence of express authorization, as well as the broader relationship between constitutional rights and remedies. A principal function of stare decisis is to avoid these types of disputes by seeking common ground. A shared commitment to precedent allows Justices to compromise on solutions that, if not perfect from any perspective, are good enough for everyone.[184]

Rather than grounding an argument for overruling in *Bivens*'s ostensible inconsistency with other lines of cases, one might focus on what subsequent developments in the law reveal about *Bivens* itself. By validating a cause of action for damages without explicit authorization in constitutional or statutory text, the *Bivens* Court arguably engaged in unsound reasoning. Perhaps that factor should be enough to doom *Bivens* as a precedent.

The immediate obstacle to this claim is the Court's embrace of the principle that disagreement with a decision's rationale is not enough to warrant its abandonment.[185] In response, one might endorse a variant that supports the overruling of decisions that are not just flawed, but clearly or exception-

183 Similar lessons extend to the practice of the lower courts; the *Bivens* framework remains the law, and it ought to apply absent special factors—of the sort recognized in cases like *Hernández*—counseling otherwise.

184 For commentary on the role of precedent in furnishing common ground, see, for example, STRAUSS, *supra* note 87, at 102; Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1711 (2013).

185 *See supra* Section II.B.

ally flawed.[186] This latter formulation preserves the idea that overruling is an exceptional act. After all, the universe of clearly erroneous precedents is, by definition, a subset of wrong decisions. Nevertheless, even a formulation that limits overrulings to decisions whose reasoning is clearly erroneous becomes problematic if it tends to collapse into judgments about interpretive philosophy.[187]

That is precisely how the argument from clear error would apply to a case like *Bivens*. To call *Bivens*'s reasoning clearly erroneous is, in effect, to depict the decision as the product of a different era of interpretive philosophy. But shifts in interpretive philosophy are not special or remarkable. They are standard fare. As such, they fall short of justifying the exceptional act of overruling.[188] Characterizing *Bivens* as unsound, anachronistic, and inconsistent with other cases is really just saying the same thing in three different ways. All three amount to charges against *Bivens* on the merits—charges that are insufficient to support a departure under a robust system of precedent.

There was a time in the Supreme Court's history when implying rights of action was seen as unproblematic, even necessary. During a subsequent period, the Court came to view that practice as ill-advised. We remain in the latter era now, though that is not to say we could never return to the former. In all events, stare decisis implores the Justices to commit themselves to a rule of law that transcends philosophical disagreements. Modern-day objections to *Bivens* revolve around its embodiment of an interpretive approach that has fallen out of favor. The critical work of stare decisis entails bridging methodological disagreements, thereby preserving the continuity of law even as prevailing philosophies shift.[189] It is only by working *across* methodologies, philosophies, and ideologies that judges can separate the work of the courts from the province of politics.

This is an argument for preserving, and reaffirming, *Bivens*. It also carries broader implications for the doctrine of stare decisis. The debates over

186 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (discussing the treatment of decisions that are "grievously or egregiously wrong"); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) (concluding that the relevant precedent, which involved an interpretation of the Fifth Amendment, "was not just wrong"; rather, "[i]ts reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence"); *cf.* DUXBURY, *supra* note 11, at 122 (noting the argument for overruling unauthorized exercises of judicial discretion). For an analysis of the impact of clear error, see generally Nelson, *supra* note 46.

187 *Cf. Ramos*, 140 S. Ct. at 1432 (Alito, J., dissenting) (contending that "the Court should have a body of *neutral* principles on the question of overruling precedent").

188 Justice Alito recently discussed the interplay between precedent and judicial philosophy in the context of criminal procedure. *See id.* at 1433 (noting the ramifications of "label[ing] all functionalist decisions as poorly reasoned" given that functionalism was prominent during an earlier era of the Court's criminal procedure jurisprudence).

189 CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) ("Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same.").

Bivens provide the Supreme Court with a valuable opportunity. The Justices could use the case to underscore the principle that legal rules retain their validity notwithstanding developments in interpretive theory. In doing so, the Court would crystallize the distinction between the content of the law and the identity of the Justices. Different Presidents will appoint different Justices with different interpretive philosophies. The Justices will rely on their respective philosophies in resolving the cases before them. Sometimes that will mean a case is decided differently than it would have been had a majority of Justices been appointed by another President. But the dynamic changes with an applicable precedent on the books. Now the ability of today's Justices to put their stamp on the law is limited. This effect occurs by design, drawing on a belief that the rule of law is best served by solicitude for institutional continuity even if that means some perceived errors will go uncorrected.

