

# NOTES

## TREATING LIKE SUBDECISIONS ALIKE: THE SCOPE OF STARE DECISIS AS APPLIED TO JUDICIAL METHODOLOGY

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*The Supreme Court has explained that stare decisis binds the Court to both its result and “those portions of the opinion necessary to [the] result.” Yet the Supreme Court does not seem to extend this principle to those “necessary portions,” herein called subdecisions, that involve methodological questions. For example, when a case rests on a subdecision about whether a Court should consult legislative history in interpreting a statute, the effect of that opinion on future cases is unclear. This Note focuses on stare decisis with respect to subdecisions about statutory interpretation to shed light on the broader issue of the scope of stare decisis. After describing the purpose and operation of stare decisis, this Note examines statutory interpretation subdecisions to determine whether the court gives them precedential effect. It finds that the Court applies stare decisis to some statutory interpretation subdecisions but not others, with no coherent principle explaining the inconsistency. Finally, this Note uses the purposes of stare decisis to argue that the Court should apply it to all statutory interpretation subdecisions.*

### INTRODUCTION

The Supreme Court considers stare decisis—the obligation to adhere to past opinions<sup>1</sup>—to be “indispensable” to the “rule of law.”<sup>2</sup> In describing the doctrine, the Court has explained that “[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”<sup>3</sup> This constraint helps legitimize the judicial system by requiring the Court to treat like cases alike.<sup>4</sup>

While the Court is constrained in this way, considerable debate among Justices and scholars surrounds the merits of particular methods of deciding cases. Many commentators describing this debate seem to presume that each Justice has full discretion to develop or select her own judicial methodology. For example, many scholars and Justices have dif-

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1. *Stare decisis et non quieta movere* (stare decisis for short) literally means “[t]o stand by things decided, and not to disturb settled points.” Black’s Law Dictionary 1443 (8th ed. 2004).

2. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

3. Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996); see also Henry P. Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 22 & n.78 (1979) [hereinafter Monaghan, Supreme Court Opinions] (arguing that stare decisis binds Court to “all points of significance”).

4. See *infra* note 36 and accompanying text.

fering opinions about methods of statutory interpretation. This debate encompasses disagreements about what weight to accord the statutory purpose, or whether to consult specific sources of legislative history.<sup>5</sup> Observers of this debate routinely identify individual Supreme Court Justices as “champions” of particular interpretive philosophies.<sup>6</sup> At recent judicial confirmation hearings, Senators asked judicial nominees about their methodologies with regard to statutory interpretation.<sup>7</sup> Moreover, prognosticators attempting to predict the outcome of a specific case before the Court often count up the textualists, formalists, or pragmatists, assuming that tally will reveal the direction of the opinion.<sup>8</sup> Many Justices themselves have produced scholarship advocating particular interpretive rules.<sup>9</sup> The pervasive sentiment is that decisions about judicial methodology are left to the discretion of the individual Justice.

5. See *infra* notes 75–85 and accompanying text (discussing statutory interpretation).

6. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 801 n.204 (1999) (referring to Justices Scalia and Thomas as among “[t]oday’s foremost judicial champions of textualism”); Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. Rev. 1353, 1366 (2005) (referring to “Justice Kennedy’s grand centrism”); Adam David Elfenbein, *Patterson v. Shumate*: Interpretive Error, 66 Am. Bankr. L.J. 439, 445 (1992) (calling Justice Stevens “a champion against mechanical statutory interpretation”); Kathryn A. Perales, Note, *It Works Fine in Europe, So Why Not Here? Comparative Law and Constitutional Federalism*, 23 Vt. L. Rev. 885, 903 (1999) (referring to Justice Breyer as “champion[ ] of pragmatism”).

7. Senator Chuck Grassley asked then-Judge Alito: “What do you think about judges allowing their own political and philosophical views to impact on any jurisprudence? Second, do you believe that there is any room for a judge’s own value or personal beliefs when he or she interprets the Constitution?” Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 355 (2006) (statement of Sen. Charles E. Grassley, Member, S. Comm. on the Judiciary). At then-Judge Roberts’s confirmation hearing, Senator Orrin Hatch posed the following question to the nominee: “Some of the philosophies [discussed in a book by Cass Sunstein] were whether a judge should be an originalist, a strict constructionist, a fundamentalist, a perfectionist, a majoritarian or a minimalist. Which of those categories do you fit in?” Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 158 (2006) (statement of Sen. Orrin G. Hatch, Member, S. Comm. on the Judiciary).

