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PRECEDENT AND DISCRETION

Supreme Court precedent is a topic of perennial prominence. The Court overruled or severely limited multiple precedents last year, just as it did the year before that. Because of our widely repeated norm of stare decisis, every overruling is criticized. Scholars have then debated whether the Court needs a stronger norm of stare decisis, so that it overrules fewer cases.¹

This focus is misguided. Rather than worrying about which cases will be cast aside, we should pay more attention to those precedents that are left standing in place. Many of the Court's questionable precedents nonetheless go unquestioned. The real problem is not that the Court overrules too much, but that it overrules without a theory that explains why it overrules so little.

At last, it seems such theories may be coming. Last Term, Justice Thomas (in *Gamble v United States*)² and Justice Alito (in *Gundy v United States*)³ each attempted to explain some of their decisions to

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¹ Compare Randy J. Kozel, *Settled Versus Right* (Cambridge, 2017), with Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 Supreme Court Review 121, 141–43 (2019).

² 139 S Ct 1960 (2019).

³ 139 S Ct 2116 (2019).

reject and adhere to precedent. These explanations deserve serious scholarly scrutiny, which they have not yet received.

Unfortunately, these interventions do not solve, and indeed they exacerbate, the problem. What they propose is neither a regime of adherence to precedent, nor a regime without precedent, but rather a regime in which individual Justices have substantial discretion whether to adhere to precedent or not. This turns precedent from a tool to constrain discretion into a tool to expand discretion, and ultimately into a tool to evade more fundamental legal principles.

Part I describes the state of *stare decisis* in the Court today. Part II discusses Justice Thomas's theory that precedent must be overruled when it is "demonstrably erroneous." Part III describes Justice Alito's theory that precedents ought not be overruled on the basis of "halfway originalism." Part IV explains why discretionary precedent—of which these theories are examples—is worse than no precedent at all.

I. PRECEDENT IN THE NEW ROBERTS COURT

The Supreme Court's commitment to precedent has become a central topic of both legal theory and legal politics. This development is predictable when the working majority of the Court changes, because of the mismatch between the cases that have been decided in the past and the way the same Justices would decide them today.

During the last two Supreme Court nomination hearings, precedent was cast in a starring role. Now-Justice Gorsuch repeatedly answered questions about past cases by promising to analyze them under the "law of precedent"⁴ and reminded the Senators that he had coauthored an "excellent doorstep"⁵ of a book on that topic. Now-Justice Kavanaugh (also a coauthor of that doorstep) went further, arguing to the Senators that "the system of precedent comes from Article III itself."⁶

Last Term put those commitments to the test. The Court had four cases that directly confronted the question of whether to overrule

⁴ Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States, 115th Cong, 1st Sess 74–76, 135 (2017).

⁵ *Id.* at 74. See also *id.* at 135 ("great doorstep"). See generally Bryan A. Garner, ed, *The Law of Judicial Precedent* (West, 2016).

⁶ Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States, 115th Cong, 2nd Sess 226 (2018) (Kavanaugh Confirmation Hearing). See also *id.* at 149, 157, 503–04.

past Supreme Court cases, as well as two more in which the Court was asked to formally limit or narrow⁷ a precedent:

In *Knick v Township of Scott*,⁸ the Court overruled *Williamson County Regional Planning Commission v Hamilton Bank*,⁹ making it easier to bring federal takings claims. And in *Franchise Tax Board of California v Hyatt*,¹⁰ the Court overruled *Nevada v Hall*,¹¹ making it possible for states to demand sovereign immunity in other states' courts.

Meanwhile, in *Gamble v United States*,¹² the Court declined to overrule three cases establishing a “dual sovereignty exception” to the principle of double jeopardy.¹³ And in *Kisor v Wilkie*,¹⁴ the Court declined to overrule two cases requiring deference to agency interpretations of ambiguous regulations,¹⁵ albeit with some warnings about the narrow scope of those cases.

Additionally, in *American Legion v American Humanist Association*,¹⁶ the Court expressly disavowed the applicability of a prior Establishment Clause precedent—*Lemon v Kurtzman*¹⁷—to “longstanding monuments, symbols, and practices.”¹⁸ And in *Herrera v Wyoming*,¹⁹ the Court wrote of its precedent in *Ward v Race Horse*²⁰ that while the case had not been “expressly overruled” it was nonetheless “repudiated” in its reasoning.²¹

⁷ See generally Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum L Rev 1861 (2015).

⁸ 139 S Ct 2162 (2019).

⁹ 473 US 172 (1985).

¹⁰ 139 S Ct 1485 (2019).

¹¹ 440 US 410 (1979).

¹² 139 S Ct 1960 (2019).

¹³ See, for example, *United States v Lanza*, 260 US 377 (1922); *Abbate v United States*, 359 US 187 (1959); *Bartkus v Illinois*, 359 US 121 (1959).

¹⁴ 139 S Ct 2400 (2019).

¹⁵ See *Auer v Robbins*, 519 US 452 (1997); *Bowles v Seminole Rock & Sand Co.*, 325 US 410 (1945).

¹⁶ 139 S Ct 2067 (2019).

¹⁷ 403 US 602 (1971).

¹⁸ *American Legion*, 139 S Ct at 2081–82 (plurality). Justice Thomas voiced his express agreement with this part of the plurality opinion and noted that he would “take the logical next step and overrule the *Lemon* test in all contexts.” *Id.* at 2097 (Thomas, J., concurring in the judgment).

¹⁹ 139 S Ct 1686 (2019).

²⁰ 163 US 504 (1896).

²¹ *Herrera*, 139 S Ct at 1697.

