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The fate of stare decisis hangs in the wind. Different factions of the Supreme Court are now engaged in open debate—echoing decades of scholarship—about the doctrine's role in our constitutional system. Broadly speaking, two camps have emerged. The first embraces the orthodox view that stare decisis should reflect "neutral principles" that run orthogonal to a case's merits; otherwise, it will be incapable of keeping the law stable over time. The second argues that insulating stare decisis from the underlying merits has always been a conceptual mistake. Instead, the doctrine should focus more explicitly on the merits—by diagnosing the magnitude of past error and allowing "egregiously wrong" decisions to be dismantled without constraint.

This Article develops a compromise approach: an "aggregate voting rule," requiring the combined vote across both courts—the one that crafted the holding at t_1 and the one scrutinizing it at t_2—to total a majority. In other words, the durability of past decisions should depend on the amount of support they were originally able to command. This would capture the main appeal of reform position—the idea that stare decisis should not preclude the correction of significant missteps—but also retain the core of stability that defines the orthodox view. Under the latter, the ideal of respect for precedent drives the doctrine's content. Under an aggregate voting rule, the same ideal would express itself, instead, in the doctrine's mechanical structure—freeing judges to focus on the merits, without abandoning the (non-merits) values that have long animated stare decisis. This would facilitate the airing out of disagreement and the forward motion of law, while also encouraging judges to locate avenues of doctrinal compromise.

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INTRODUCTION

Stare decisis is reeling. In a series of embittered opinions over the last few terms, the Supreme Court has been dismantling precedent at a rapid clip,[1] with some Justices vying to move even faster.[2] More startling than the number of cases,

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1. Five cases have overturned precedent in the last three terms. Four have been 5-4 opinions; one has been 6-3. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2460 (2018) (5-4 decision) (overruling Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977), by holding that the First Amendment prohibits mandatory contributions to public unions); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2092–93 (2018) (5-4 decision) (abrogating Quill Corp. v. N. Dakota By & Through Heitkamp, 504 U.S. 298 (1992), and Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill., 386 U.S. 753 (1967), by holding that the dormant Commerce Clause allows states to impose sales taxes on sellers with no physical presence in the state); Franchise Tax Bd. of California v. Hyatt, 139 S. Ct. 1485, 1492 (2019) (5-4 decision) (overruling Nevada v. Hall, 440 U.S. 410 (1979), by holding that states retain their sovereign immunity from private suits brought in the courts of other states); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2168 (2019) (5-4 decision) (overruling Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), by holding that individuals do not face a state-level exhaustion requirement under the Takings Clause when their property has been taken but the extent of owed-compensation has not yet been determined); Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (6-3 decision) (abrogating Apodaca v. Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S. 356 (1972), by holding that the Sixth Amendment requires that a jury find a criminal defendant guilty by a unanimous verdict). For perspective on how this pace relates to historical trends, see *infra* Appendix.

2. *See* Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring) ("I write

however, is the embedded commentary they have inspired. For the first time in the institution's history, sitting Justices have begun openly expressing doubt about stare decisis, taking to the pages of the U.S. Reports to debate the doctrine's future.[3] If anything, recent political events—especially the confirmation of Justice Barrett to the Court in October of 2020—have only intensified the debate's stakes.[4]

Broadly speaking, two proposals are on offer. The first, expounded by Justice Breyer and Justice Kagan, is that mere disagreement is never enough to justify overruling precedent. Rather, a "special justification" is required,[5] one that draws reference to analytic criteria—such as stability and workability[6]—that run

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separately because, in my view, the time has come to consider discarding the *Bivens* doctrine altogether. . . . Stare decisis provides no veneer of respectability to our continued application of these demonstrably incorrect precedents.") (internal quotation marks omitted) (citations omitted); Gamble v. United States, 139 S. Ct. 1960, 1993 (2019) (Ginsburg, J., dissenting) ("The separate-sovereigns doctrine, I acknowledge, has been embraced repeatedly by the Court. But stare decisis is not an inexorable command.") (internal quotation marks omitted) (citations omitted); Kisor v. Wilkie, 139 S. Ct. 2400, 2425–26 (2019) (Gorsuch, J., concurring) ("[W]hether we formally overrule *Auer* or merely neuter it, the results in most cases will prove the same. But means, not just ends, matter, and retaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve. All to what end? So that we may *pretend* to abide stare decisis? . . . Respectfully, I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply [overturn *Auer*].").

3. *See, e.g.*, Nina Varsava, Essay, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118 (2020) (canvassing the extent of disagreement on the Court regarding the proper theory of precedent); Linda Greenhouse, *A Precedent Overturned Reveals A Supreme Court in Crisis*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/opinion/supreme-court-precedent.html [https://perma.cc/AN8C-UGTG] ("Below the surface of [Ramos's] 6-to-3 outcome lies a maelstrom of clashing agendas having little to do with the question ostensibly at hand and a great deal to do with the court's future. . . . [I]t's clear that what this case was really about was precedent: when to honor it, when to discard it and how to shape public perceptions of doing the latter."). *See also supra* notes 1–2 (detailing the opinions that have played out this debate).

4. *See, e.g.*, Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html [https://perma.cc/673K-9SEY]; Emily Hildreth, *The Nomination of Amy Coney Barrett and the Future of Stare Decisis*, SYRACUSE L. REV. LEGAL PULSE (Oct. 8, 2020), https://lawreview.syr.edu/the-nomination-of-amy-coney-barrett-and-the-future-of-stare-decisis/ [https://perma.cc/6XBB-7T8H].

5. *See Franchise Tax Bd. of California*, 139 S. Ct. at 1504 (Breyer, J., dissenting) ("Overruling a case always requires 'special justification.'"); *Knick*, 139 S. Ct. at 2189 (Kagan, J., dissenting) ("Stare decisis, of course, is not an inexorable command. But it is not enough that five Justices believe a precedent wrong. Reversing course demands a special justification—over and above the belief that the precedent was wrongly decided.") (internal quotation marks omitted) (citations omitted).

6. *See* Frederick Schauer, *Stare Decisis: Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (canvassing similar background); Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the

perpendicular to a case's underlying substance.[7] In short, if "the durability of precedent" turns on "[judges'] individual views about whether decisions are right or wrong," stare decisis risks reproducing—in distorted form—the very substantive disputes whose impasse it is supposed to mediate.[8]

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evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.") There are also economically minded variations of this claim. *See* Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of the Law*, 93 IOWA L. REV. 559, 579–86 (2008). For excellent general background on the scholarly discussion to date, see Randy J. Kozel, The Case for Stare Decisis 27–41 (unpublished manuscript) (on file with author) (tracing six distinct foundations on which scholars and judges have claimed to justify stare decisis).

7. What is more, "stability, reliance, and workability" are just exemplary criteria. Scholars have developed many more. For specific variants of these arguments, see, for example, SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS 2 (1995) (invoking "efficiency," "justice," and "fairness" as values served by stare decisis); *see also* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422–24 (1988) (offering an efficiency-focused account of stare decisis). Some commentators also suggest that respect for precedent may improve the quality of decision-making, and/or lead to a greater likelihood of correct decision-making. Deborah Hellman, *An Epistemic Defense of Precedent*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 63 (Christopher J. Peters ed., 2013); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 21–26 (2012). Still others have argued that it should be grounded in some notion of reciprocity or humility. *See, e.g.*, MICHAEL GERHARDT, THE POWER OF PRECEDENT 3 (2008) (theorizing a "golden rule of precedent," whereby judges should "treat others' precedents as they would like their own to be treated," in the hope of striking a balance between aspirations of stability and the reality of deep, unyielding interpretive dispute); Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835 (2012) (developing a humility-centric take on stare decisis); Herbert C. Kaufman, *A Defense of Stare Decisis*, 10 HASTINGS L.J. 283 (1958) (same).

8. RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 6 (2017); *see also* Corinna Barrett Lain, *Mostly Settled, but Right for Now*, 33 CONST. COMMENT. 355 (2018) (arguing that adjustments to doctrine in this realm—reconfiguring factors and the like—is fated to have limited practical effect, given the reality of divergent policy preferences); Zachary S. Price, *Precedent in a Polarized Era*, 94 NOTRE DAME L. REV. 433 (2018) (book review) (expressing skepticism about the ability of "neutral principles" to actually stabilize the doctrine).

The second proposal, developed systematically by Justice Thomas and echoed by Justice Kavanaugh,[9] is that stare decisis should index the magnitude of t_1 error.[10] Adherence to "garden-variety" errors may, in some circumstances, be tolerable.[11] But when it comes to "demonstrably erroneous" precedent—past cases that do not even arguably rest on "a permissible interpretation of the [constitutional] text"—the Court should "correct the error, *regardless* of whether other factors support overruling the precedent."[12] As a matter of constitutional theory, the idea here is straightforward: it is the document itself, not intervening judicial interpretations, that ought to have the ultimate say.[13]

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9. Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: we should not follow it."); Allen v. Cooper, 140 S. Ct. 994, 1007–08 (2020) (Thomas, J., concurring) ("The Court claims we need 'special justification[s]' to overrule precedent because error alone 'cannot overcome stare decisis.' That approach does not comport with our judicial duty under Article III.") (internal citations omitted); Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring) (identifying as one—especially important—element of the stare decisis inquiry whether "the prior decision [is] not just wrong, but grievously or egregiously wrong[.] A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it.").

10. This view draws heavily on the scholarship of Caleb Nelson (which Thomas cited explicitly). *See* Nelson, *supra* note 6; *see also* Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 433–34 (2018) (configuring a similar account—with a nod to Nelson's view—based on a distinction between "the fallible conclusions of individual[] [judges] from the judgment of an enduring law").

11. *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring).

12. *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring) (emphasis added); *see also Ramos*, 140 S. Ct. at 1413–15 (2020) (Kavanaugh, J., concurring) (elaborating these themes).

13. *See also Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring) ("In my view, the Court's typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law."). *See generally* Nelson, *supra* note 6. In fact, some commentators have taken this logic so far as to argue for the elimination of stare decisis altogether. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); *see also* Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 371–73 (2007) (enumerating sources to a similar effect); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 932–33 (2008) (same); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (describing stare decisis as the "imprisonment of reason"). It bears mention, in passing, that this entire way of thinking—whatever its particulars—is premised on a "Protestant" view of constitutional law. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). In theory, of course, it is possible to resist the view that constitutional meaning is located, ultimately and exclusively, in the document itself rather than the interpretive traditions that have grown up around it.

Both proposals have virtues and drawbacks.[14] The problem is that choosing between them forces an all-or-nothing approach: either stare decisis remains completely insulated from the merits, or the two inquiries fuse together. In what follows, I stake out a compromise position, one that captures the benefit of the "non-merits" approach—resilience to ordinary political change—but also acknowledges the value of attending to a case's merits when deciding whether to undo past law. The proposal is simple. Rather than making respect-for-precedent the focal point of qualitative analysis, that principle should instead be hardwired into stare decisis *quantitatively*: as an "aggregate voting rule." That is, precedent should be modifiable only if the tally of votes across both courts—the court that fashioned the precedent at t_1 and the one scrutinizing it at t_2—totals a majority. So dismantling a 5-4 precedent would require six votes at t_2; dismantling a 6-3 precedent would require seven; and so on.

An aggregate voting rule promises numerous advantages over the status quo. First, it would genuinely constrain the process of legal evolution. As Professor Baude recently argued, a stare decisis regime that fails to exert meaningful constraint is actually "worse than no [stare decisis] at all,"[15] because if "individual Justices have substantial discretion whether to adhere to precedent," the doctrine turns "from a tool [of constraint] into a tool to *expand* discretion, and ultimately . . . to evade more fundamental legal principles."[16] I agree—and the point only sharpens as political conditions become more polarized.[17] An aggregate voting rule would rise to Professor Baude's challenge: insulating stare decisis from the dynamics of discretion

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14. With respect to the "neutral principles" approach, it is not obvious that criteria like "workability" can be kept separate—even in principle—from the merits inquiry. *See, e.g.*, Sachs, *supra* note 10; Price, *supra* note 8. And with respect to the "demonstrably erroneous" approach, a worry about circularity arises: the theory is supposed to explain why judicial views from t_2 should enjoy priority over those from t_1, but the analytic mechanism it uses—asking whether, at t_2, the precedent seems demonstrably erroneous—assumes the answer it purports to deliver. *See* Schauer, *supra* note 6, at 138–39 n.93 (questioning whether the "demonstrably erroneous" standard for overturning past precedent would actually be effective, since "it is hardly obvious that Justices bent on overruling either perceive or are willing to follow previous decisions they think are wrong but not demonstrably so, or that they suspect are wrong but are not convinced are wrong").