3. Impact of Persistence

While the Supreme Court has refused to recognize damages claims for certain constitutional violations, it has left *Bivens* intact. This is perhaps easiest to see in the Court's discussions of *Bivens* before the turn of the century, which "tend[ed] to confirm the viability of the *Bivens* doctrine" despite "find[ing] it inapplicable to the case at hand."[190] Only later did more foundational challenges to *Bivens* gain momentum at the Court, casting doubt on judicial "recognition of implied rights to sue."[191]

Notwithstanding these challenges, *Bivens* remains on the books. Even the Court's 2017 decision in *Ziglar v. Abbasi*, which criticized *Bivens* in fairly strident terms, reached its resolution through a process decidedly internal to the *Bivens* framework.[192] *Ziglar* concluded that damages claims are unavailable when they would challenge "a high-level executive policy created in the wake of a major terrorist attack on American soil."[193] That conclusion is consistent with the notion that *Bivens*-type actions might be inappropriate in situations where there are special factors, not present in *Bivens* itself, that demonstrate the unsuitability of damages claims.[194] The remainder of *Ziglar*'s discussion of *Bivens* did little more than enumerate some of the factors that judges and Justices should consider in deciding whether a damages action is available. Understood against this backdrop, *Ziglar*'s characterization of "expanding the *Bivens* remedy" as a "'disfavored' judicial activity" was an impression formed after evaluating the relevant factors, not an imperative

190 Pfander et al., *supra* note 157, at 575; *see also id.* (noting that "[a]lthough *Wilkie* [*v. Robbins*, 551 U.S. 537 (2007),] declined to recognize a *Bivens* claim in the specific context of retaliatory takings, it did not denigrate the enterprise of weighing factors relevant to the wisdom of allowing the suit to proceed").

191 *Id.*

192 137 S. Ct. 1843, 1859, 1864–65 (2017).

193 *Id.* at 1860.

194 *Id.*

that carries binding effect in future cases.[195] Neither *Ziglar*, *Hernández*, nor any other case has rejected *Bivens* or foreclosed the availability of damages claims. That fact is just as important as the "caution" urged by the Court.[196]

The Court recently observed in a different context that precedent must be viewed "on its own terms, not through gloss added by a later Court in dicta."[197] The same is true of *Bivens*. If the Court wishes to overrule *Bivens*, the requisite steps are well established. Until then, *Bivens* remains the law of the land. It was *Bivens* that recognized the possibility of "special factors counselling hesitation in the absence of affirmative action by Congress."[198] Over time, the Court has more readily found such factors to be present.[199] Yet it has preserved *Bivens*, leaving open the possibility that in the next case, it might tighten its conception of the special factors counselling hesitation and reaffirm its commitment to a doctrinal framework that has been in place for fifty years.[200]

C. *Defining* Bivens*'s Scope*

This Part has made two claims. First, under the law of stare decisis, there is no special justification for overruling *Bivens*. Second, by confirming that *Bivens* remains good law despite its being the product of a bygone era of legal interpretation, the Supreme Court can infuse both *Bivens* and the doctrine of stare decisis with added potency.

Before closing the Part, I take a brief detour from *Bivens*'s strength—meaning its resiliency in the face of arguments for overruling—to add a few words about the decision's scope. These reflections on scope do not affect the foregoing discussion of *Bivens*'s durability. I offer them simply because they bear on a different feature of the law of precedent, relating to the constraining authority of doctrinal frameworks, which *Bivens* provides useful occasion to explore.

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195 *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

196 Hernández v. Mesa, 140 S. Ct. 735, 742 (2020).

197 Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2200 n.4 (2020); *cf.* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2138, 2141–42 (2020) (Roberts, C.J., concurring in the judgment) ("We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*.").

198 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

199 *See, e.g.*, James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275, 296–97 (Vicki C. Jackson & Judith Resnik eds., 2010) (noting increased resistance to judicially implied damages claims in the years since *Bivens* was decided).

200 *Cf. June Med. Servs.*, 140 S. Ct. at 2134–35 (Roberts, C.J., concurring in the judgment) (noting that when a decision under review "departed from the cases that came before it," the Court "better serves the values of *stare decisis*" by "'[r]emaining true to an "intrinsically sounder" doctrine established in prior cases'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231 (1995) (plurality opinion))).

A precedent's scope is the universe of propositions for which it constitutes binding authority.[201] In defining the scope of precedent, the starting point is identifying the legal provision that the precedent construed. With respect to *Bivens*, the Supreme Court implied a damages claim based on an unlawful search and arrest.[202] If *Bivens* is properly understood as involving an interpretation of the Fourth Amendment, the Court did not and could not create a binding precedent with respect to *other* amendments. Federal courts may not issue advisory opinions, nor may they infuse conjecture with precedential effect that constrains future judges.[203] To be sure, one might believe the logic of *Bivens* applies to other amendments just as it does the Fourth. Alternatively or in addition, one might see virtue in a coherent approach to implied damages claims across different constitutional provisions. But arguments of that sort are not arguments from precedent.[204] They do not entail the conclusion that *Bivens* exerts binding force outside the search-and-seizure domain where it originated.