The obvious accusation is that the Roberts Court is poised to cut a swath through any precedent that a five-Justice majority believes to be incorrect—a warning sounded in dissents by both Justice Breyer and Justice Kagan,²² in cynical echo of Justice Brennan’s saying that “with five votes, you could accomplish anything.”²³ This complaint has been echoed in much commentary about the Court as well.²⁴

But things are not so simple. Nobody on the Court believes in absolute *stare decisis*.²⁵ Nobody thinks it was wrong for the Court to overturn, say, *Plessy v Ferguson*²⁶ during the 1950s. Moreover, the most systematic reviews of Supreme Court overruling suggest that there is no increasing trend: the Roberts Court overrules precedent less often than the Rehnquist, Burger, or Warren Courts.²⁷

This leads us to the more important concern. Compared to the small number of Supreme Court decisions that have been overruled, what about the many precedents that the same Justices have *not* overruled, and often refused to even consider whether to overrule? The Court’s decisions to stand by precedent are far more common, and often less justified, than its decisions to overrule. For instance:

In 2018 the Supreme Court decided *Janus v AFSCME*,²⁸ overturning part of its prior decision in *Aboud v Detroit Board of Education*,²⁹

²² *Knick*, 139 S Ct at 2190 (Kagan, J, dissenting); *Franchise Tax Board*, 139 S Ct at 1506 (Breyer, J, dissenting).

²³ Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* 196 (Houghton Mifflin, 2010). But for an ambiguity here, see Mark Tushnet, *Themes in Warren Court Biographies*, 70 NYU L Rev 748, 763 (1995) (“Some clerks understood Brennan to mean that it takes five votes to do anything, others that with five votes you could do anything”).

²⁴ See, for example, Charles Fried, *Not Conservative*, Harv L Rev Blog (July 3, 2018), archived at <https://perma.cc/G568-Y5LU>; *The Activist Roberts Court, 10 Years In*, New York Times (July 4, 2015), archived at <https://perma.cc/M64X-YZ86>; Erwin Chemerinsky, *Does Precedent Matter to Conservative Justices on the Roberts Court?*, ABAJ (June 27, 2019), archived at <https://perma.cc/F3TM-7F9X>.

²⁵ Justice Kagan, who voted to uphold precedent in five of the six cases, still voted to repudiate *Race Horse* in *Herrera*. At the other extreme, Justice Gorsuch voted against precedent in all six cases.

²⁶ 163 US 537 (1896), overruled at least as to education by *Brown v Board of Education*, 347 US 483, 494–95 (1954), and then rejected as to transportation in *Gayle v Browder*, 352 US 903 (1956).

²⁷ See *Supreme Court Decisions Overruled by Subsequent Decision* (Government Printing Office, 2017), archived at <https://perma.cc/V6YJ-TEP5>; Jonathan Adler, *The Stare Decisis Court, Reason: The Volokh Conspiracy* (July 18, 2018), archived at <https://perma.cc/3A2P-D437>; Brandon J. Murrill, *The Supreme Court’s Overruling of Constitutional Precedent*, Congressional Research Service (Sept 24, 2018), archived at <https://perma.cc/TM8N-YFYV>.

²⁸ 138 S Ct 2448 (2018).

²⁹ 431 US 209 (1977).

and rendering mandatory contributions to public sector unions unconstitutional. But the Court did not seriously question the other half of its decision in *Abood*—the half that was actually wrong—which had subjected such contributions to First Amendment scrutiny in the first place.³⁰

In its 2019 decision in *Franchise Tax Board*, the Supreme Court overturned its precedent in *Nevada v Hall*, despite plausible arguments for retaining the decision. But the Court did not revisit several jurisdictional precedents that were far more clearly erroneous.³¹ Indeed, the Court didn't even mention the problem, even though those issues were jurisdictional.

In case after case, the Court has applied the doctrine of qualified immunity to protect officers from liability for their unconstitutional actions. It has done so despite a civil rights statute that explicitly creates official liability, and despite the lack of a valid legal source for the judge-crafted doctrine.³² Even as various Justices have expressed misgivings about the doctrine,³³ all of them have continued to apply it and the Court has declined to revisit it.

And of course similar examples abound. Adherence to precedent is still the rule, not the exception, in nearly every case before the Court.

The real problem with the Supreme Court's decisions to overrule precedent is not *how much*, but *when*. The Court does not consistently adhere to its precedents, but it does not consistently revisit them either.

The Court's own cases do invoke reasons when they decide whether prior cases should be overruled. But there are competing sets of reasons, laid down in highly controversial cases,³⁴ and they leave plenty of discretion in the hands of the Court, as evidenced from its recent disagreements. That 800-page doorstop coauthored by Justices Gorsuch and Kavanaugh contains little guidance on the seemingly

³⁰ See William Baude and Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv L Rev 171, 180–89 (2018).

³¹ See William Baude and Stephen E. Sachs, *The Misunderstood Eleventh Amendment* (October 8, 2019) 14–15, 17–20, 40–46, online at <https://ssrn.com/abstract=3466298>.

³² See William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal L Rev 45, 77 (2018).

³³ See *Ziglar v Abbasi*, 137 S Ct 1843, 1871 (2017) (Thomas, J, concurring in part and concurring in the judgment); *Kisela v Hughes*, 138 S Ct 1148, 1161 (2018) (Sotomayor, J, dissenting, joined by Ginsburg, J).

³⁴ Compare *Payne v Tennessee*, 501 US 808, 828–30 (1991), with *Planned Parenthood of Southeast Pennsylvania v Casey*, 505 US 833, 854–61 (1992), and *Citizens United v Federal Election Commission*, 558 US 310, 362–65 (2010).

central question of when the Supreme Court should overturn its own case law.³⁵ In the last volume of this review, Professor Frederick Schauer concluded that stare decisis doctrine is so “tissue-thin” that it has little or no constraining effect on the Court.³⁶

In principle, the Court could perhaps transcend this disagreement if there were at least agreement on a valid *legal source* of precedent, sufficiently determinate that it could derive rules to govern the Court’s practice. But that determinate source has not materialized either. So it appears that the Justices do not in fact acknowledge a law of precedent, and maybe not even a “semblance of law” to use in law’s stead.³⁷

This lack of doctrine was on display last Term. No Justice was in the majority in all six of the Court’s confrontations with precedent. All of the Justices, for instance, who were in the majority in *Knick* and *Franchise Tax Board* refused to join *Herrera* or *Kisor* or both. This is partly a consequence of a multimember Court; even if the Justices are individually consistent, the institution as a whole inevitably will not be.³⁸ It also suggests the lack of any *shared* account of stare decisis.³⁹

Even if the Court as an institution is inconsistent, we might still hope for individual Justices to be consistent.⁴⁰ What made last Term somewhat hopeful was that oral arguments revealed that some of the Justices finally seemed to recognize the need for a transsubstantive, content-independent account of stare decisis. Schauer pointed out that a doctrine of stare decisis is only rhetoric unless it operates to protect some decisions that you dislike;⁴¹ Justice Kagan started invoking the doctrine in criminal procedure cases where we might at least imagine she disagrees with the precedents.⁴² Across multiple

³⁵ Garner, *Judicial Precedent* at 396–409 (cited in note 5) (describing competing “Reasons For Overruling” and “Reasons Against Overruling”).