15. William Baude, *Precedent and Discretion*, 2020 SUP. CT. REV. 313, 314; *see also* Schauer, *supra* note 6 (exploring a similar worry that stare decisis will become a pure matter of "rhetoric").

16. *Id.* (emphasis added).

17. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 152 (2019) (proposing reforms for the Supreme Court since "increased polarization in society, the development of polarized schools of legal interpretation aligned with political affiliations, and greater interest-group attention to the Supreme Court nomination process [] have conspired to create a system in which the Court has become a political football, and in which each nominee can be expected to predictably vote along ideological lines that track partisan affiliation"); *see also* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 537 (2004) (arguing that, in a polarized political environment, the courts may engage in more instances of "constitutional hardball," purposely avoiding collaboration and further solidifying the divisive atmosphere). For a game-theoretic gloss on this set of themes, see *infra* notes 67–70 and accompanying text.

that ultimately set the stage for doctrinal collapse. I do not claim that an aggregate voting rule is the *only* way to accomplish this goal. Any alternative, however, would have to be similarly wooden and uncompromising; that is the flip side of non-circumventable.[18]

Second, an aggregate voting rule would rest on solid conceptual foundations. As I elaborate in Part I, the roots of stare decisis lie in separation-of-powers. To quote Chief Justice Roberts from the 2019 term: "[t]he constraint of precedent distinguishes the judicial method and philosophy from those of the political and legislative process," reflecting 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."[19] An aggregate voting rule would vindicate these principles by forging a link between precedential strength—as expressed in initial vote-count—and durability through time.[20]

Finally, and perhaps most importantly, an aggregate voting rule would facilitate deliberation and compromise—the precursors of true legal stability.[21] Change would still be possible, but it would involve shorter leaps and be driven by broader, ideologically diverse coalitions.[22] And the entire process would be more likely, as Justice Douglas once wrote, "to take the capricious element out of law."[23]

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18. *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 680 (2007) (offering an analogous argument about the virtue of woodenness in the context of *Chevron*).

19. June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (internal quotation marks omitted) (citations omitted); *see also* Randy J. Kozel, *"Stare Decisis" and the Separation of Power*, FEDERALIST SOC'Y (Sept. 9, 2015), https://fedsoc.org/commentary/fedsoc-blog/stare-decisis-and-the-separation-of-power [https://perma.cc/ND2A-QSP3] (arguing that stare decisis "highlights the fact that the work of the courts is fundamentally different from the work of the political branches"); Hon. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944) (reflecting on similar themes).

20. *See* F. E. Guerra-Pujol, *Bitcoin, the Commerce Clause, and Bayesian Stare Decisis*, 22 CHAP. L. REV. 143, 157 (2019) (arguing that the "strength of a contested precedent" should factor into the stare decisis analysis).

21. *See, e.g.*, Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L. J. 1273 (2019) (arguing that doctrinal compromise is an important constitutional value); *see also* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996) (on the importance of rich deliberation).

22. *See, e.g.*, Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013) (identifying the mediation of ideological disagreement as one of the values stare decisis aims to serve).

23. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). For more contemporary variants of the same worry, see, for example, Epps & Sitaraman, *supra* note 17, at 143; Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018) ("[I]t is striking how many commentators—including prominent constitutional scholars, a former Attorney General, and current members of Congress—have recently questioned the legitimacy of the United States Supreme Court."). For popular press accounts of similar sentiment, see Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-

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The argument proceeds as follows. I begin, in Part I, by elaborating the conceptual foundations of stare decisis. From there, in Parts II and III, I turn to the specifics of the aggregate voting rule in both concept and mechanics. Finally, in Part IV, I offer a handful of examples from recent Supreme Court jurisprudence: on one hand, cases that would have satisfied an aggregate voting rule and, accordingly, underscore its virtues; and, on the other hand, cases that would *not* have satisfied an aggregate voting rule, highlighting the erosion of legitimacy that can result (and may have already resulted) from its absence.

I. STARE DECISIS AS SEPARATION-OF-POWERS

First things first—why should courts afford precedent special force? Past cases certainly have "persuasive authority."[24] The question is why they should bind. What justifies tethering the interpretive enterprise at t_2 to the will of predecessor-judges from t_1?

The answer lies in separation-of-powers. Respect for precedent—the notion that past decisions have at least some measure of force simply *as past decisions*, insofar as they were fashioned by predecessor-members of the same institutional body—marks the boundary between judicial and political authority. Alongside the case or controversy requirement,[25] it is what makes courts *courts*, rather than legislatures or enforcement institutions whose members happen to don robes.[26] As Justice Powell

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legitimacy-crisis.html?searchResultPosition=1 [https://perma.cc/4TM5-H8BD]; Ian Millhiser, *Kagan Warns That the Supreme Court's Legitimacy Is in Danger*, THINKPROGESS, (Sept. 17, 2018, 8:00 AM), https://archive.thinkprogress.org/justice-kagan-warns-that-the-supreme-courts-legitimacy-is-in-danger-2de1192d5636/ [https://perma.cc/9HJ5-3W6E] (documenting Justice Kagan's worry that, today, "people increasingly look at [the Court] and say 'this is just an extension of the political process'").

24. *See, e.g.*, Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790–92 (2012) (exploring the concept of persuasive authority as it intersects with stare decisis); *see also* Hellman, *supra* note 7 (arguing that even for judges who embrace a radical critique of stare decisis, precedent should still have *evidentiary* force).

25. *See, e.g.*, John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) ("The need to resolve such an actual case or controversy provides the justification not only for judicial review over the popularly elected and accountable branches of the federal government, but also for the exercise of judicial power itself . . . ."); Spokeo Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) ("Although the Constitution does not fully explain what is meant by '[t]he judicial Power of the United States,' Art. III, § 1, it does specify that this power extends only to 'Cases' and 'Controversies,' Art. III, § 2. And no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (internal citations omitted); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226–27 (1974) (holding that generalized grievances are "too abstract to constitute a 'case or controversy' appropriate for judicial resolution," because their resolution would cause courts, in effect, to step into the position of a legislature).

26. *See* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 813–18 (2018). Although other commentators have drawn this structural distinction, debate

wrote thirty years ago, courts are "the bod[ies] vested with the duty to exercise the judicial power . . . [a]n important aspect of [which] is the respect [courts show] for [their] own [past decisions]."[27] And as Chief Justice Roberts put the same point just a few years ago, 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. . . . Adherence to precedent is necessary to avoid an arbitrary discretion in the courts. The constraint of precedent distinguishes the judicial method and philosophy from those of the political and legislative process.[28]

The distinctiveness—and sanctity—of respect for precedent is easy to see by considering its absence in the legislative process. Ordinary political change is not beholden to the past. Often, lawmakers at t_2 will look to, and even defer to, the choices of lawmakers at t_1.[29] But they are under no obligation to do so. It is one thing to criticize a member of Congress for "casting a substantively wrong vote," but quite another to criticize the same lawmaker for "not accepting a content-independent obligation to vote the same way as her predecessor merely because that was the way in which her predecessor had voted."[30] The former is commonplace; the latter is a category error. Someone who complained about legislators failing to show "respect" for past statutes would simply betray confusion about the nature of political change.

In other words, part of what marks political power as political is its lack of fidelity to the past. This does not mean lawmakers never look backward for guidance; they routinely do, and often wisely. But lawmakers are in no sense *bound* by past decisions. They may have good reasons, on the merits, to decide to keep an already-enacted statute intact, but that is a choice just like any legislative choice—not a duty

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has focused almost exclusively on which branch, if any, may *undo* the convention of stare decisis—the Supreme Court, Congress, or both. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000) (arguing that Congress is authorized to nullify the precedential force of particular opinions). *Compare* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075 (2003), *with* John Harrison, Essay, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503 (2000). This debate, though important, runs perpendicular to my account here.

27. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 287 (1990).

28. June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (internal quotation marks omitted); *see also* Randy Kozel, *supra* note 19 (arguing that stare decisis "highlights the fact that the work of the courts is fundamentally different from the work of the political branches"); Jackson, *supra* note 19 (reflecting on similar themes).

29. *See, e.g.*, Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835 (2015) (arguing that legislative deference to the past often takes the form of stable bodies of statutory law developed over time—using the Exceptions Clause of Art. III as an example).

30. Schauer, *supra* note 6, at 126.

of the office.[31] As Professor Schauer recently put it, when "we disagree with the decision of [a legislator] who makes a decision different from what [her predecessor] would have decided, we couch our criticism in the language of content-based rightness and wrongness, . . . [not] legitimacy," because a legislator bears no "obligation to vote the same way as her predecessor merely because that was [how] her predecessor had voted."[32] In fact, new legislators are often elected into office precisely on promise of reform—sometimes radical reform. In that case, for a new lawmaker to pledge "respect" to previously enacted statutes would not merely be unwarranted. It would verge on dereliction.

Nor, furthermore, are lawmakers required to infuse the laws they pass with full precedential force. As a practical matter, legislation typically *is* intended to have lasting effect and general reach; lawmakers usually strive to enact statutes that will reshape the entire legal order and continue to shape it into the future. But when lawmakers opt not to do this, when they enact bespoke statutes, aimed to dispose of particular cases without sweeping more broadly, nothing has gone wrong.[33] Subject to the (narrow) limits of the Bill of Attainder Clause,[34] Congress is allowed to, and sometimes does, pass statutes related to particular grievances,[35] individual private chattels,[36] or specific pieces of public infrastructure.[37] In fact, the Supreme Court recently lent its blessing—as consistent with separation-of-powers—to statutes that name ongoing court cases *by docket number* and fashion context-specific rules with

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31. The same is true of the executive branch, though institutional dynamics can be more complicated. As a matter of custom—on display, especially, in institutions like the Office of Legal Counsel—the executive branch frequently develops "internal precedent" that exerts some degree of constraint on decision-making. *See* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); *see also* Jack Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112 (2015). The key difference between executive "precedent" and judicial precedent, however, is that the latter is susceptible to normal political change; a later administration's disagreement with an earlier administration is a sufficient basis, in principle, to undo executive branch precedent. In practice, the act of undoing may be less common than its legislative equivalent. But this merely produces a sturdier default regime, one still governed by policy judgments—not "respect for precedent" in the judicial sense.

32. *See* Schauer, *supra* note 6, at 125–26.

33. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995) ("While legislatures *usually* act through laws of general applicability, that is by no means their *only* legitimate mode of action.") (emphasis added).

34. *See id.* ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also *punishment*."); Landgraf v. USI Film Prod., 511 U.S. 244, 266 (1994) ("The [Constitution's] prohibitions on 'Bills of Attainder' in Art. I . . . prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct."); *see also* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324–25 (2016) (outlining other structural constraints on legislative power that functionally preclude certain kinds of targeting lawmaking—such as the Ex Post Facto clause—but also clarifying that none establishes a blanket prohibition on such lawmaking).

35. *See* Pope v. United States, 323 U.S. 1 (1944).

36. *See* Seariver Mar. Fin. Holdings Inc. v. Mineta, 309 F.3d 662 (9th Cir. 2002).

37. *See* Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974).

no general applicability whatsoever.[38] The bottom line is clear: the exercise of political power is not beholden to precedent, in either a backward-looking or a forward-looking sense. It is simply an expression of present-day will.[39]

This stands in marked contrast to judicial power, which certainly tends to express present-day will—but also remains irreducible to it. Others have worked out conceptual arguments along these lines,[40] but one practical illustration of the point is the fact that appellate courts use the first-person plural: speaking as a "we" that extends and acts over time. This "we" is not solely that of the present generation, though it is partly that. It also includes the past generations of jurists who sat on the same bench; who grappled with the same questions and left their mark on the law; and who remain participants in its intergenerational dialogue even as their handiwork is, as it sometimes ought to be, undone.[41]

The idea that stare decisis has structural roots—that it is more than just an interpretive doctrine—has not gone wholly unnoticed. But the emphasis, to date, has been on the limits of judicial power writ large: how stare decisis constrains the federal judiciary, consistent with the design of Article III. On this account, stare decisis becomes the flip side of life tenure and political insulation; it is the burden that accompanies and justifies the benefit.[42]

The "limited judiciary" view runs into a simple problem. Much as stare decisis may constrain the *form* of judicial decision-making, it does not actually limit judicial power relative to the other branches. It may limit that power *at* t_2. But it also, for just the same reason, enlarges judicial power—as a mechanism of entrenchment—*at* t_1. Accordingly, when Randy Kozel (for example) argues that "[w]ithout a practice of deferring to past decisions, life-tenured and salary-protected judges would receive substantial discretion to interpret the Constitution according to their individual

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38. *See Bank Markazi*, 136 S. Ct. at 1310.