On this theory, if the Supreme Court was correct to accept *Bivens*-type arguments for violations of other constitutional provisions, it is because those arguments were sound on their own terms. Likewise, if the Court was right to reject similar arguments in other contexts, it was due to the unique considerations those contexts presented regarding the suitability of implying damages claims. Stare decisis is beside the point.

Yet there is another way to understand *Bivens*, one that carries very different ramifications for its scope as a precedent. Perhaps we should view the case not as an interpretation of the Fourth Amendment, but rather as a remedial doctrine.[205] *Bivens*, the argument goes, does not tell any judge or Justice how to interpret the Fourth Amendment. Rather, it identifies a type of remedy that is available across a range of constitutional liberties.[206] What is more, *Bivens* derives its framework from background remedial rules, not from the text of any rights-granting provision such as the Fourth Amend-

201 On the distinction between precedential scope and precedential strength as well as various theories of precedential scope, see generally KOZEL, *supra* note 14, at 21–25; Larry Alexander, *Precedential Constraint, Its Scope and Strength: A Brief Survey of the Possibilities and Their Merits*, *in* 3 ON THE PHILOSOPHY OF PRECEDENT 75 (Thomas Bustamante & Carlos Bernal Pulido eds., 2012).

202 *See Bivens*, 403 U.S. at 389.

203 *See* GARNER ET AL., *supra* note 25, at 133 ("A decision rendered on a purely hypothetical question has no precedential force.").

204 *See* Schauer, *supra* note 98, at 576.

205 For a related argument with respect to the *Chevron* doctrine of administrative law, see generally F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. REV. 1 (2018).

206 *See Bivens*, 403 U.S. at 395–96 ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."); *see also* Carlson v. Green, 446 U.S. 14, 18 (1980) ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.").

ment.[207] This distinction is significant, for if *Bivens* is an exposition of general remedial principles, its scope may be more extensive than if it is an interpretation of the Fourth Amendment alone.[208]

Of course, *Bivens* did not hold that damages follow constitutional violations as day follows night. Damages claims are permissible only absent "special factors" that counsel against their availability.[209] We should not be surprised by occasional disputes over whether such factors are present in a given case. But the broader takeaway is that if *Bivens* is properly understood as a remedial doctrine, it sets forth the binding framework for determining the availability of damages claims against federal officials for a variety of constitutional wrongs. As we have seen, neither *Hernández* nor any of its predecessors casts doubt on that conclusion.[210] While the Court has deemed damages claims inappropriate in certain situations, it has preserved the *Bivens* rubric.

CONCLUSION

The Supreme Court continues to express deep respect for precedent. While leaving room for each Justice to consult her own interpretive philosophy in adjudicating disputes, the Court describes stare decisis as critical to preserving its identity as an enduring institution greater than the sum of its parts. Translating these principles into practice, the Court has insisted on a special justification before departing from precedent. Despite challenges to the legitimacy of stare decisis, and notwithstanding expressions of doubt over its efficacy, the doctrine continues to hang around.

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207 *See Bivens*, 403 U.S. at 396 (acknowledging that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," but analogizing to the rule that "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done'" (quoting Bell v. Hood, 327 U.S. 678, 684 (1946))); Robinson v. Sherrod, 631 F.3d 839, 842 (7th Cir. 2011) (observing that "*Bivens* is under a cloud, because it is based on a concept of federal common law no longer in favor in the courts"); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 524–25 (2013) (noting that "the *Bivens* line of cases has come to be seen as an example of federal common lawmaking"); *cf.* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293 (1995) ("The insight at the heart of *Bivens* is that the judiciary has a duty to enforce the Constitution. . . . If the remedy is not forthcoming from the political branches, the Court must provide it.").

208 Whether these background principles sound in federal common law or in the Constitution itself is beyond my purview here. For analysis, see, for example, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541–42 (1972) (considering the Supreme Court's authority to create remedies via Article III); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975) (writing of *Bivens* that "unless the Court views a damage action as an indispensable remedial dimension of the underlying guarantee, it is not constitutional interpretation, but common law" (footnote omitted)).

209 *Bivens*, 403 U.S. at 396.

210 *See supra* Section IV.A.

We can think of *Bivens* the same way. Over the years, *Bivens* has faced serious criticism, including at the Court. Still, the *Bivens* framework remains controlling. Debates over the reach of *Bivens* do not alter the fact that the decision continues to hang around. And in constitutional law, hanging around is half the battle.

The persistence of *Bivens* leaves the door open for its reinvigoration. It would take only a case or two to change the narrative from a slow erosion of *Bivens* to its durability over the years. The same goes for the doctrine of stare decisis more generally. Though stare decisis is not in doubt, the Court occasionally seems quick to depart from decisions whose reasoning is dubious in the eyes of today's Justices. By making clear that shifts in interpretive philosophy are not license to disrupt settled law, the Court can take another step toward safeguarding the place of precedent.