³⁶ Schauer, *Stare Decisis*, 2018 Supreme Court Rev at 132, 135, 137–30 (cited in note 1). See also Jeffrey A. Segal and Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices*, 40 Am J Pol Sci 971 (1996).

³⁷ See generally Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 Const Comm 417 (2018).

³⁸ Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 812 (1982).

³⁹ See *id.* at 818 n 39 (“Stare decisis is applied so loosely that it seems fair to say that it does not exist as a doctrine”).

⁴⁰ *Id.* at 832 (“There is no reason why we cannot ask each Justice to develop a principled jurisprudence and to adhere to it consistently”).

⁴¹ Schauer, 2018 Supreme Court Review at 128 (cited in note 1).

⁴² See Oral Argument, *Gamble v United States*, No 17-647, *20, 38–40 (Dec 6, 2018); Oral Argument, *Ramos v Louisiana*, No 18-5924, *21–22, 29–30, 37–39, 49–50 (Oct 7, 2019).

cases Justice Kavanaugh began to float a theory that stare decisis was binding unless a prior decision was either “grievously” or “egregiously” wrong, plus several other factors.⁴³ But in the end, neither of these Justices provided a theory of precedent in writing.

Two other Justices, however, did provide an account of how they would confront precedent. Justice Thomas did so in an extended concurrence in *Gamble v United States*, maintaining that he was forbidden to follow precedent in any case where it was “demonstrably erroneous.”⁴⁴ Justice Alito did so in a much shorter concurrence in *Gundy v United States*,⁴⁵ which seemed to echo a passage in his previous opinion in *Janus* decrying “halfway originalism.”⁴⁶

These accounts deserve further scrutiny. They confront serious problems about the role of precedent in the Supreme Court. Indeed, they deserve plaudits for addressing overarching theories of precedent at all. And they each provide accounts that may initially seem startling, but are plausible upon closer inspection.

Nonetheless, despite the credit they deserve, both of these accounts of precedent ultimately share a disconcerting feature: they end up giving the Justices an important degree of discretion in deciding whether to adhere to an erroneous precedent. That discretion, as I will eventually explain, mutates precedent into the opposite of what it should be.

II. JUSTICE THOMAS AND THE DEMONSTRABLE ERROR

Justice Thomas’s separate opinion on precedent arrived as a concurrence to the Court’s decision in *Gamble*, which decided to retain the “dual sovereignty exception” to the doctrine of double jeopardy. The merits of the case are of only tangential relevance here. The dual sovereignty exception permits a defendant to be placed into jeopardy twice for the same offense, so long as it is by two different sovereign governments (such as a state and the federal government). Prior opinions by Justices Thomas and Ginsburg, as well as a pile of

⁴³ See Oral Argument, *Franchise Tax Board v Hyatt*, No 17-1299, *53–54 (Jan 9, 2019); Oral Argument, *Gamble v United States*, No 17-647, *41–42 (Dec 6, 2018).

⁴⁴ *Gamble*, 139 S Ct at 1981 (Thomas, J, concurring); see Part II.

⁴⁵ 139 S Ct 2116 (2019).

⁴⁶ *Id* at 2131 (Alito, J, concurring); *Janus*, 138 S Ct at 2470. See Part III.

learned research, had called the doctrine into question, especially on originalist grounds.⁴⁷

In *Gamble*, the Court granted certiorari to decide whether the doctrine should be overruled, and it might have seemed that to agree to ask the question was to foreshadow the answer. But in a 7–2 decision, the Court ultimately decided to retain the doctrine, concluding that the historical evidence against the doctrine was too “feeble” to outweigh other arguments including the Court’s many precedents.⁴⁸ One of those seven was Justice Thomas, who wrote that “the historical record does not bear out my initial skepticism of the dual-sovereignty doctrine.”⁴⁹

Even though his view of stare decisis was no longer relevant to the case, Justice Thomas decided to write at length “to address the proper role of the doctrine of stare decisis,” a doctrine which he believed had gone astray from the Court’s “judicial duty under Article III.”⁵⁰ Channeling academic arguments that might once have seemed fringe, Justice Thomas argued that judges have an obligation—not just a *power*, but a *duty*—to disregard and overrule any precedent that is “demonstrably erroneous.”⁵¹

This opinion provided a serious intellectual framework for Justice Thomas’s long-standing skepticism of stare decisis. Justice Thomas has aptly been regarded as one of the Justices most willing to overturn incorrect decisions,⁵² and has published many separate opinions calling for the reconsideration of settled precedent.⁵³ In *Gamble* Justice Thomas explained that his long-standing practice of disregarding precedent was not only legitimate, but sometimes obligatory.

⁴⁷ *Puerto Rico v Sanchez Valle*, 136 S Ct 1863, 1877 (2016) (Ginsburg, J, concurring, joined by Thomas, J); see also Brief of Amicus Curiae Stuart Banner in Support of Petitioner, *Walker v Texas*, No 16-636 (Dec 12, 2016).

⁴⁸ *Gamble*, 139 S Ct at 1964.

⁴⁹ *Id.* at 1980 (Thomas, J, concurring).

⁵⁰ *Id.* at 1981.

⁵¹ *Id.*

⁵² Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along*, New York Times A13 (March 4, 2019).

⁵³ For two of many examples, see *Eastern Enterprises v Apfel*, 524 US 498, 538 (1998) (Thomas, J, concurring) (calling for reconsideration of *Calder v Bull*, 3 Dall 386 (1798)); *McDonald v City of Chicago*, 561 US 742, 850–58 (2010) (Thomas, J, concurring in judgment) (calling for overruling *The Slaughterhouse Cases*, 83 US (16 Wall) 36 (1873) and *United States v Cruikshank*, 92 US 542 (1876)).