39. Indeed, when the exercise of judicial power begins to look "bespoke," it becomes scandalous—the most famous example in recent memory being *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

40. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001); RONALD DWORKIN, LAW'S EMPIRE (1986); s*ee also* Frederick Schauer, *Precedent*, *in* ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW 132 ("If communities are held together and even defined by shared values and norms, among other things, then requiring consistency across time, which is what a norm of stare decisis does, may be . . . part of why we can say we are members of the same community as those who are long dead."); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1048–55 (1990) (developing a Burkean account of self-constitution over time).

41. *See* PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION 88–89 (2016) (exploring the dynamics of this "we" convention). I thank Peter Siegelman for helping me appreciate the salience of this point.

42. *See* Kozel, *supra* note 26; Murphy, *supra* note 26, at 1080 (arguing, in light of separation-of-powers principles, that "*courts* cannot constitutionally eliminate their obligation, deeply rooted in common law, to show measured (though not absolute) deference to their own precedents"); *see also* KOZEL, *supra* note 8, at 32 ("Areas of textual ambiguity raise concerns about leaving the Justices without a meaningful source of constraint. Precedent offers a response. . . . Stare decisis guides the way forward and creates an 'argumentative burden' that future Justices must carry in explaining their decision to break from settled law.").

methodological and normative premises,"[43] he neglects the obverse: that the very same practice of "deferring to past decisions" also affords substantial discretion to a *different* group of judges—those who created the precedent in the first place.[44]

In this sense, the structural value of stare decisis is not that it limits judicial power, per se. Rather, it is that stare decisis distinguishes the form of power wielded by judges from that wielded by other officials. The undoing of precedent is different in kind from ordinary political change. This certainly means, as Justice Kagan recently put it, that "[later-in-time] judges do not get to reverse a decision just because they never liked it in the first instance"[45]—a proposition long regarded as the lodestar of stare decisis.[46] But it also means something more. It means the criteria courts use when deciding whether to undo precedent must differ from the criteria used by other branches to decide whether to cut anchor with past regulations or previously enacted statutes. The exercise of judicial power must be seen as more than a bundle of discrete policy choices, aimed to satisfy present-day needs. It must be imaginable as a dialogue across time, working alongside the political process—but also distinct from it—to reflect and produce our self-conception as a polity.[47]

None of this, to be clear, makes precedent immutable. If there is one thing all participants in the debate—including those who call for the abolition of stare

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43. Kozel, *supra* note 26, at 793.

44. This reality has, not surprisingly, inspired commentators to call for other types of constraint on judicial power across the board. Some, for instance, have called for supermajority voting requirements on appellate courts, in the hope of hedging against outsized power for bare judicial majorities. Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 943 (2003); *see also* Joon Seok Hong, *Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea*, 67 AM. J. COMP. L. 177 (2019) (exploring the use of a 6-3 supermajority rule on South Korea's constitutional court, exploring how mechanism works mechanically—with majority-dissents—and arguing that the mechanism has been beneficial to the court's legitimacy). *But see* Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONSTITUTIONAL L. 1201 (2020). Others, meanwhile, have argued for more expansive compulsory dockets. *See, e.g.*, Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018).

45. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

46. *See, e.g.*, Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1120 n.75 (1995) ("[T]o permit overruling where the overruling court finds only that the prior court's decision is wrong is to accord the prior decision . . . [no] weight *as precedent*."); *see also* Nelson, *supra* note 6, at 2–3 (discussing variations of this argument); Midlock v. Apple Vacations W., Inc., 406 F.3d 453, 457 (7th Cir. 2005) (opinion of Posner, J.) ("[I]f the fact that a court considers one of its previous decisions to be incorrect is sufficient ground for overruling it, then stare decisis is out the window, because no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with; a court has no incentive to overrule them even if it is completely free to do so.").

47. *See* PAUL W. KAHN, THE REIGN OF LAW (2002); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). For further background on the concept of self-authorship in political theory, see RUBENFELD, *supra* note 40; Paul W. Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115, 173–77 (2014); Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 CONSTELLATIONS 26 (1994).

decisis—agree on, it is that precedent may sometimes be dismantled. Values change. Commitments evolve. We are not doomed to be the marionettes of our ancestors. At the heart of our constitutional project is, after all, a promise of self-rule.

What it does mean, however, is that judges must take precedent seriously—not because it will necessarily lead to favorable results,[48] but because precedent reflects the reasoned judgment of predecessors and, on that basis alone, warrants solicitude. And this, in turn, means that whatever else the notion of "respect for precedent" entails, it *at least* requires that when courts revisit past decisions, they approach the task differently than a legislature would. The enterprise of dismantling precedent must be distinguishable, in form, from ordinary political change.

In short, for the distinction between judicial and political power to persist, the former must involve more than an all-things-considered analysis of the precedent's quality or collateral effects. It must not be an extension of ordinary politics, differentiated only by the institutional channels—confirmation battles and captioned opinions, rather than elections and changes to the U.S. Code—through which it takes shape. Rather, it must embrace a *form* of analysis that is distinctively judicial in nature.[49] In the next Part, I offer a proposal to that effect.

II. AN AGGREGATE VOTING RULE

When judges wish to undo past law, an aggregate voting rule should govern the enterprise. The test would be simple. For any given precedent, does the combination of votes across both courts—the court that created the precedent at t_1 and the court seeking to undo it at t_2—total a majority? If so, and only if so, the law may be changed.

A. Durability as a Function of Strength

In terms of separation-of-powers, an aggregate voting rule has two major advantages. First, it would be susceptible to minimal or no manipulation. Any qualitative rule, by virtue of being qualitative, raises concern about less-than-candid reasoning. It gives judges room to offer "substitute arguments": to appear to abide

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48. *See, e.g.*, Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 187–88 (2006) (distinguishing between views of stare decisis anchored in "instrumentalist considerations"—i.e., the ends advanced by adherence to precedent—and views anchored directly in the concept of "binding force," consequences aside); Kronman, *supra* note 40, at 1043 (exploring the idea of "[being] bound, within limits, to honor the past for its own sake: not because doing so is necessary to maximize utility or to guarantee the equality of persons, but for the simpler and more direct reason that it is the past and, simply as such, has some claim to our respect").

49. Note that this claim differs from general "rule of law" justifications for stare decisis. *See, e.g.*, Waldron, *supra* note 7. Although the latter may also have bite, the argument here is that stare decisis (partly) defines the parameters of judicial authority in *our* legal system, not in *every* legal system. If the broader proposition is true, the narrower follows a fortiori, but the narrower may be true—it may be that stare decisis matters distinctively to our legal system—without implicating the rule of law writ large.

by the rule's spirit when, in fact, they are simply wielding political power by other means.[50] As Jacob Gersen and Adrian Vermeule have argued in the context of *Chevron*,[51] a doctrine that "requires judges to internalize a legal norm of deference, but [is] accompanied by none of the traditional mechanisms [that] force decision-makers to internalize the consequences of their choices,"[52] is unlikely to yield much, if any, deference in practice. Especially in the most difficult and controversial cases, a soft norm of deference will always be at risk of getting eclipsed by the urgently felt need to get things right; no matter the longer-term consequences for separation-of-powers.

Second, and more importantly—since there are many ways to reduce manipulability—an aggregate voting rule builds a judicially specific variable into its very fabric: the strength of precedent, as measured by the initial vote-count. The intuition here is not complex or technical. It just feels *different* for a t_2 court to overturn precedent instituted by a narrow majority at t_1, compared to precedent more sturdily forged; abrogating a 7-2 holding, let alone a 9-0 holding, is simply not the same as abrogating its 5-4 counterpart.

Gamble v. United States, a recent case in which the Supreme Court had to decide whether to undo precedent almost two centuries old, provides a helpful example. *Gamble* concerned the "separate sovereigns" rule, which holds that no double jeopardy protection attaches, even for substantively identical prosecutions, if the charges are brought by different sovereigns (most commonly, the federal government and a state). Policy arguments against the rule are legion.[53] In the years leading up to *Gamble*, various members of the Court had voiced deep dissatisfaction with the separate sovereigns idea,[54] and amici from across the political spectrum weighed in to support its undoing.[55]

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50. *See, e.g.*, Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237 (2016).

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

52. Gersen & Vermeule, *supra* note 18, at 680.

53. *See, e.g.*, Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 9–10 (1992) (arguing that the separate sovereign doctrine is a fiction given the reality that state and federal authorities so often work in tandem); *id.* at 8 n.30 (compiling sources that have canvassed other arguments against the rule); *see also* Brief of Amici Curiae Criminal Procedure Professors, Stephen E. Henderson, George C. Thomas III, Michael J.Z. Mannheimer & Kiel Brennan-Marquez in Support of Petitioner at 19–23, Gamble v. United States, 139 S. Ct. 1960 (2019) (arguing that the dual sovereignty exception runs contrary to the purposes of double jeopardy and is unnecessary given the *Blockburger* "same offence" analysis).

54. *See* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. Current 'separate sovereigns' doctrine hardly serves that objective.") (citations omitted).

55. *Compare* Brief of Amici Curiae Constitutional Accountability Center, Cato Institute, American Civil Liberties Union & American Civil Liberties Union of Alabama in Support of Petitioner at 5, Gamble v. United States, 139 S. Ct. 1960 (2019), *with* Brief of Amicus Curiae Senator Orrin Hatch in Support of Petitioner at 2, Gamble v. United States, 139 S. Ct. 1960 (2019).

So the Court was faced with a choice: acknowledge the rule's substantive drawbacks, or defer to its pedigree? Midway through petitioner's argument, after a long back-and-forth about policy, Justice Kagan jumped in with an illuminating missive about stare decisis:

> [Y]ou know, this is an 170-year-old rule, and it's an 170-year-old rule that's been relied on by close to 30 [J]ustices . . . [P]art of what stare decisis is, is a kind of doctrine of humility where we say we are really uncomfortable throwing over [a rule] that 30 Justices have approved just because we think we can kind of do it better.[56]

Of course, thirty is an anomalously large number of "pro" votes. But the point, for our purposes, is more foundational: that voting patterns—as an expression of strength—matter to the stare decisis analysis *at all*. At some level, of course they do; it would be strange if the doctrine we use to operationalize "respect for precedent" was indifferent to precedential strength. Yet existing accounts of the doctrine, in both extant law and the reform proposals traced in Part I, turn a blind eye toward this variable.[57] The "neutral principles" model is overtly instrumentalist. The question is how to advance the relevant non-merits goals—stability, predictability, and the like—while accommodating the possibility of error-correction. Strength matters not. Likewise, any conception of stare decisis keyed to the magnitude of past errors (like the "demonstrably erroneous" standard proposed by Justice Thomas) pays strength no mind; the analysis focuses exclusively on the quality of past decisions, as measured against the t_2 judge's preferred rubric.

These elisions seem odd for a simple reason: abrogating strong precedent simply *means more* than abrogating precedent that was sharply divisive all along. Hence Justice Kagan's question: discarding the separate sovereigns rule would have required concluding that a small battalion of similarly situated jurists had been mistaken about its merits. Though certainly not impossible, it would have been a more momentous act, and required a more pressing sort of justification, than overturning an equivalently flawed 5-4 rule. (No wonder the Court decided not to.[58])

Put simply, not all holdings are made equal. Some are so foundational that their undoing, if it is ever legitimate, would require exigency of a scale that defies imagination. *Marbury* and *Brown* are like this.[59] So is *McCulloch*, and perhaps also

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56. Transcript of Oral Argument at 20, Gamble v. United States, 139 S. Ct. 1960 (2019).

57. The one possible exception is the "humility" view, which may be consistent with my argument—to the extent humility is a distinctively judicial trait—but also admits of no obvious implementation rule. *See supra* note 19 and accompanying text.

58. *See Gamble*, 139 S. Ct. at 1969 ("All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.").

59. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Brown v. Bd. of Educ. of Topeka, 374 U.S. 483 (1954). *See* Solum, *supra* note 48, at 207 (arguing that even if *Marbury* or *Brown* theoretically could be overturned, "we may not be able to imagine the circumstances in which that would happen").

Erie.[60] Other holdings, meanwhile, are more like default rules. They are useful for tiebreaking and solving coordination problems, but also discardable, without much pomp or ado, as sentiment against them begins to consolidate. And many holdings, of course, sit somewhere in between. Although vote count is hardly a perfect spectrometer of these dynamics, it is a reasonable proxy—and going forward, only the more so, once judges have notice of the aggregate rule and are able to factor the import of strength into their voting decisions ex ante.[61]

Beyond its intuitive appeal, the idea that strength matters—that precedents laid down by thin majorities are less weighty than precedents forged through greater coalition—supplies a principled way to distinguish the undoing of precedent from ordinary political change. When it comes to stare decisis, the problem with concepts like stability, predictability, and workability is not that they are unappealing tools of decision-making. The problem is that their appeal proves too much. Tools like these are always at play in legal reasoning; they bear no special relationship to stare decisis.[62] Furthermore—and this is the heart of the matter—the tools are also at play in the legislative process. Keeping the world stable and predictable is something lawmakers ought to consider, as a countervailing value, whenever they are inclined toward reform. Often, of course, the impulse toward reform will prevail; the benefits of change will outweigh the cost to stability. But *in principle*, stability is something lawmakers, like judges, would be irresponsible not to take seriously. Predictability and workability likewise: because these variables play the same essential role in the judicial and legislative processes, they cannot index a distinction between the two. They are sound enough reasons for action. The trouble is, they are sound across the board.

The same is not true of precedential strength. It is only in the judicial context that a direct, monotonic relationship exists between (1) the strength of precedent and (2) its durability. In the political context, the strength of a past enactment—whether, say, a statute passed by the Senate unanimously versus squeaking by 51-49 after prolonged bitter debate—does not, by itself, indicate whether the past enactment merits greater deference. It might; strength can be a sign of hallowedness or wisdom,

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60. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

61. Of course, a better spectrometer—a more sensitive instrument for assessing the strength of precedent—would ideally factor in other qualitative considerations. There is, however, a tradeoff between (1) ensuring sensitive measurement of strength and (2) guarding against manipulability; a qualitatively richer rule, designed to measure strength more exactly, would also be susceptible to more gamesmanship. The aggregate voting rule endeavors to strike a balance between these competing aims. Special thanks to Steven Wilf for helping me appreciate and think through this point.

62. *See* Solum, *supra* note 48, at 188 ("[C]ompar[e] the situation in which there is a prior Supreme Court precedent on a particular point of law to the situation in which there is no prior decision and a new case presents a novel issue of law. Of course, it is possible that the former case involves greater reliance interests than the latter case, but this is not necessarily so. It might well be that the relevant individuals and institutions have made plans based on guesses about the Supreme Court's likely decision or that they have made plans for no good reason at all. From the instrumentalist perspective, reliance interests are valued in terms of consequences of disappointed expectations. Stare decisis is simply one *mechanism* by which reliance interests could be generated.") (emphasis added).

and we can certainly imagine a later-in-time lawmaker responding accordingly. But strength can also accentuate the shortcomings of past enactments. Especially in moments of tumult, when the status quo has come to seem undesirable or even iniquitous, strength may only reinforce the need for its dismantling. An abolitionist newly arrived in Congress in the early 1850s, for example, would presumably be unmoved by the strength of the various Fugitive Slave Acts on the books. If the acts had garnered slim support, that would confirm the importance of overturning them; and if they had garnered *significant* support, presumably that would only impassion the abolitionist's crusade further. Similarly, for a "Contract with America" Republican elected to Congress in the mid-1990s on the promise of restoring fiscal responsibility, it surely would not have mattered whether past appropriations statutes were enacted by strong majorities; if anything, the greater the consensus around profligate spending, the more pressing the need for reform.

In the judicial context, by contrast, as the strength of precedent increases, so does the solicitude it commands. This does not mean strong precedents should always be kept intact. Nor does it mean that a t_2 judge will have less reason, on the merits, to disagree with a strong precedent; qualitative persuasiveness and numerical strength run orthogonal. What it does mean, however, is that the burden required to undo strong precedent is greater, holding everything else equal, than the burden required to undo weak precedent. Unlike in the legislative context, the relatively greater strength of a past case—even its opponents would acknowledge—is never *cause* for undoing. For instance, even for the two Justices in *Gamble* who would have unwound the separate sovereigns rule,[63] the observation that, over the generations, "close to 30 [J]ustices" expressed support for the rule was a *bad fact*—a feature of the case that, unto itself, counseled in favor of keeping the rule, and required compelling reasons to overcome. The fight in *Gamble* was about whether such reasons existed, not whether they were necessary. They undoubtedly were necessary. The dismantling of strong precedent always occurs in spite of—never because of—its strength.

At bottom, the aggregate voting rule is a codification of this sensibility: making up for in sturdiness what it suffers in formalism. The sensibility is distinctively judicial, a marker of what differentiates judges from their counterparts elsewhere in government. For judges, the act of undoing strong precedent is a solemn one; even when necessary, it is never to be done lightly. This is simply not true of ordinary legislation. Lawmakers may have instrumental reasons to keep an existing statute intact, but they owe it no deeper loyalty. Strong or weak, precedential force is not a salient concept; the question is simply how best to advance whatever agenda they were elected to pursue.

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63. *See, e.g.*, *Gamble*, 139 S. Ct. at 2005 (2019) (Gorsuch, J., dissenting) (arguing that stare decisis requires the Court to "pay heed to the considered views of those who have come before us, especially in close cases [like *Gamble*]"—but nevertheless, countervailing reasons are sufficient to overcome respect for precedent).

B. Facilitating Intra-Court Deliberation

In addition to better grounding stare decisis in separation-of-powers, an aggregate voting rule also promises an important practical advantage over the status quo: it would require judges to seek doctrinal compromise rather than play for thin majorities. This is the desirable obverse of a "holdout" problem. As the number of required votes for abrogation increases (depending on the strength of the original precedent), judges further away from the median of the voting bloc would need to be convinced, and they would, accordingly, wield more influence over the deliberative process. So, for example, a 6-3 precedent would require seven votes to overturn, which means the Justice in the seventh position—the holdout vote—would be able to extract the greatest marginal share from the other six. In the status quo world, of course, a formally equivalent dynamic already occurs with respect to simple majorities (hence the power of "swing votes"), but it would be accentuated under an aggregate regime. As Professor Kozel recently put it:

> [I]ncreasing the number of Justices whose votes are needed to overrule a precedent . . . raises the probability that the Court's collective decision to overrule will bridge methodological divides. In a world of pluralism, it will often be difficult to cobble together a supermajority to overrule a precedent unless the precedent is unacceptable from multiple methodological perspectives. Depending on the composition of the Supreme Court, building even a five-Justice majority may require considerable compromise. As the requisite number of votes rises to six or seven, it becomes decreasingly likely that a majority coalition could overrule a precedent without drawing together adherents of competing methodological schools.[64]

These dynamics encourage both moderation and innovation. If a larger bloc of judges is required to locate common ground before undoing precedent, the ground they locate will be correspondingly more moderate: subject to starker limiting principles and more elaborate caveats—an outcome, all things considered, of greater caution.[65] Furthermore, the process of locating the common ground is also likely to unearth new possibilities. For the same reasons that dialogue, reason-giving, and other "process virtues" associated with democratic theory are likely to enrich the field of decision-making in political or majoritarian settings, they are likely to do so in the courts.[66]

In other words, the need to secure more votes would replicate a version of what Zachary Price has helpfully described as "symmetric constitutionalism"—that is, an "ethos or disposition" that drives judges, even "amid intense partisanship and deep political division," to seek forms of "bipartisan symmetry [based on] notions of mutual toleration and broadly shared equal citizenship that ultimately underlie our

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64. Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1178 (2015).

65. *See* Price, *supra* note 21.

66. *See, e.g.*, Kahn & Brennan-Marquez, *supra* note 47, at 173–77 (exploring democratic theory related to compromise- and legitimacy-enhancing quality of deliberation).

system of constitutional self-governance."[67] Professor Price has argued for the incorporation of symmetric constitutionalism, as a mindset, into judicial decision-making across the board: voluntarily, as a matter of institutional prudence.[68] I am quite sympathetic to this argument. The point of the aggregate voting rule would be to pick up where prudence leaves off. It would encourage judges who are *not* endogenously drawn to symmetric constitutionalism to adopt a similar mindset on instrumental grounds—or, at the very least, to replicate some of the mindset's functional effects.

Game-theoretic models of judging reinforce the point. Judicial behavior on multimember courts can be conceptualized as a "repeated game"[69]—a model bargaining environment in which participants know that, despite (sometimes) having divergent goals, they will have to cooperate on a routine basis, amid fluctuating power dynamics. Models along these lines can become extraordinarily complex. But the core insight is straightforward. Eric Posner summarized it well: when players have to cooperate continually and "over a long period of time during which each can observe the actions of others and decide on the basis of those actions whether to continue cooperating or stop," players recognize that "if they cheat in one round they may have no chance of obtaining high payoffs in the next," so they naturally develop "strategies" to reach "[s]ome level of cooperation, and a concomitant production of . . . potential surplus."[70]

As applied to stare decisis, in particular, the idea would be that judges on multimember courts—recognizing they will sometimes be in the "pro" position, and other times in the "con" position, vis-à-vis precedent—have a natural incentive to cooperate with their colleagues.[71] Not because of collegiality or generosity of spirit (though one hopes our most powerful jurists might exhibit these traits, too), but because each judge has an ongoing interest in other judges cooperating with them down the line. Of course, cooperation can mean many different things, and it is certainly no panacea. Disagreement and acrimony will persist. As they should; in a pluralistic democracy, they are signs of health, not decrepitude. The point is that requiring larger, more ideologically diverse coalitions to overturn past law would be unlikely to produce gridlock or inflame division. On the contrary, it would likely result in more cooperation in both ideological directions—as judges, working together repeatedly over time, recognize the value of reciprocal openness to compromise.

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67. Price, *supra* note 21, at 1276.

68. *See id.*

69. For an exemplary analysis along these lines, see Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63 (1994).

70. Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101, 108 (1997).

71. *See* Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward A Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 748–49 (1993) ("The temptation to ignore or distinguish each other's precedents creates a risk that *stare decisis* will unravel," because when one judge "'defect[s]' by either distinguishing or refusing to follow [their colleagues' preferred] precedent," it inspires the same response in reverse—producing a risk of spiraling); *see also* Rasmusen, *supra* note 69; GERHARDT, *supra* note 7 (working out a "golden rule" of precedent along similar lines).

C. Precedents That Are No Longer Good Law

Before moving on to the nuts-and-bolts of the aggregate voting rule, an important caveat bears mention. Namely, the aggregate voting rule should not apply—because stare decisis, in the first instance, does not apply—to precedent that is no longer good law. This may sound obvious, but it has proven less-than-straightforward in practice.

There are three ways that precedent, despite remaining on the books, can cease to be good law. The first is macro-level change that effectively undoes the holding of a t_1 case, making the matter one of first impression at t_2. The clearest (and rarest) case is formal constitutional amendment. The Eleventh Amendment abrogated *Chisholm v. Georgia*; the Fourteenth undid many holdings related to slavery. But even short of formal amendment, there are functional changes so momentous—incorporation, the New Deal—that they effectively modify the entire legal order, unfastening precedent in their wake.[72] When the Supreme Court reexamines a Commerce Clause case that predates *Wickard v. Filburn*, for instance, the t_1 case might plausibly be said to lack precedential value entirely;[73] likewise for cases involving portions of the Bill of Rights that, as of the time of the t_1 decision, had not been formally incorporated against the States.[74]

The second possibility is doctrinal evolution that reconstitutes an entire area of law, draining existing precedent of force. Two recent Sixth Amendment cases—*Hurst v. Florida*[75] and *Alleyne v. United States*[76]—illustrate the point. In both, the Court fortified the requirement, contra past decisions, that juries rather than judges make the factual findings necessary to justify more severe punishment. In *Hurst*, the question was whether juries, in capital cases, must have ultimate decision-making power over the death penalty; reversing course from thirty years earlier, the Court said yes.[77] In *Alleyne*, the question was whether juries must find specific predicate facts that trigger a higher mandatory minimum sentence (such as "brandishing," instead of merely "carrying," a firearm during the crime of conviction). Again, the Court said yes, this time undoing precedent less than a decade old.[78]

Both cases turned on the same point: the Court's watershed holding in *Apprendi v. New Jersey*,[79] which transformed the landscape of Sixth Amendment doctrine, effectively creating a blank slate for *Hurst* and *Alleyne*.[80] Before *Apprendi*, the Sixth

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72. Another example is fundamental changes to the understanding of federal jurisdiction. *Compare* Minturn v. Maynard, 58 U.S. 477 (1854) (categorically exempting certain contracts from admiralty jurisdiction), *with* Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603 (1991) (abolishing the categorical exemption).

73. *See, e.g.*, Bond v. United States, 564 U.S. 211 (2011), *overturning* Tenn. Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Granholm v. Heald, 544 U.S. 460 (2005), *overturning* State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

74. For example, *compare* Ex parte Bain, 121 U.S. 1 (1887), *with* United States v. Cotton, 535 U.S. 625 (2002) (concerning the status of federal indictments).

75. 136 S. Ct. 616 (2016).

76. 570 U.S. 99 (2013).

77. *See* Spaziano v. Florida, 468 U.S. 447 (1984).