The steps in Justice Thomas's argument are relatively simple: Legal questions can have right and wrong answers. Statutes and constitutional provisions are generally the controlling sources of law in federal courts. Precedents themselves are not law. So to the extent that a precedent reaches the demonstrably wrong answer about a statute or constitutional provision, it is contrary to the law, and judges should follow the law rather than the precedent.⁵⁴

Justice Thomas acknowledged some academic precursors of this argument, especially work by Professor Caleb Nelson.⁵⁵ In particular, Nelson had forcefully emphasized the distinction between precedents that were demonstrably erroneous and thus invalid, and other precedents that fell within a plausible range of indeterminacy. But Thomas's variation of the theory brought an important difference: the introduction of discretion.

In cases where a precedent was plausible—that is, it was not “demonstrably erroneous”—Justice Thomas maintained that a judge had discretion. The judge could follow precedent, or not. “[W]hen traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law,” then courts “*may (but need not)* adhere to an incorrect decision as precedent.”⁵⁶ Justice Thomas repeatedly emphasized this point: “Of course, a subsequent court may nonetheless conclude that an incorrect precedent should be abandoned, even if the precedent might fall within the range of permissible interpretations. But nothing in the Constitution requires courts to take that step.”⁵⁷

In this respect Justice Thomas's theory departs from the historical approach to *stare decisis* described by Nelson. On Nelson's account, judicial discretion was more constrained. When the underlying written law⁵⁸ was clear, that law constrained judicial discretion. When that law was indeterminate, and thus the precedent was plausible, *stare decisis* would “restrain the ‘arbitrary discretion’ of courts” by

⁵⁴ *Gamble*, 139 S Ct at 1983–84 (Thomas, J, concurring).

⁵⁵ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va L Rev 1 (2001). See also Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv J L & Pub Pol 23, 26 (1994).

⁵⁶ *Gamble*, 139 S Ct at 1984 (Thomas, J, concurring) (emphasis added).

⁵⁷ *Id* at 1986.

⁵⁸ Or in the case of the common law, the “external sources.” See Nelson, 87 Va L Rev at 23–27 (cited in note 55), for a complicated debate not important for constitutional purposes.

requiring adherence to precedent.⁵⁹ Justice Thomas abandoned that requirement, without having the boldness to go further and argue that stare decisis was always forbidden. Instead, Justice Thomas created a space where stare decisis produced discretion instead of constraint.

This discretionary departure is especially ironic, because Justice Thomas repeatedly justified his approach on the ground that it was necessary to constrain judicial discretion. He noted that it was “always ‘tempting for judges to confuse our own preferences with the requirements of the law,’” and that “the Court’s *stare decisis* doctrine exacerbates that temptation by giving the veneer of respectability to our continued application of demonstrably incorrect precedents.”⁶⁰ He argued that we should “restore our *stare decisis* jurisprudence to ensure that we exercise ‘mer[e] judgment,’ . . . anything less invites arbitrariness into judging.”⁶¹

In fact, however, Justice Thomas was only halfway willing to “restore” this historical account of stare decisis. He proposed a mandatory, historical account of stare decisis for demonstrably erroneous precedents, but a discretionary, novel account of stare decisis for more ambiguous precedents. His approach was therefore only halfway able to fulfill its goals of constraining arbitrariness and judicial discretion.

Moreover, Justice Thomas’s approach tries to eliminate arbitrariness, but such arbitrariness also creeps back in through other aspects of the Court’s procedures. For instance, the vast majority of precedents are never questioned by the parties. So it becomes very important to know how Justice Thomas’s rule of precedent interacts with the traditional rule of waiver. Justice Thomas addressed this issue in a footnote:

I am not suggesting that the Court must independently assure itself that each precedent relied on in every opinion is correct as a matter of original understanding. We may, consistent with our constitutional duty and the Judiciary’s historical practice, proceed on the understanding that our predecessors properly discharged their constitutional role until we have reason

⁵⁹ Nelson, 87 Va L Rev at 5 (cited in note 55), quoting Federalist 78 (Hamilton) in Clinton Rossiter, ed, *The Federalist Papers* 439 (1999).

⁶⁰ *Gamble*, 139 S Ct at 1981 (Thomas, J, concurring), quoting *Obergefell v Hodges*, 135 S Ct 2584, 2612 (2015) (Roberts, J, dissenting).

⁶¹ *Gamble*, 139 S Ct at 1981 (Thomas, J, concurring).

to think otherwise—as, for example, when a party raises the issue or a previous opinion persuasively critiques the disputed precedent.⁶²

This answer, too, renders stare decisis more discretionary than would application of an ordinary render waiver rule.

Rather than saying that a precedent will not be reconsidered if a challenge to it is waived, Justice Thomas allows only that the Court “may” decline to investigate the correctness of a precedent. There is discretion. And rather than limit those who can challenge a precedent to the parties, Justice Thomas also allows prior opinions to do so, and apparently other unnamed sources (“for example”). This apparently creates discretion to decide when an amicus brief, an academic article, or other source might circumvent the waiver rule. Thus a Justice may, but need not, decline to investigate the validity of a precedent that has gone unchallenged.

A final example of discretion and potential arbitrariness is created by the Court’s own certiorari process. The Supreme Court’s appellate jurisdiction is largely discretionary, allowing the Court to decide what cases, and what questions presented in those cases, it would like to resolve. Since the parties are supposed to restrict themselves to the questions presented,⁶³ this means that the certiorari process can filter out most attempts to revisit any of the Court’s precedents.⁶⁴

This filtering ability is compounded by a Court-pronounced rule of strong vertical precedent. Lower courts are never supposed to declare the Supreme Court’s precedents overruled if the Court has not. No matter how “wobbly” or “moth-eaten” the “foundations” of its precedents, the Court has instructed, “it is this Court’s prerogative alone to overrule one of its own precedents.”⁶⁵ If this rule is followed,⁶⁶ then no circuit split emerges about the validity of a Supreme

⁶² Id at 1986 n 6.