78. *See* Harris v. United States, 536 U.S. 545 (2002).

79. 530 U.S. 466 (2000).

80. Although *Apprendi* technically predates *Harris*, the predecessor to *Alleyne*, the two are only one year apart and there can be little doubt—as *Alleyne* itself discussed, and even the

Amendment required only that "a jury of one's peers" finds the facts necessary to establish a crime's formal elements. *Apprendi* expanded the Sixth Amendment to bear on aggravating factors at sentencing—a shift that fundamentally altered the relative allocation of power between judges and juries in the criminal process and, in doing so, severed the jurisprudential link between *Hurst*, *Alleyne*, and their predecessors.[81]

Third, and finally, it is possible for precedent to be on the books but no longer good law if the doctrinal standard is explicitly time-bound, or tethered to evolutionary change, in a manner that causes the t_1 case to become out-of-date. The Eighth Amendment's prohibition on cruel and unusual punishment, for example, depends explicitly on "the evolving standards of decency that mark the progress of a maturing society,"[82] which has been understood as an *empirical* question, answerable only by examining how systems of criminal justice—both across the fifty states, and throughout the world—operate. In light of this, precedent is, at most, of minimum value, since its factual predicates are constantly shifting. Consider *Roper v. Simmons*.[83] There, the question was whether juvenile offenders may constitutionally be sentenced to death, which *Stanford v. Kentucky* had answered in the affirmative sixteen years earlier.[84] In spite of *Stanford*'s recency, the *Roper* Court had little trouble coming to the opposite conclusion, since—consistent with the doctrine—conditions on the ground had evolved. In the intervening period, "objective indicia of consensus [against putting juveniles to death]" had come to light, transforming the presentation of the question at t_2.[85]

The same would also be true, presumably, of doctrines that track the "clear establishment" of law at any given point in time—qualified immunity,[86] for instance, or federal habeas.[87] A t_1 case holding that Proposition X was not clearly established

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dissent seemed to concede—that *Apprendi*'s full implications were still being worked out as of the time *Harris* came down.

81. Intervening *statutory* changes can also be transformative in a manner that pulls the t_1 question and the t_2 question apart. Examples include: the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") tightening the prerequisites of federal habeas jurisdiction (*compare* Townsend v. Sain, 372 U.S. 293 (1963), *with* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (moving from a "deliberate bypass" standard to a "cause and prejudice" to determine—post-AEDPA—when habeas actions lie in federal court, notwithstanding their final resolution in state court)), as well as amendments to the Patent Code that, by redefining misuse, affect the definition of "market power" for antitrust purposes (*compare* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), *with* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006)).

82. Moore v. Texas, 137 S. Ct. 1038, 1048 (2017).

83. 543 U.S. 551 (2005).

84. *See* Stanford v. Kentucky, 492 U.S. 361 (1989).

85. 543 U.S. 551, 564 (2005); *see also* State ex rel. Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) (en banc) (arguing that, "in the fourteen years since *Stanford* was decided, a national consensus [had] developed against the execution of juvenile offenders," giving the Supreme Court of Missouri grounds to disregard *Stanford* as precedent).

86. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (transforming qualified immunity into an "objective" inquiry, mobilized around the question of whether the right in question had been "clearly established" at the moment of the alleged violation).

87. *See* 28 U.S.C. 2254(d)(1) (indicating that a state court decision may be set aside on federal habeas review only if the decision was "contrary to, or involved an unreasonable

as of that moment may (or may not) remain in force at t_2. But, either way, it would be a merits issue; the question would be whether, at t_2, Proposition X continued to be unclear. If the proposition had become well-established in the interim, the t_1 case would pose no obstacle. It would, in an important sense, cease to be good law.[88]

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I do not mean to pretend there are always sharp lines where, in fact, the boundaries sometimes feather. In certain cases, it may be difficult to determine whether an intervening change has so transformed the doctrinal landscape as to render the t_1 case inert;[89] or likewise, if a doctrinal standard is so dependent on background facts—as in the Eighth Amendment example—that precedential value naturally tends to deplete over time.

One thing, however, is clear. A strong indication that precedent remains good law—that nothing in the passage of time or change of circumstance has altered the legal question—is when the only arguments marshaled by t_2 judges concern merits-disagreement with their t_1 counterparts. *Trammel v. United States* is a good example. The issue in *Trammel* was whether, in the context of federal prosecutions, spousal privilege should enable one spouse to bar the other's voluntary testimony.[90] Twenty-two years earlier, in *Hawkins v. United States*, the Court had squarely held yes.[91] In

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application of, clearly established Federal law, as determined by the Supreme Court of the United States").

88. This reasoning may also extend, in some circumstances, to cases involving changes to background economic conditions—depending on how economically tethered the underlying legal rule is. Antitrust doctrine, for example, takes its cues almost entirely from background economic conditions. *See, e.g.*, State Oil Co. v. Kahn, 522 U.S. 3 (1997) (holding, contra past precedent, that vertical price-fixing should not be per se illegal, but rather analyzed under the rule of reason, because of both economic change and an evolved understanding of economic theory). And tax is similar, if somewhat more multifarious in its policy goals. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (holding, contra past precedent, that interstate taxation power should not depend on a physical presence requirement, given "the [i]nternet's prevalence . . . [and] changed . . . dynamics of the national economy").

89. A good example, from just last term, is *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), concerning state exhaustion requirements for constitutional takings claims. The previous precedent, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), had held that would-be plaintiffs in regulatory takings cases have to seek "just compensation" through state-law mechanism before bringing a constitutional challenge. In overturning this rule, the *Knick* majority offered various arguments; one was that an intervening case—*San Remo Hotel v. City of San Francisco*, 545 U.S. 323 (2005)—had changed the rules of preclusion, such that plaintiffs in a *Williamson County*-type situation would face the prospect of (1) seeking compensation through a state-law mechanism, (2) getting the claim for compensation denied, and (3) having a federal court turn around and afford the denial preclusive effect. This "trap," the *Knick* Court reasoned, had been "totally unanticipated in *Williamson County*," vitiating the latter's precedential force. 139 S. Ct. at 2174.

90. 445 U.S. 40 (1980).

91. *See* Hawkins v. United States, 358 U.S. 74 (1958).

Trammel, it reversed course, offering a host of policy arguments and marshaling "reason and experience" to its cause.[92]

Although Justice Stewart concurred in the *Trammel* Court's judgment, he wrote separately to make clear that he could not

> join an opinion that implies that 'reason and experience' have worked a vast change since the *Hawkins* case was decided in 1958. . . . The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the *Hawkins* case in 1958. I thought those arguments were valid then, and I think so now. The Court is correct when it says that '[t]he ancient foundations for so sweeping a privilege have long since disappeared.' But those foundations had disappeared well before 1958; their disappearance certainly did not occur in the few years that have elapsed between the *Hawkins* decision and this one.[93]

At bottom, in other words, what distinguished *Trammel* from *Hawkins* was simply that the Justices hearing the former case were convinced by arguments that had failed to persuade their predecessors. The two just disagreed. That their disagreement played out over multiple decades was irrelevant; the passage of time had done nothing to transform the issue. As such, *Hawkins* was clearly good law—it was simply good law that the *Trammel* majority, rightly or wrongly, found objectionable on the merits. What bothered Justice Stewart was the pretense that something *besides* disagreement was afoot: something that made it unnecessary to pay *Hawkins* the respect that, as precedent, it was rightly owed.[94]

III. DOCTRINAL MECHANICS

Now for some brass tacks. How would an aggregate voting rule work in practice? This Part begins with a high-level outline and then transitions into more granular consideration of the mechanical details.

A. Broad Strokes

At a high level, the aggregate voting rule would be straightforward. Once the t_2 Court assured itself, consistent with the discussion above, that the precedent on the table was still good law, the analysis would proceed directly to the merits: what is the right answer to the legal question under dispute? Engagement with this question could, and presumably often should, involve attention to traditional hallmarks of

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92. 445 U.S. at 47–53.

93. *Id.* at 53–54 (Stewart, J., concurring) (internal citations omitted).

94. Justice Breyer and Justice Kagan both have opinions from last term suggesting this dynamic. *See* Franchise Tax Bd. Of California v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) ("It is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question. The majority has surrendered to the temptation to overrule. . . ."); *Knickt*, 139 S. Ct. at 2190 (Kagan, J., dissenting) ("[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance.").

stare decisis—stability, predictability, and the like—insofar as those variables *bear* on the right answer. After all, these are among the variables that courts typically consider when deciding matters of first impression. Judges are not blind to the potentially destabilizing effects of their decisions; nor should they be. Sensitivity to reflective equilibrium has always been an aspect of sound judging, at least in the common law world.[95] But once the judges at t_2 make up their minds about the case's merits, there would be no special "stare decisis factors" to consider. The votes would simply be tallied, and the precedent would either be overturned or not.

But wait—a skeptic might say—if the aggregate voting approach permits judges to simply "skip" to the merits, that sounds like a betrayal, not a vindication, of the respect for precedent ideal. Traditionally, the point of stare decisis has been to counteract the judicial temptation to disregard the work of past judges. By allowing judges to proceed directly to the merits, the aggregate voting rule could be said to *indulge* that temptation, in lieu of keeping it at bay.

This objection meets with two responses. First, nothing in the aggregate vote rule precludes respect, at t_2, for the handiwork of judges at t_1. In fact, the analytic criteria that have historically been used to operationalize such respect—stability and reliance—could still factor into the decision-making process. They would simply be folded into the merits. Second, an aggregate voting regime does more than simply enable consideration of past views at t_2. In fact, it actively *encourages* such consideration, by training attention on a variable—precedential strength—that, in cases with a strong t_1 majority, could plausibly prompt a skeptical judge at t_2 to take the view of her predecessors more seriously. The reason is simple. Being reminded that a position garnered substantial (as opposed to marginal) support from one's epistemic peers is, all else equal, a reason to reevaluate one's skepticism.[96] Of course, the *mere* fact of significant past support will never—and should never—be sufficient, standing alone, to dislodge t_2 skepticism. But it remains a relevant variable nonetheless, and one that the aggregate voting rule is more likely to highlight than to suppress.

B. Details

With that overview in mind, we now turn to a number of hurdles that would beset an aggregate voting rule in practice. None is insurmountable, but each deserves attention before resting assured of the approach's viability.

1. Concurrences

The first hurdle is how to count concurrences. Often, the vote tally at t_1 will be easy to determine; it will simply require noting the size of the majority voting bloc. Other times, however, the task will prove more difficult in light of ambiguity about which judges actually *comprise* the majority. In other words, an aggregate voting

95. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 33–49 (2010) (outlining the foundational role of "traditionalism"—and its link to stability—in the common law and common law reasoning).

96. For background on these concepts, see Alex Stein, *Law and the Epistemology of Disagreements*, 96 WASH. U. L. REV. 51 (2018).

rule would encounter a variant of the so-called "*Marks* problem"—that is, how to count concurring votes that bear a nonobvious qualitative relationship to the majority opinion.[97]

Consider a case like *United States v. Jones*.[98] The question was whether, consistent with the Fourth Amendment, the police may place a GPS tracker on a suspect's car and proceed to track his movement on public roads for upwards of a month. All nine Justices agreed the answer was no. But they differed sharply as to the rationale. Four Justices would have resolved the question exclusively on "trespass" grounds: the problem arose when police installed the tracker in the first place, since doing so—physically interfering with a car—amounted to a common law trespass.[99] Meanwhile, four *other* Justices would have bypassed the trespass issue entirely and focused instead on the privacy violation occasioned by a month of ongoing surveillance.[100] Finally, one Justice—Justice Sotomayor—joined the trespass opinion (rendering it the formal majority opinion) but also penned a solo concurrence that, as a matter of Fourth Amendment principle, swept even more broadly than the privacy-focused concurrence.

In terms of voting composition, *Jones* is more complex than usual. But the complexity also underscores two important issues. The first is that, before the "pro" votes for a given precedent can be tallied, it is necessary to determine exactly *which* precedent—which legal proposition, or set of propositions—is actually under dispute. Were *Jones* ever to be revisited, for instance, the aggregation dynamics would differ based on which component of the case was up for grabs. If a t_2 case (sometime in the future) was poised to reevaluate the overall question presented (i.e., "May the police install a GPS tracker and follow a suspect around for a month?"), *Jones* would be a 9-0 precedent. If, on the other hand, the question under dispute at t_2 were narrower (say, "Does it count as a Fourth Amendment search for police to install a GPS tracker on a car?"), precedential strength would diminish accordingly. To a large extent, then, the scope of precedent for aggregation purposes will depend on how the reevaluation effort is framed at t_2. The more fundamental that effort, the steeper the climb—if later-in-time judges wish to cut to a precedent's heart, rather than trimming or refining its periphery, they will be more likely, on balance, to encounter a sturdier voting bloc from t_1.

The second issue is that, once the relevant precedent is identified, the size of the majority voting bloc—the number of "pro" votes—needs to be tallied. Here, the only practicable test is a rather formalistic one: how many judges joined the majority opinion? In *Jones*, the answer is five; of the concurring Justices, only Justice Sotomayor chose to sign on to the majority opinion as well. Like any formalistic test, this one is likely to clash, at times, with the deeper, qualitative reality. In *Jones*, for example, it certainly feels (to me, at least) like Justice Sotomayor *actually* does not care much for the trespass framework; but at day's end, she endorsed it by joining

97. *See generally* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943 (2019) (discussing creation of precedent on a fragmented Court); Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 806–18 (2017) (discussing possible methods of application for the *Marks* rule).

98. 565 U.S. 400 (2012).

99. *Id.* at 404–05.

100. *Id.* at 419 (Alito, J., concurring).

the majority opinion. We can also imagine the inverse case, where it feels as though some judges outside the formal majority nevertheless "joined in spirit," and, in an ideal world, should have their votes count for aggregation purposes.[101] Ultimately, however, the formalism here is a feature, not a bug, even as it may complicate the retrospective application of an aggregate voting rule (which may or may not be wise in any case). The important point is that *prospectively*, a rule tethered to formal vote composition—rather than a more qualitative test—would give judges the power to control how their votes are counted.

2. Overlap in Court Membership

A second issue related to vote counting looms: potential overlap of specific jurists. If some of the same judges are on the relevant court between t_1 and t_2, should this change the aggregation analysis? In the case of a changed mind, the answer is easy: no. If (1) the judge was part of the t_1 majority but has since come to doubt the precedent's validity, or (2) the judge dissented at t_1 (or concurred without joining the majority opinion) but has since become persuaded of the precedent's merit, the change ought to register. Judges, in other words, are not "locked in" to their positions from t_1. Consistent with the idea of legal development as a dialogue across time, the evolution of an individual jurist's understanding of the law should be allowed to unfold dynamically.

More difficult are cases of stasis. If a judge was also on the relevant court at t_1, meaning their vote has already been registered in the majority or dissent (depending on direction), and they have *not* changed their mind in the intervening time, should the vote still count toward the t_2 tally? Here, I confess to ambivalence; a reasonable regime could be designed either way. It is not crucial for the regime to register dynamic consistency in a particular jurist's views, because the latter—unlike a changed view—is not necessarily an indication of law's development over time. It *could* be; but it could equally be a sign of obstinance. Ultimately, a default rule would have to be configured; and in keeping with the separation-of-powers framework traced in Part I, it could (in the case of a judge's uniform vote across time) be configured either way.

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101. An arguably similar example is *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which involved a four-Justice plurality with Justice White concurring in the result; when the case was overturned by *Seminole Tribe of Florida*, the dissenters argued that *Union Gas* was effectively *not* a plurality opinion but rather a true majority, given its qualitative texture. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 94 (1996) (Stevens, J., dissenting) ("In a rather novel rejection of the doctrine of *stare decisis*, the Court today demeans [*Union Gas*] by repeatedly describing it as a 'plurality decision' because Justice White did not deem it necessary to set forth the reasons for his vote. . . . [But] the arguments in support of Justice White's position are so patent and so powerful that his actual vote should be accorded full respect."). Without taking sides in this particular dispute, the point is that, under the vote-counting framework proposed here, cases like *Union Gas* would qualify as plurality opinions unworthy of any stare decisis effect—since the aggregate voting rule would always be satisfied—and of course, going forward, Justices would understand this rule and be able to plan their votes accordingly.

3. Atypical Dispositions

The final issue related to vote counting—no doubt rarer than the tallying problems just explored, but still important—is how to deal with atypical dispositions. For example, should a short per curiam opinion by the Supreme Court, issued without the benefit of oral argument, count as 9-0 precedent equivalent to a full-length unanimous opinion? I am not trying to imply the answer is no, only to flag the question as requiring resolution before the aggregate approach could be put into effect.

Prompting similar questions—though even less common than per curiam opinions—are true summary dispositions. For example, *Obergefell v. Hodges*, which famously invalidated state law bans on same-sex marriage,[102] required overturning the contrary precedent of *Baker v. Nelson* from 1972,[103] in which the Court summarily denied review on the question of whether the U.S. Constitution prohibits states from limiting marriage to heterosexual couples. Because the petition in *Baker* fell under the Court's mandatory rather than discretionary jurisdiction, the denial was, by necessity, a merits determination; by finding no "substantial federal question" presented, the Court effectively held that gay marriage was not a matter of constitutional right.[104] Indeed, in the years leading up to *Obergefell*, lower courts routinely treated *Nelson* as controlling precedent.[105]

Should *Baker* count as a 9-0 unanimous opinion? Because the denial of review generated no dissents (or even concurring opinions outlining an alternate, or more tempered basis, for the holding), it was, in a formal sense, the act of a unanimous Court. Yet it is also possible that at least some Justices dissented behind the scenes. Up to three might have thought the case presented a viable constitutional question—and even regarded gay marriage as a matter of constitutional right—without being able to change the review decision. Furthermore, it may be that a one-line, unreasoned order, even if it qualifies jurisprudentially as a holding on the merits, is simply not the sort of precedent that demands full force.[106]

These are knotty questions; I am not sure fully satisfying answers exist. Courts, in the course of effectuating the aggregate approach, would have to make judgment

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102. 135 S. Ct. 2584 (2015).

103. 409 U.S. 810 (1972).

104. *See, e.g.*, Andrew Janet, Note, *Eat, Drink, and Marry: Why* Baker v. Nelson *Should Have No Impact on Same-Sex Marriage Litigation*, 89 N.Y.U. L. REV. 1777, 1778–89 (2014) (explaining why *Baker* was formally a merits ruling and exploring its implication); Lyle Denniston, *Gay Marriage and* Baker v. Nelson, SCOTUSBLOG (July 4, 2012, 4:52 PM), https://www.scotusblog.com/2012/07/gay-marriage-and-baker-v-nelson/ [https://perma.cc/CCT3-5KW9] (likewise).

105. *See, e.g.*, Massachusetts v. U.S. Dep't of Health Hum. Servs., 682 F.3d 1, 4 (1st Cir. 2012) ("*Baker* is precedent binding on us unless repudiated by subsequent Supreme Court precedent.").

106. For an argument along these lines, see Janet, *supra* note 104, at 1784–89. *But see* Windsor v. United States, 699 F.3d 169, 193–94 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part) (arguing that summary dispositions on the merits are opinions with full precedential effect).

calls whenever a t_2 case raises the same legal questions as a short-form precedent from t_1.[107]

4. Ties

Another practical hurdle is how to resolve ties. Although a tie-breaking rule could toggle either way—the principle of intergenerational commitment does not, on its own, dictate the answer to the tie-breaking question[108]—I submit, for two reasons, that ties should net in favor of stability rather than change.

The first reason is that, in the most closely analogous context, ties already net in favor of stability. The context is appellate review that culminates in equipoise, as when an appeals court sits en banc, and the same number of judges vote to affirm as vote to vacate,[109] or likewise, a short-handed Supreme Court (e.g., because of a pending vacancy) is deadlocked 4–4.[110] When this occurs, the legal result is the continued instatement of the relevant opinion below, be it administrative or judicial.[111] The same principle could easily be applied, *mutatis mutandis*, to a deadlocked t_2 vote as to the status of t_1 precedent—with the legal result being maintenance of the precedent intact.

The second reason to have ties net in favor of stability is that it would dampen the "swing vote" dynamics with respect to 5–4 precedent—the concern, in other words, that a one-judge change in the Court's membership could potentially destabilize all narrowly-drawn precedent from the Court's previous era. Of course, the possibility of doctrinal pendulum-swings relatively close together in time would not be

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107. *Obergefell* is an example. Although the *Obergefell* majority made a faint-hearted attempt to argue that the constitutional question had fundamentally transformed since *Baker*, this position proves difficult to sustain. To be sure, the issue of whether marriage may be permissibly limited to heterosexual couples is certainly one about which (1) people fiercely disagree, and (2) general sentiment has evolved significantly (and may continue to evolve) over time; indeed, much of the *Obergefell* Court's argument in support of the "different question" view focused on how much public norms regarding homosexuality had changed since the 1970s. *See* 135 S. Ct. at 2594–97. Obviously, however, a change in public (or judicial) sentiment by itself is not enough to extinguish an old opinion's precedential force; if it were, stare decisis would lose all bite.

108. In other words, it is conceivable that an aggregate approach—consistent with the idea of commitment—would embrace a "tie resolves to change" rule, such that (say) a 6–3 precedent could be overturned by a 6–3 supermajority at t_2. Whatever its wisdom, there would be nothing conceptually infirm about that outcome.

109. For background on this dynamic, see Daniel Egger, Note, *Court of Appeals Review of Agency Action: The Problem of En Banc Ties*, 100 YALE L.J. 471 (1990).

110. *See generally* Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245 (2016).

111. Truth be told, the "why?" behind this practice is poorly theorized. It is hardly obvious, for example, that when an appellate court cannot definitively resolve Question X, the right solution is always to defer to the lower court's view, rather than (say) vacating any opinions and orders that depend on a specific answer to Question X, and letting the issue ripen elsewhere. But, settled practice, reaching back many generations, has been to defer to lower courts in the face of appellate equipoise—so it provides a sturdy analogy for our purposes.

eliminated entirely; multi-judge turnover would still enable them. But a tie-goes-to-precedent rule would, on the margins, produce an entrenchment effect.[112]

All that said, there is an important caveat here: unanimous precedent would presumably have to be treated differently—ties would have to net in favor of change—lest it become *irrevocably* entrenched. This small deviation from the normal tie-breaking rule, however, should be no cause for concern, since (1) unanimity among an ideologically diverse group of jurists at t_2 is strong evidence of a dispositive shift in public understanding; and (2) double-unanimous shifts often occur in response to macro-level changes in the legal landscape,[113] increasing the odds that the precedent has ceased to be good law.

5. How Would Actual Opinions Look?

A final practical hurdle is the composition of opinions. When a t_2 majority believes t_1 precedent should be overturned, but that majority is insufficiently numerous to clear the aggregate hurdle, what should happen? Here, I admit to standing on the proverbial shoulders of other scholars, who have already worked out careful answers in the context of supermajority voting proposals. Jed Shugerman, for example, has explained that with a 6–3 supermajority rule, if only five Justices managed to come to consensus, then "instead of four Justices dissenting . . . [there would be] five Justices effectively dissenting."[114] In other words, it would be business as usual, the only difference being that, depending on the aggregation dynamics, a majority would not be necessary to yield an opinion for the Court. Rather, a minority could do so—just as with plurality opinions in the status quo world—and a majority would have an opportunity to dissent.

Of course, courts would also have the option to issue more circumspect opinions, if they thought the situation called for it. For example, it is conceivable that in cases where a t_2 Supreme Court was unable to satisfy the aggregate voting rule in an especially contentious setting, it might opt to release a short per curiam opinion, outlining that result, instead of airing out the internal dynamics of disagreement. Whatever the exact form of every holding in every case, the point, generally speaking, is that the problem would be manageable. An aggregate voting rule would present no unique problems or challenges—beyond the overarching need for institutional delicateness, case-by-case.

IV. EXAMPLES FROM SUPREME COURT JURISPRUDENCE

What does an aggregate voting rule hold in store for judicial practice? Would it hinder or facilitate the healthy evolution of doctrine? These are deep questions, hard to answer in the abstract because they depend on many variables—jurisprudential

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112. For background on this dynamic, see Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631 (2017).

113. *See, e.g.*, Minturn v. Maynard, 58 U.S. 477 (1854) (9–0 decision), *overruled by* Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991) (9–0 decision); Ex parte Bain, 121 U.S. 1 (1887) (9–0 decision), *overruled by* United States v. Cotton, 535 U.S. 625 (2002) (9–0 decision).

114. Shugerman, *supra* note 44; Hong, *supra* note 44.

priors about what qualifies as "healthy evolution"; preferences about the ideal level of moderation in doctrine; predictions about the adaptive behavior of judges as they navigate a regime defined by aggregate voting; and so on. Still, it seems possible to identify a few paradigm cases in both directions: success stories, which highlight the benefits of an aggregate voting rule, as well as cautionary tales, which underscore the shortcomings of a regime, like the status quo, that fails to build respect for precedent into its analytic mechanism. The Part concludes by examining some of the patterns that emerge from the last forty years of jurisprudence, when the Court began to dismantle certain precedents from the Warren era. As one might expect, the results are checkered. Sometimes, the Court's approach to stare decisis feels rather majestic—and quite different from ordinary political change. Other times, it seems indistinguishable from raw partisanship.