⁶³ US S Ct Rule 14.1(a); US S Ct Rule 24.1(a).

⁶⁴ See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex L Rev 1711, 1731–33 (2013); Amy Coney Barrett and John Copeland Nagle, *Congressional Originalism*, 19 U Pa J Const L 1, 16–23 (2016); Frederick Schauer, *Stare Decisis and the Selection Effect*, in Christopher J. Peters, ed, *Precedent in the United States Supreme Court* 121 (Springer, 2012).

⁶⁵ *State Oil Co. v Khan*, 522 US 3, 20 (1997). See also *Bosse v Oklahoma*, 137 S Ct 1, 2 (2016); *United States v Hatter*, 532 US 557, 567 (2001); *Agostini v Felton*, 521 US 203, 237 (1997); *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 US 477, 484 (1989).

⁶⁶ To be sure, there have been important cases where it was not, such as the lower-court cases leading up to the recognition of same-sex marriage in *Obergefell v Hodges*, 135 S Ct 2584 (2015), that concluded that the Supreme Court’s summary affirmance in *Baker v Nelson*, 409 US 810 (1972), was no longer controlling. See Richard M. Re, *Narrowing Supreme Court*

Court precedent, and circuit splits are one of the primary reasons the Court grants certiorari.⁶⁷

This is how the same Justice who agreed that the Court's qualified immunity jurisprudence should be revisited⁶⁸ could nonetheless apply it unblinkingly in subsequent cases.⁶⁹ The *duty* to disregard demonstrably erroneous precedents is a lot less powerful if it applies only to precedents that the Justices have chosen to reconsider when exercising their discretion to vote for certiorari. As Judge Amy Coney Barrett and Professor John Nagle have put it: "Institutional features of Supreme Court practice permit all Justices to let some sleeping dogs lie, and so far as we are aware, no one has ever argued that a Justice is duty-bound to wake them up."⁷⁰

III. JUSTICE ALITO AND HALFWAY ORIGINALISM

While Justice Alito has also described himself as an originalist, his constitutional approach is noticeably distinct from Justice Thomas's.⁷¹ So too, his theory of stare decisis. An interesting illustration of this difference came in Justice Alito's short concurring opinion in *Gundy*.

Gundy was a challenge to a federal statute as violating the non-delegation doctrine. Such challenges are rarely successful, but *Gundy* concerned a criminal statute—the Sex Offender Registration Notification Act—so there were at least three possible arguments for the challenger to win. One was to convince the Court that the statute lacked an "intelligible principle" and violated the current version of the nondelegation doctrine. A second was to convince the Court

Precedent from Below, 104 Georgetown L J 921, 968–71 (2016); Emily Buss, *The Divisive Supreme Court*, 2016 Supreme Court Review 25, 35–64 (2016). Some of those cases specifically relied on the fact that *Baker v Nelson* was a summary affirmance, and arguably subject to a less strong rule of vertical precedent. See *Bostic v Schaefer*, 760 F3d 352, 373 (4th Cir 2014); see also Re, 104 Georgetown L J at 968 n 235 (cited in this note).

⁶⁷ US S Ct Rule 10; Barrett, 91 Tex L Rev at 1730 (cited in note 64).

⁶⁸ *Ziglar v Abbasi*, 137 S Ct 1843, 1871 (2017) (Thomas, J, concurring in part and concurring in the judgment).

⁶⁹ See, for example, *District of Columbia v Wesby*, 138 S Ct 577, 589–93 (2018) (Thomas, J).

⁷⁰ See Barrett and Nagle, 19 U Pa J Const L at 20 (cited in note 64).

⁷¹ See Matthew Walther, *Sam Alito: A Civil Man*, American Spectator (Apr 21, 2014), archived at <https://perma.cc/XD92-CVGH> ("I think I would consider myself a practical originalist."). See also Steven G. Calabresi and Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 Geo Wash L Rev 507, 512 (2019) (concluding that a "theme of Justice Alito's jurisprudence is originalism, though not in the traditional sense of the word that one might associate with Justice Scalia").

that a more exacting version of the nondelegation doctrine should be revived. A third was to convince the Court that a more exacting standard should apply in criminal cases, thus making it easier for Gundy to win without threatening the administrative state. Gundy likely hoped to assemble a coalition of votes from among these different theories.

But Gundy did not prevail. A plurality of the Court concluded that the statute contained an intelligible principle and should be upheld under current doctrine.⁷² A three-Justice dissent concluded that a more exacting test should be revived, and that the statute would fail.⁷³ And Justice Alito wrote separately, providing the fifth vote to the majority outcome⁷⁴ for his own reasons:

The Constitution confers on Congress certain “legislative [p]owers,” Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001). Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. See *ibid.*

If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.⁷⁵

Justice Alito’s approach stands in marked contrast to Justice Thomas’s. Justice Alito appeared to maintain that the Court’s nondelegation doctrine was erroneous because it permitted excessive delegation to the executive branch, but he nonetheless chose to follow it in *Gundy* because “it would be freakish” to grant relief to sex offenders without also granting it to other regulated parties.

While uncharitable readers might be tempted to see this as an overtly political or results-oriented opinion, Justice Alito in fact

⁷² *Gundy*, 139 S Ct at 2121.

⁷³ *Id.* at 2139–44 (Gorsuch, J, dissenting).

⁷⁴ Because Justice Kavanaugh did not participate in the decision of the case, Justice Alito’s fifth vote was necessary to the publication of the opinions, but not the judgment. Without it, the Court would have affirmed, without opinion, by an equally divided Court.

⁷⁵ *Gundy*, 139 S Ct at 2130–31 (Alito, J, concurring in the judgment).

shrewdly identifies a profound problem of constitutional theory. The underlying problem is the problem of constitutional law and the second best. It is not unique to originalism, but it may be especially easy to see for originalists. Suppose the Constitution requires one thing and doctrine requires something different. And suppose that for whatever reason—lack of votes, reliance interests, or something else—the erroneous doctrine is not going to be completely overruled. What should a judge do? Adhere to the Constitution wherever possible, thus minimizing the scope of the doctrine? Adhere to the doctrine until it is overruled? There is a particular dilemma in cases at the border of the doctrine. Extend the doctrine, and you extend the error. Reject the doctrine, and you create a sharp—and perhaps unjustified—difference in two similar types of cases.