A. Success Stories

Here, as in so many aspects of constitutional law, *Brown v. Board of Education* proves a lodestar.[115] The opinion is famously unanimous—a fact that has surely contributed to its lasting power.[116] When multi-member courts speak with one voice, especially if they speak as resoundingly as they did in *Brown*, the effect is significant; it infuses the opinion with an unmatched combination of legitimacy and gravitas.

Stare decisis highlights another reason why *Brown*'s unanimity matters: *Plessy v. Ferguson*, which *Brown* effectively overruled,[117] was an 8–1 opinion, meaning that only a 9–0 opinion would have been capable—under an aggregate voting regime—of dislodging it. Of course, neither *Plessy* nor *Brown* was decided under an aggregate voting regime, so the point is necessarily speculative; and I certainly do not mean to imply that *Brown*'s majesty is reducible to numbers. Even so, there is something about the opinion's majesty, something about the way it reckoned with *Plessy*'s "separate but equal" theory so directly—and vanquished it so resoundingly—that vindicates the idea of respecting precedent. *Brown*, put simply, *did* respect the gravity of *Plessy*. It took seriously the fact that the latter had, for sixty years, been a feature of our constitutional order: one that cried out for dismantling, to be sure, but also whose dismantling was not to be undertaken lightly. It was something to be celebrated as fervently as *Plessy* itself was something to be lamented—an act worthy of solemnity, perhaps of the sort that only a unanimous opinion can convey.[118]

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115. 347 U.S. 483 (1954).

116. *See* Hon. Constance Baker Motley, *The Historical Setting of* Brown *and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 15 (1992) ("A critical aspect of the Court's opinion in *Brown I* was its unanimity. . . . When the Supreme Court decided *Brown I* in 1954, no one expected a unanimous decision. As we now realize, however, unanimity was absolutely necessary to the implementation of *Brown I*, the Supreme Court's most controversial decision at that time.").

117. Plessy v. Ferguson, 163 U.S. 537 (1896). For background on this theme, see Jack M. Balkin, Plessy*,* Brown*, and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689 (2005).

118. *See* Dwight G. Duncan, *A Modest Proposal on Supreme Court Unanimity to Constitutionally Invalidate Laws*, 33 BYU J. PUB. L. 1, 5–6 (2018) (arguing judicial legitimacy is at its height, especially in cases involving the invalidation of laws, when courts issue unanimous opinions).

In other words, the relationship between *Brown* and *Plessy* would be different if the strength of either case, as expressed through vote count, had been different. If *Plessy* had been a divisive case—say a 5–4 opinion—it would not have operated as the legal keystone of segregation. Of course, Jim Crow may still have flourished in the post-Reconstruction South, and *Brown* would have been no less important for overturning a weak rather than strong judicial apology for segregation, but the significance of the abrogative act would have changed. Likewise, if *Brown* had been divisive, it still would have undone *Plessy* and set the wheels in motion for the Civil Rights Act of 1964 and the eventual disintegration of Jim Crow, but again, the significance would have been different. It would have registered less as a transcendent call-to-action than an outcome—however morally triumphant—of political will.

Brown is an especially vaunted example of the historical vindication to which an aggregate voting rule can contribute. But down-to-earth examples abound as well. For a relatively recent one, consider *Pearson v. Callahan*,[119] in which the Court reversed a nearly unanimous case from only eight years prior, *Saucier v. Katz*.[120] The latter had held that in cases involving qualified immunity, lower courts must address the merits even if the case could, in principle, be disposed of on immunity grounds alone; that is, they must decide whether a right had been violated, so as to "support the Constitution's elaboration,"[121] before moving on to whether the violation was well-enough codified to warrant a remedy.[122] In short, the short-lived *Saucier* rule forbade lower courts from concluding that no constitutional elaboration is required, since the case can be resolved on non-merits grounds. Rather, it required them to advance the doctrinal ball, even if the ultimate conclusion was that no remedy would be available to this particular plaintiff.

Saucier unleashed a maelstrom of critique. Appellate judges began waxing poetic about "uncomfortable exercise[s]" in needless lawmaking,[123] "puzzling misadventures in constitutional dictum,"[124] and "well-intentioned" efforts that ultimately end in "hypothetical and vague" legal rules.[125] Similar critiques also sprouted up in district court opinions,[126] as well as academic commentary.[127] And

119. 555 U.S. 223 (2009).

120. 533 U.S. 194 (2001).

121. *Id.* at 201.

122. *See generally id.*

123. Dirrane v. Brookline Police Dep't, 315 F.3d 65, 69–70 (1st Cir. 2002).

124. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006) (cited in Scott v. Harris, 550 U.S. 372, 388 (2007) (Breyer, J., concurring)); *see also, e.g.*, Lyons v. City of Xenia, 417 F.3d 565, 583 (6th Cir. 2005) (Sutton, J., concurring) ("[T]he point is not to *maximize* the number of constitutional rulings but to *optimize* constitutional rulings . . . ."); Ehrlich v. Town of Glastonbury, 348 F.3d 48, 56 (2d Cir. 2003) ("Delimiting the scope and nature of constitutional rights in dicta entails obvious concerns.").

125. Kwai Fun Wong v. United States, 373 F.3d 952, 956 (9th Cir. 2004).

126. *See, e.g.*, Viereckl v. Ramsey, No. 05 C 6292, 2006 WL 3319973 (N.D. Ill. Nov. 13, 2006) (reviewing the case law criticizing the *Saucier* sequencing rule but reluctantly following it); Taylor v. Humphries, 402 F. Supp. 2d 840, 844 n.5 (W.D. Mich. 2005) (calling the *Saucier* rule "contrary to the general rule of constitutional adjudication").

127. *See, e.g.*, Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L.

most starkly, some judges simply decided to rebel, refusing to apply the *Saucier* rule as written.[128]

Not surprisingly—with the risk of mutiny on its hands—the Court quickly decided to change tack. Writing for a unanimous Court in *Pearson*, Justice Alito acknowledged the drawbacks of the *Saucier* framework, toggling from a mandatory regime to a permissive one. Under *Pearson* (which is still good law), lower courts are allowed but not required to reach the merits in qualified immunity cases. For our purposes, the point is not to choose sides on the merits; it is to notice, as with *Brown*, how different *Pearson* would have seemed had it been a divisive (say, 5-4 or 6-3) opinion rather than a unanimous one. In that case, the Court's reversal-of-course may have been no less warranted—depending on one's view of the merits—but it would have reflected more a contingent change in membership than a deeper change of heart.

B. Cautionary Tales

If cases like *Brown* and *Pearson* spotlight the virtues of an aggregate voting rule, other cases speak to the inverse: the dissatisfaction provoked by precedential change that cannot readily be distinguished from its ordinary political counterpart. Behold two recent examples, both politically charged—but in opposite directions.[129]

REV. 847, 882–95 (2005); Leval, *supra* note 124.

128. *See, e.g.*, *Ehrlich*, 348 F.3d at 57 ("[I]n appropriate, discrete cases, we may move directly to the second step of the *Saucier* test and refrain from determining whether a constitutional right has been violated."); Koch v. Town of Brattleboro, 287 F.3d 162, 166 (2d Cir. 2002) ("Although we normally apply this two-step test, where we are convinced that the purported constitutional right violated is not 'clearly established,' we retain the discretion to refrain from . . . the first step of the test . . . ."). At one point, in fact, the Court declined to follow (in the *Saucier* era) its *own* rule. *See* Brosseau v. Haugen, 543 U.S. 194 (2004).

129. With these examples, I hardly mean to imply that the dynamic is limited to politically charged cases. I use them simply for illustrative purposes. A good example of a less politically charged case (though one still split along partisan lines) is *Bowels v. Russell*, 551 U.S. 205 (2007), which concerned the availability of equitable tolling for habeas appeals. Holding such relief impermissible, the *Bowels* Court undid an obscure fifty-year-old rule known as the "unique circumstances" doctrine, which permitted lower court judges to fashion ad hoc equitable exceptions—in light of idiosyncratic facts—to an otherwise-applicable jurisdictional bar. The issue in *Bowels*, all agreed, was a pure question of law; it concerned the scope of judicial power to relax, case-by-case, a legislatively imposed jurisdictional bar based on filing deadline. There was likewise no dispute about the relationship between *Bowels* and the t_1 case—*Harris Truck Lines v. Cherry Meat Packers*, 371 U.S. 215 (1952)—inaugurating the "unique circumstances" doctrine. Both teed up the same jurisdictional question, and nothing in the interim half-century had altered its presentation. For other examples along the same lines, see, for example, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which concerned the applicability of the FLSA to state governments; *Payne v. Tennessee*, 501 U.S. 808 (1991), which involved the admissibility of victim impact reports at a capital-sentencing hearing; and *United States v. Halper*, 522 U.S. 93 (1997), which concerned the scope of Double Jeopardy protection after a defendant has already been civilly sanctioned for the same conduct.

The first is *Citizens United v. FEC*, the well-known 2010 case about First Amendment protections for corporate political expenditures.[130] Various issues were presented in *Citizens United*, but for our purposes, the important precedent is *Austin v. Michigan Chamber of Commerce*,[131] which upheld limits on the ability of corporations—simply because they are corporations—to make independent expenditures (i.e., election-related expenditures apart from campaign contributions) from their general coffers. The worry, according to the *Austin* Court, was not "the mere fact that corporations may accumulate large amounts of wealth," but that corporate wealth, amassed with the benefit of a "state-conferred [business] structure," can "unfairly influence elections when it is deployed in the form of independent expenditures."[132] Put differently, the concern is not how *much* corporations spend, per se, but whether their "expenditures reflect actual public support."[133] Mindful of this risk, the Court distinguished between laws that generally curtail the ability of corporations to outlay money toward elections—which the First Amendment forbids—and laws, like the one actually at issue in *Austin*, that require corporations to keep a "segregated fund" that is earmarked, and initially solicited, for the specific purpose of making political expenditures.[134]

Fast forward twenty years, and a rather different view of corporate expenditure limits came to triumph. Writing for a five-Justice majority in *Citizens United*, Justice Kennedy argued that *Austin* rested, at bottom, on the claim that "political speech may be banned based on the speaker's corporate identity," an idea he thought anathema to "ancient First Amendment principles."[135] Kennedy's analysis had two parts. The first was a conceptual argument—based on foundational "mistrust" of government and correlative faith in an "open marketplace" of ideas[136]—for being wary of limits on political speech based on the type of speaker.[137] The second was a genealogy of pre-*Austin* cases, all of which, on Kennedy's reading, "forb[ade] restrictions on political speech based on the speaker's corporate identity."[138]

On the merits, one or both of these arguments may succeed. As they relate to stare decisis, however, both arguments trip the same hurdle: namely, that the *Austin* Court already disposed of them—by disagreeing. Obviously, the *Austin* Court did not believe pre-*Austin* precedents were inconsistent with *Austin*; otherwise, it would not have held as it did (at least, not without overturning some past cases). Nor is there any reason to think that in the course of deciding *Austin*, the Court somehow failed to consider the "ancient First Amendment principles" extolled in *Citizens United*. In fact, far from disavowing those principles, *Austin* was explicitly premised on their importance.[139] The theory behind *Austin*'s holding was *not* that we should be

130. 558 U.S. 310 (2010).
131. 494 U.S. 652 (1990).
132. *Id.* at 660.
133. *Id.*
134. *Id.* at 655–56 (delineating the distinction).
135. *Citizens United*, 558 U.S. at 319 (citing Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 490 (2007) (Scalia, J., concurring in part and concurring in judgment)).
136. *Id.* at 340, 354 (internal citations omitted).
137. *Id.* at 340–41.
138. *Id.* at 348.
139. Austin v. Mich. Chamber of Com., 494 U.S. 652, 659–60 (1990) (citations omitted)

unconcerned about governmental censorship so long as the speakers in questions are corporations rather than flesh-and-blood people; it was that the state's interest in addressing "the significant possibility that corporate political expenditures will undermine the integrity of the political process" was sufficiently serious to outweigh countervailing alarm about censorship.[140]

What *Citizens United* came down to, then, was not a change in legal or factual circumstances sufficient to drain *Austin* of precedential force. It came down to difference of constitutional opinion. The majority in *Citizens United* simply did not share the *Austin* Court's view that "prevent[ing] corporations from obtaining 'an unfair advantage in the political marketplace' by using 'resources amassed in the [] marketplace'" qualifies as a compelling government interest.[141] To Justice Kennedy, this rationale seemed indistinguishable from the "dangerous and unacceptable" idea that government may step in to "equaliz[e]" the "relative ability of individuals and groups to influence [their peers through speech]."[142] And once again, Kennedy may be right. The problem is that the *Austin* majority clearly thought otherwise, and nothing in the passage of time had changed the legal question. All that had changed was the Court's composition—and consequently, the view of the First Amendment that was able, as of 2010, to garner five votes.

So much for *Citizens United*; a similarly high-profile example, this time from the other side of the political spectrum, is *Lawrence v. Texas*,[143] which invalidated state law bans on sodomy in direct abrogation of *Bowers v. Hardwick*, precedent from just seventeen years prior.[144] In many ways, *Lawrence* is even more bald-faced than *Citizens United*. The majority hardly even bothered to conjure non-merits reasons—that is, traditional stare decisis justifications—for abandoning the t_1 case. After half-heartedly suggesting that interim cases had "ero[ded]" *Bowers*'s doctrinal "foundations"[145]—an odd proposition, given that the only remotely relevant case, *Romer v. Evans*,[146] concerned equal protection claims not at issue in *Bowers* or *Lawrence*[147]—and then pivoting to the idea that *Bowers* had effectively been

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(acknowledging the First Amendment dangers associated with attempts by the state "to equalize the relative influence of speakers on elections," much less actively censoring based on viewpoint).

140. *Id.* at 668.

141. *Citizens United*, 558 U.S. at 350.

142. *Id.* (citation omitted).

143. 539 U.S. 558 (2003).

144. 478 U.S. 186 (1986).

145. 539 U.S. at 576.

146. 517 U.S. 620 (1996).

147. 539 U.S. at 574–75 (explaining that *Bowers* had explicitly to do with substantive due process, not equal protection, and declining to resolve *Lawrence* on equal protection grounds because doing so would leave *Bowers* intact and "might [cause some to] question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants"). Of course, this does not make *Romer v. Evans* irrelevant to *Bowers* and *Lawrence* in a "real world" sense. *Romer* advanced the cause of gay rights, and *Lawrence*, by abrogating *Bowers*, certainly did the same. But there is no plausible argument that a genuine doctrinal change had taken hold between *Bowers* and *Lawrence*. Contrast this with the situation explored above with *Hurst* and *Alleyne* (and their respective predecessors). There, the intervention of *Apprendi* wholly reimagined the relevant Sixth

channeling global sentiment (and that global sentiment had plausibly changed),[148] the majority made the actual basis of its holding plain: "The rationale of *Bowers* does not withstand careful analysis. . . . [It] was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[149]

Points for candor, but of course the "entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance."[150] And just as with *Citizens United*, this is not to say *Lawrence* got the underlying question wrong. In both cases, the majority offered a robust litany of reasons—merits reasons—why it thought the t_1 majority had badly mishandled the legal issue. But far from putting distance between the question resolved at t_1 and the question on the table at t_2, those reasons only highlighted the identity of the constitutional question across time. When all is said and done, the Justices in the *Lawrence* majority, like those in the *Citizens United* majority, just *disagreed*—purely and simply—with colleagues past.

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The problem in *Citizens United* and *Lawrence* is not that Justices at t_2 disagreed with their t_1 counterparts. That is common; and more importantly, it is a sign of democratic health. The problem is that the opinions failed to show respect for the views with which they disagreed. We can understand the temptation, of course. Judges are only human. In fact, depending on one's personal convictions, one or both of these opinions may feel, as a more straightforward matter of justice, achingly *right*. But the point of stare decisis—and the separation-of-powers principles on which it rests—is that such a feeling, by itself, is no warrant for the dismantling of precedent.

I want to be quite clear, however—this does *not* mean that *Citizens United* or *Lawrence* would have been impossible under aggregate voting rule. It means they would have required greater compromise. In practice, compromise may or may not have been possible; one can never know for sure. But in principle, room for compromise certainly existed. In *Citizens United*, for example, a split-the-difference resolution was readily available. The Court could have held the relevant restrictions unconstitutional as applied to *media* corporations, not all corporations. This still would have overturned *Austin*, but on narrower—and more widely appealing—grounds.[151] Similarly, in *Lawrence*, it is conceivable that, under an aggregate voting

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Amendment framework; so much so that, by logical implication, it effectively overturned *Hurst* and *Alleyne*'s predecessors, causing the merits question to be posed anew as a matter of first impression. *See supra* Part II.C. Nothing so jurisprudentially dramatic was afoot in *Romer v. Evans*. At most, *Romer* foreshadowed *Bowers*'s undoing. But in no sense did it require that outcome conceptually.

148. *Lawrence*, 539 U.S. at 576 (suggesting that "*Bowers* relied on values we share with a wider civilization").

149. *Id.* at 577–78.

150. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

151. *See* Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013) (arguing that "if [*Citizens United*] had been analyzed under the

regime, Justice O'Connor would have joined the majority, pushing the vote-count to 6-3 rather than 5-4 (i.e., enough to overturn *Bowers*). Having voted with the majority in *Bowers* herself, Justice O'Connor was in an uncomfortable position in *Lawrence*; so, understandably, she took a narrower route through the case, concurring in the judgment on equal protection grounds, keeping *Bowers* on life-support. Had her vote been dispositive, however, it is not at all clear that she would have done the same.

C. General Patterns

Neither *Brown* and *Pearson*, nor *Citizens United* and *Lawrence*, are isolated examples. In all four cases, the dynamics around stare decisis may have been especially pronounced, but their form exhibits a more general pattern. Looking back over the last forty years or so of the Court's jurisprudence—essentially, every time it has undone its own precedent in the Rehnquist and Roberts eras—many examples of each type emerge. (See Appendix *infra* pages 39–40.)

Sometimes, the Court has ruled, at t_2, in a manner that effectively complies with an aggregate voting rule. And these cases, like *Brown* and *Pearson*, tend to show off the rule's strengths: the holdings tend to be, if not always more moderate, at least built on sturdy, ideologically diverse foundations. *Crawford v. Washington* is a good example.[152] There, the Court revolutionized the Confrontation Clause, instituting a regime that turns on the "testimonial" (or "non-testimonial") nature of out-of-court statements rather than traditional hearsay principles.[153] The majority opinion, authored by Justice Scalia, spoke for an ideologically diverse bloc of seven Justices, codifying a sense of skepticism that had been growing for at least a decade prior.[154]

Other times, however, the Court has opted to transform the law by thin majority, an enterprise that—as in *Citizens United* and *Lawrence*—typically feels indistinguishable from ordinary political change. Examples abound, and in many, the same dynamic from *Citizens United* and *Lawrence* is discernible: it seems perfectly possible that an aggregate voting rule would not have disabled legal change, but simply led to greater care and compromise. For example, in *Franchise Tax Board of California v. Hyatt*, the question was whether an official from State X may be sued in State Y (assuming jurisdictional requirements are met) even if that same official would have enjoyed immunity from an identical suit in her home state. The Court said no, holding, in effect, that sovereign immunity crosses lines—and reversing a precedent from four decades prior. In so doing, the *Hyatt* majority declined to embrace an available split-the-difference solution: namely, that an official from State X should be liable in State Y only if the similarly situated official *from State Y* would also be liable. In other words, the Court could have conferred immunity on a context-by-context basis, according to a parity principle: states may not hold officials from elsewhere accountable for conduct that their own officials may pursue with

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Press Clause, it should not have been so controversial, and would not have the far-reaching consequences for campaign finance law that so concern its critics").

152. 541 U.S. 36 (2004).

153. *See id*.

154. *See* GEORGE FISHER, EVIDENCE 3d Ed. 590–94 (2013) (tracing this genealogy in detail).

compunction. Whatever its other merits or drawbacks, there is good reason to believe this position would have garnered more than five votes.[155]

Furthermore, setting the issue of compromise aside,[156] there are also plenty of cases from the last 40 years—beyond those discussed in Part II—where the status of precedent is simply unclear. Was the t_1 still good law at the time of its undoing? To revive an example from earlier, Justice Gorsuch's view of *Gamble* (the case about the separate sovereigns rule) was that virtually none of the government's precedents were forceful, let alone persuasive, for a simple reason: they predated the incorporation of the Double Jeopardy Clause against the states.[157] Similarly, many antitrust cases—a common site of abrogation—could be said, like *Roper v. Simmons*, to involve inquiry that depends on fundamentally unstable factual predicates. In antitrust, the relevant predicate is likely economic impact: per se rules are warranted if, and only if, the business arrangement in question *always* tends to yield anticompetitive effects. If this only happens some of the time, the rule of reason should govern; and the story of the last four decades of antitrust law is unequivocally the story of the Court deciding, more and more, that the rule of reason should govern, based on background economic change.[158]

Are changes like these—incorporation, background economic change—sufficient to drain a t_1 holding of precedential force? Plausibly so, though I hardly purport to offer an exhaustive theory on that question. The point is simply that *some* precedents, like those explored at the end of Part II, will see their force dissipated by intervening developments.[159] And any implementation of the aggregate voting rule—or for that

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155. The reason is simple: two years prior, in the previous incarnation of the same case, seven Justices had seen fit to split the baby in a similar manner. *See* Franchise Tax Bd. of Cal. v. Hyatt, 578 U.S. 171 (2016) (holding—in keeping with the "parity" theme—that officials from State X may not be held liable in State Y for an amount greater than an official from State Y would be held liable for the same injury).

156. Another good example is *Montejo v. Louisiana*, 556 U.S. 778 (2009), in which the Court had to decide whether a defendant's right to counsel, once invoked, can be revoked in the context of a police interrogation. Holding the answer to be "yes" across the board—and thereby undoing *Michigan v. Jackson*, 475 U.S. 625 (1986)—the Court declined to draw a distinction between states where the right to counsel attaches automatically and states where it must be invoked. Such a distinction might have furnished common ground for a sturdier and more moderate majority opinion.

157. *See* Gamble v. United States, 139 S. Ct. 1960, 2005–09 (2019) (Gorsuch, J., dissenting) (suggesting that the incorporation of the Double Jeopardy Clause against the state fundamentally alters the legal landscape, extinguishing the precedential force of pre-incorporation affirmation of the separate sovereigns rule).

158. *See, e.g.*, State Oil Co. v. Kahn, 522 U.S. 3 (1997) (holding, contra past precedent, that vertical price-fixing should not be per se illegal, but rather analyzed under the rule of reason); Leegin Creative Leather Prods. v. PSKS, 551 U.S. 877 (2007) (same, but for vertical price constraints, rather than price-fixing).

159. A further example, arguably at least, is *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which inaugurated so-called "plausibility pleading." *Twombly* represented a clear departure from the older standard in *Conley v. Gibson*, 355 U.S. 41 (1957), which called for cursory review of complaints—asking only, in essence, if it was logically possible for a claim to succeed. No one, including the *Twombly* majority, disputes that it dismantled *Conley*. But there is some doubt that *Conley* was actually in effect, on the ground, by the time *Twombly*

matter, any other approach to stare decisis—should make room, doctrinally, for that reality.

CONCLUSION

Respect for precedent—the idea that past decisions are more than just ornaments of history or instruments of advocacy—is a cornerstone of our legal system. Yet it teeters on the brink of collapse. A fresh approach is needed: a rule that both (1) vindicates the separation-of-powers principles that underpin stare decisis, and (2) is capable of exerting meaningful constraint in practice. To that end, I have proposed an aggregate voting rule, built on the proposition that a precedent's durability should be a function of its original strength. Such a rule may not "save" the constitutional project in all respects.[160] But it would still be a salutary change—helping resuscitate a form of civic faith that has rarely been more completely, or swiftly, in decline.

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was heard. In which case, it is difficult to fault the *Twombly* Court, at least on stare decisis grounds, for cutting anchor. *See* Kiel Brennan-Marquez, *The Epistemology of* Iqbal *and* Twombly, 26 REGENT U. L. REV. 167, 168 n.7 (2013) (compiling sources on this point).

160. *See* Epps & Sitaraman, *supra* note 17.

APPENDIX—ALL SCOTUS CASES FROM 1985-OVERTURNING PRECEDENT

White = OK • Gray = Tie • Dark Gray = Aggregate majority in favor of maintaining precedent

Overturning Case (t_2)	Vote (t_2)	Original Case (t_1)	Vote (t_1)
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)	5–4	Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)	5–4
Collins v. Youngblood, 497 U.S. 37 (1990)	9–0	Thompson v. Utah, 170 U.S. 343 (1898); Kring v. Missouri, 107 U.S. 221 (1883)	7–2, 5–4
Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603 (1991)	9–0	Minturn v. Maynard, 58 U.S. 477 (1854)	9–0
Payne v. Tennessee, 501 U.S. 808 (1991)	6–3	Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989)	5–4
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