Moreover, any approach that sometimes involves considering doctrine will also give rise to the possibility of “compensating adjustments.”⁷⁶ That is, once doctrine has replaced the otherwise-correct constitutional answer in one area, it is no longer clear what to do in related areas. The most famous example is the argument that we ought to compensate for the unconstitutional expansion of delegated power to agencies by upholding the otherwise unconstitutional legislative veto.⁷⁷ One unconstitutional act sort of makes up for the other.

Professor Adrian Vermeule, who has written the most systematic treatment of this problem to date, has concluded that both “the ambitious idea that judges should evaluate global consequences on a case-by-case basis” and the opposite “case-by-case procedure” are suspect on second-best grounds.⁷⁸ Most other scholars have grappled with this problem only in the context of individual compensating adjustments to particular doctrines.⁷⁹ Perhaps, like *The General Theory of the Second Best* in economics, it has no general solution.⁸⁰

⁷⁶ Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U Chi L Rev 421, 421 (2003).

⁷⁷ Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L Rev 1, 23–40 (1994); *INS v Chadha*, 462 US 919, 978 (1983) (White, J. dissenting). See also Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 Harv L Rev 4, 20–23 (2009) (listing this and many other examples).

⁷⁸ Vermeule, 70 U Chi L Rev at 436–37 (cited in note 76); see also Vermeule, 123 Harv L Rev at 62–63 (cited in note 77).

⁷⁹ Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich L Rev 1405, 1442–48 (2019) (official immunity); McCutchen, 80 Cornell L Rev 1 (cited in note 77) (separation of powers and legislative veto). John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* 94–97 (Harvard, 2013) (expressing skepticism of compensating adjustments by judges).

⁸⁰ See generally R. G. Lipsey and Kevin Lancaster, *The General Theory of the Second Best*, 24 Rev Econ Stud 11 (1956).

In any event, Justice Alito's opinion in *Gundy* effectively rejects the simpleminded approach to second-best problems of simply trying to get each case, individually, as close as possible to the correct doctrine. It treats correct constitutional doctrine as something that should be pursued somewhat systematically or not at all.

This is consistent with his opinion the previous year in *Janus*. In *Janus* the Supreme Court held that it violated the First Amendment to force public employees to give a portion of their paycheck to a public sector union. One of the arguments made by the union in its defense was an originalist one: as an original matter, public employees did not have any First Amendment rights, and so First Amendment doctrine should not be extended to give them a new right against compelled subsidies.

Justice Alito, in his opinion for the Court, responded that taking this originalist argument seriously "would mean overturning decades of landmark precedent," and accused the union of "desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. We will not engage in this halfway originalism."⁸¹ On its face this was a strange accusation, since the majority itself went on to "retain the part of *Abood* that they like[d]," but the upshot was clear enough: Justice Alito may call himself an originalist, but he did not want to call himself a chump.

Some federal appellate judges have also begun to endorse Justice Alito's skepticism of halfway originalism. In the Eleventh Circuit, litigants asked the en banc court to narrow the scope of *Terry v Ohio*, which authorized frisks without obvious originalist analysis.⁸² Judge William Pryor wrote the opinion refusing this request, noting that the well-established exclusionary rule *also* lacked an originalist basis, and concluding: "[W]e cannot use a halfway theory of judicial precedent to cut back on *Terry* while faithfully adhering to the exclusionary rule."⁸³

In the Fifth Circuit, the same thing happened in the qualified immunity context. Responding to various criticisms (including by this

⁸¹ *Janus*, 138 S Ct at 2469–70 (citation omitted). The Court also went on to dispute the originalist argument on its own terms. *Id.*

⁸² *United States v Johnson*, 921 F3d 991, 1009–11 (11th Cir 2019) (Jordan, J, dissenting), discussing *Minnesota v Dickerson*, 508, 366, 381 (1993) (Scalia, J, concurring) and other originalist critiques of *Terry*.

⁸³ *Johnson*, 921 F3d at 1002 (en banc).

author) that the doctrine lacked a lawful foundation, Judges James Ho and Andrew Oldham authored a joint dissent invoking the no-halfway-originalism principle. Even if qualified immunity lacked a lawful basis, they wrote, “a principled originalist would not cherry pick which rules to revisit based on popular whim. A principled originalist would fairly review decisions that favor plaintiffs as well as police officers.”⁸⁴ Hence, the judges asked rhetorically: “Does the majority seriously believe that it is an ‘unreasonable seizure,’ *as those words were originally understood at the Founding*, for a police officer to stop an armed and mentally unstable teenager from shooting innocent officers, students, and teachers?”⁸⁵ No, they declared: “If we’re not going to do it right, then perhaps we shouldn’t do it at all.”⁸⁶

In both cases, the lower-court judges could also reasonably note that they were simply bound to apply Supreme Court precedent regardless of whether it was right or wrong.⁸⁷ But they did not stop there, apparently to signal their special skepticism of halfway originalism. Justice Alito is thus hardly a lone voice.

But this call for “principled” rather than “halfway” originalism has problems. The first is that even its proponents do not adhere to it consistently. Consider another example from last Term, the cert petition in *Hester v United States*,⁸⁸ where the Court was asked to extend its jury-trial precedents to an order of restitution. Justices Gorsuch and Sotomayor wrote in support of the petition.⁸⁹ But Justice Alito wrote to explain his vote against:

The argument that the Sixth Amendment, as originally understood, requires a jury to find the facts supporting an order of restitution depends upon the proposition that the Sixth Amendment requires a jury to find the facts on which a sentence of imprisonment is based. That latter proposition is supported by decisions of this Court, see *United States v. Booker*, 543 U.S. 220, 230–232 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000), but

⁸⁴ *Cole v Carson*, 935 F3d 444, 477 (5th Cir 2019) (Ho and Oldham dissenting).

⁸⁵ *Id.* at 478 (Ho and Oldham dissenting).

⁸⁶ *Id.* In a subsequent opinion, Judge Ho again voiced these concerns, and clarified that this was not a justification for retaining qualified immunity doctrine in its current form. *Horvath v City of Leander*, 2020 WL 104345, at *13 (5th Cir) (Ho concurring in the judgment in part and dissenting in part) (“We can walk and chew gum at the same time. Courts can faithfully interpret the Fourth Amendment as well as § 1983. We can get *both* prongs of the doctrine right.”).

⁸⁷ *Johnson*, 921 F3d at 1002; *Cole*, 935 F3d at 477.

⁸⁸ 139 S Ct 509 (2019).

⁸⁹ *Id.* at 509–11 (Gorsuch, J, dissenting, joined by Sotomayor, J).

it represents a questionable interpretation of the original meaning of the Sixth Amendment, *Gall v. United States*, 552 U.S. 38, 64–66 (2007) (Alito, J., dissenting). Unless the Court is willing to reconsider that interpretation, fidelity to original meaning counsels against further extension of these suspect precedents.⁹⁰

The principle that “fidelity to original meaning counsels against further extension of . . . suspect precedents” may sound reasonable, and it is. But it is the opposite of Justice Alito’s injunctions against halfway originalism. The very same argument could have been made of the requests in *Gundy* and *Janus*: *We should not extend our “suspect precedents” permitting delegation to SORNA*, Justice Alito might have said. *We should not extend our “suspect precedents” on compelled spending by public employees to eliminate agency fees*, Justice Alito might have said. One Justice’s “halfway originalism” is another Justice’s limiting “suspect precedents.” Actually, the same Justice’s.

This is not meant to score a cheap point in a game of “jurisprudential gotcha,”⁹¹ but rather to demonstrate a broader problem with second-best originalism. The problem is that there is no general solution to the existence of a suspect precedent. It is plausible to say that the precedent should not be extended, because it is suspect. It is plausible to instead say that the precedent should be treated fairly unless and until it is overruled. But if the judge retains discretion to choose either plausible course, then each suspect precedent gives the judge an additional degree of discretion.

Say what you will about the simpleminded approach, but at least it bound the judge. Until there is a general solution to the second-best problem in constitutional law, invoking the problem gives a judge broad discretion to adhere to erroneous—even demonstrably erroneous—precedent.

IV. THE PROBLEM WITH DISCRETION

These new opinions exploring precedent, while theoretically rich, have exacerbated one of the doctrine’s unfortunate features in the Supreme Court—its discretionary nature. This discretion has two aspects. One is the elimination of constraints on the judge’s choice

⁹⁰ Id at 509 (Alito, J, concurring).

⁹¹ Justin Driver, *Judicial Inconsistency as Virtue: The Case of Justice Stevens*, 99 Georgetown L J 1263, 1265 n 7 (2011).

whether to adhere to a precedent or not. Not only do these approaches lack the hard-edged constraints of a rule, but they do not even provide the softer constraint of a guiding standard. They do not contain an internal constraint even for “the puzzled judge” who “would *like* to be able to apply the law without importing nonlegal considerations.”⁹² The second aspect is that this discretion is not bounded by or derived from law. Taken together, these discretionary features render precedent worse than useless. They make it a tool for evading other requirements of the law, and a threat to certain aspects of judicial neutrality.

Professor Schauer argued in this journal that stare decisis does little to constrain the Justices’ decisions, and that this may not be such a bad thing. “[T]he weakness, verging on impotence, of the widely referenced but rarely followed stare decisis norm” may be evidence that we do not actually want or need the stability or authority that the norm promises.⁹³

My analysis is less optimistic. It may be true that stare decisis does little to constrain the Justices, for all of the reasons recounted by Schauer and many others. But stare decisis does something else, which is to allow them to escape *other constraints* that might be imposed by law or interpretive methodology. A discretionary doctrine of precedent is not just impotent, but corrosive.

How is it corrosive? For one thing, it is inconsistent with one of the central tenets of judicial review, a tenet that traces all the way back to Chief Justice Marshall’s opinion in *Marbury v Madison*.⁹⁴ In *Marbury*, the Court had to justify its decision to review legislation duly enacted by Congress. It also had to explain how it could do so without taking on a legislative role, rather than its proscribed judicial role. It did so by emphasizing that judicial review was a *duty*, not a choice. It was “emphatically the province and duty of the judicial department to say what the law is.”⁹⁵ When the Constitution and a statute conflict, “the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”⁹⁶

⁹² See William Baude, *Originalism as a Constraint on Judges*, 84 U Chi L Rev 2213, 2223–24 (2017).

⁹³ Schauer, 2018 Supreme Court Review at 142–43 (cited in note 1).

⁹⁴ 5 US (1 Cranch) 137 (1803).

⁹⁵ Id at 177.

⁹⁶ Id at 178.

If judicial review is a duty, not a choice, then that relieves the Court of a burden of justification. The Court does not need to make its own judgment about which rule is preferable if its choice is forced. This basic account of judicial review is central to a classical conception of the judiciary, one especially revered by formalists, in which the court's job is to simply apply the law in cases that come before it.⁹⁷

To be sure, the true picture is more complicated than a quote from *Marbury*. The law itself may consist of principles or standards rather than rules.⁹⁸ The law itself may confer judicial discretion.⁹⁹ So the duty to follow the law may require judges to make difficult judgments, and even choices. But these judgments and choices are less of a threat to the law precisely because they are given by, and therefore controlled by, law. This marks the difference between “arbitrary discretion” and “mere legal discretion” that was central to antebellum debates about *stare decisis*.¹⁰⁰

To see this distinction, consider why it was plausible for now-Justice Kavanaugh to argue that *stare decisis* is required by Article III. Article III permits judges to exercise only “judicial” power. If excessive discretion could render judicial activity nonjudicial, and if *stare decisis* can hem in this discretion, then the doctrine helps to ensure that judges exercise only judicial power.¹⁰¹ Hence, now-Justice Kavanaugh invoked Federalist No. 78, where Alexander Hamilton wrote: “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”¹⁰² But this structural argument works only if precedent supplements judicial duty rather than undermining it.

The new approaches to precedent come closer to “arbitrary discretion” than “legal discretion.” For judges with otherwise formalist commitments, these approaches function to switch off the formalist

⁹⁷ See, for example, Philip Hamburger, *Law and Judicial Duty* (Harvard, 2008).

⁹⁸ See Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After *Vieth v. Jubelirer**, 73 *Geo Wash L Rev* 1166, 1182–85 (2005).

⁹⁹ See David L. Shapiro, *Jurisdiction and Discretion*, 60 *NYU L Rev* 543 (1985).

¹⁰⁰ Nelson, 87 *Va L Rev* at 9–10 (cited in note 55).

¹⁰¹ The alternative is that these limits come from written or external sources of law. *Id.* at 9–21, 22–27.

¹⁰² Federalist 78 (Hamilton) in Jacob E. Cooke, ed, *The Federalist Papers* 529 (1961); Kavanaugh Confirmation Hearing at 149, 226, 257 (cited in note 6).

mode. Rather than follow a formalist argument to a politically unpalatable conclusion, a Justice can choose to invoke second-best principles in some cases but not others. Rather than being bound by either precedent or text in cases of ambiguity, a Justice can choose which one to follow, and therefore be bound by neither. Precedent thus operates to negate the legal restrictions on judicial discretion. What good is a doctrine of precedent if it serves to increase judicial discretion rather than to decrease it?¹⁰³

This kind of arbitrary, nonlegal discretion not only permits a judge to indulge nonlegal considerations, but makes it hard for him to avoid it. A legal duty provides some justification for judicial actions that would otherwise be morally suspect. Why may a judge sometimes order the seizure of property, the restraint of liberty, or tolerate bad governmental or private behavior? Because the law says so, and the judge has some duty to apply the law.¹⁰⁴ But once the judge has a choice, he no longer has that excuse.

In other words, once the keys to *stare decisis* are in the judges' own hands, neither precedent nor nonprecedent can provide an answer to moral dilemmas or to political pressure. Consider the most salient precedent in the country, *Roe v Wade*.¹⁰⁵ In response to growing calls to overrule the controversial decision, the Supreme Court famously relied on precedent to reaffirm its core holding in *Planned Parenthood v Casey*.¹⁰⁶ But the Court did not succeed at its goal of "call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."¹⁰⁷ The future of the decision remains unsettled.

The same dilemma confronts the current Justices, some of whom may well both believe that *Roe* was wrongly decided, but prefer to narrow it or ignore it rather than overruling it. It is only a matter of time before they are put to the test, and when they do so they may be

¹⁰³ But see Richard M. Re, *Precedent as Permission* *1 (unpublished article, Nov 11, 2019) ("This essay provides an account of precedent that does not call upon it to do the one thing that everyone expects: constrain judicial decision-making. Instead, precedent is tasked to do something else: identify lawful options. So instead of beginning with precedent's limited ability to constrain, the argument focuses first on what precedent enables.").

¹⁰⁴ On the defeasibility of this duty, see William Baude, *Is Originalism Our Law?*, 115 *Colum L Rev* 2349, 2395–97 (2015).

¹⁰⁵ 410 US 113 (1973).

¹⁰⁶ 505 US at 854–69 (1992).

¹⁰⁷ *Id.* at 867.

unable to insist either that they were required to overrule it, or that they were forbidden to do so. In the absence of either a clear rule or a legally-sourced standard, the choice whether to follow *Roe* or overrule it will be “arbitrary discretion” in Hamilton’s sense. This is precisely the vice that formalist judging is supposed to forswear.

To be sure, discretionary *stare decisis* is more of a problem for some methods of judging than for others. Some legal theories already assume a great deal of discretion on behalf of the judges. For judges operating under those theories, the additional discretion granted by *stare decisis* may be nothing new. But Justices Alito and Thomas, like other members of the Court, profess to be originalists, and originalism professes to give judges a source of law outside their own will.¹⁰⁸ Discretionary precedent—neither forbidden nor required—forfeits that justification for originalism.

V. CONCLUSION

The quest for principled judging is in large part a quest for neutral principles.¹⁰⁹ Both originalism and *stare decisis* derive their enduring popularity from their potential neutrality. And, indeed, at their best they live up to this promise. Originalism can be a neutral principle.¹¹⁰ Absolute *stare decisis* is a neutral principle.

There are also some potentially principled approaches for mixing the two, such as a rule that *stare decisis* controls in cases of indeterminacy and originalism controls in cases of clarity.¹¹¹ Or a rule that follows the original understanding of “liquidation,” which required indeterminacy, deliberate practice, and settlement—a solution I have suggested elsewhere.¹¹² Perhaps even a variation on more modern *stare decisis* doctrine could accomplish this. But if a Justice or a court does not adopt a neutral principle for mixing the two, adopting two neutral principles at the same time is worse than adopting none.

¹⁰⁸ See Baude, 84 U Chi L Rev at 2223–29 (cited in note 92).

¹⁰⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1 (1971).

¹¹⁰ Baude, 84 U Chi L Rev at 2223–29 (cited in note 92).

¹¹¹ See Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 Vand L Rev 105 (2015); Nelson, 87 Va L Rev 1 (cited in note 55). This assumes that clarity is itself a neutral principle, see Richard M. Re, *Clarity Doctrines*, 86 U Chi L Rev 1497 (2019); Ryan D. Doerfler, *Going Clear* (Aug 1, 2019), online at <https://ssrn.com/abstract=3326550>.

¹¹² William Baude, *Constitutional Liquidation*, 71 Stan L Rev 1, 42–44 (2019).

The problem of the second best in constitutional law is a harder one, and deserves the same attention that has been given to the topic of stare decisis itself. Without reaching a general solution, however, we can still say it is better to adopt a consistent stance to this problem than an opportunistic one. If a suspect precedent is not revisited, there is a question whether to extend it or to limit it. But a Justice should not pick and choose different approaches for equally suspect precedents.

Modern stare decisis doctrine now does the very opposite of what the doctrine was once supposed to do. It introduces elements of the arbitrary discretion it was once meant to constrain. So while many reports in the coming years will likely assert that the Roberts Court has rendered stare decisis nothing but a pretense, I fear that the truth is actually much worse.