8. See, e.g., Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 Berkeley J. Emp. & Lab. L. 53, 82 (2000) (predicting that “textualist courts” will more likely construe Americans with Disabilities Act against claimed disability); Jonathan Turley, “When in Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 661 n.400 (1990) (arguing that “more formalist court” would have interpreted Endangered Species Act differently than court that decided *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988)).

9. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 *passim* (1992) (promoting careful use of legislative history in statutory interpretation); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation* 3, *passim* (Amy Gutmann ed., 1997) (advocating textualist approach to statutory interpretation).

These two principles, stare decisis and methodological discretion, can come into tension. Consider a case in which the outcome hinges on the meaning of a statute. This determination might, in turn, hinge on a decision about the proper weight to accord legislative history in statutory interpretation.<sup>10</sup> If a majority of the Court agrees that legislative history should not be consulted, the Court will explain the reasons for its methodological choice in its opinion and that agreement will determine the outcome of the dispute. In this scenario, the Court has made a choice that is decisive in the outcome of the case and serves as the rationale for the opinion. For ease of reference, this Note refers to such a choice as a “subdecision.”

According to the Court’s articulation of the nature of stare decisis, when the Court reaches a subdecision about judicial methodology like the one in the example above, that subdecision should receive stare decisis effect similar to any other portion of an opinion necessary to the result. Yet this conflicts with the general presumption attributing methodologies to Justices, not Courts. When a subdecision involves a choice among methodological rules, either stare decisis or methodological discretion must give way.

This Note examines one example of the tension between stare decisis and methodological discretion—the application of stare decisis to subdecisions involving methods of statutory interpretation. The focus is primarily on statutory interpretation, one category of a larger group of judicial methodological choices, because the case for applying stare decisis to statutory interpretation subdecisions is particularly clear. The reason is that many commentators believe interpretations of statutes should have the greatest stare decisis effect.<sup>11</sup> Since “[l]egislatures and courts are cooperative lawmaking bodies,”<sup>12</sup> clear communications between the two branches is important. Extending stare decisis to statutory interpretation subdecisions might enhance this communication, which would make

10. See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457, 464–65 (1892) (invoking legislative history to overcome plain meaning of statutory text).

11. For an explanation of why statutes receive the greatest stare decisis effect, see Edward H. Levi, *An Introduction to Legal Reasoning* 23 (1949) (arguing that legal reasoning applied to statutes should “attempt to fix the meaning of the word”); see also Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *Geo. Wash. L. Rev.* 317, 321 (2005) (“This special treatment of statutory precedent fits into a system in which the Supreme Court varies the strength of the precedent according to the source of law that the precedent interprets. Cases interpreting statutes, as we have been discussing, receive stronger-than-normal stare decisis effect.”); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 *Geo. L.J.* 1361, 1367 (1988) (exploring congressional practices leading to “super-strong presumption for most statutory precedents”); Lawrence C. Marshall, “Let Congress Do It”: The Case for an Absolute Rule of Statutory Stare Decisis, 88 *Mich. L. Rev.* 177, 182–83 (1989) (noting continuing force of absolute statutory stare decisis despite Court’s occasional unfaithfulness to it).

12. Levi, *supra* note 11, at 23.

the case for extending stare decisis to statutory interpretation subdecisions even stronger.<sup>13</sup>

This Note explains that the Supreme Court already treats many, but not all, subdecisions based on statutory interpretation as binding precedent without explicitly saying so. The inconsistency in the doctrine of the scope of stare decisis, as well as the lack of explanation given for when to apply the doctrine to particular subdecisions, demonstrates the need for a more coherent approach. After describing current practice, this Note concludes that the purposes behind traditional stare decisis suggest that the appropriate reform is to extend the scope of stare decisis to statutory interpretation subdecisions.

Part I frames the issue by presenting the history, purposes, and the current doctrine of stare decisis.<sup>14</sup> Part II describes the Supreme Court's uneven application of stare decisis to subdecisions based on statutory interpretation and concludes that the Court's practice is inconsistent and incoherent. Part III draws on the purposes for traditional stare decisis outlined in Part I, and makes normative arguments for applying stare decisis to all statutory interpretation subdecisions. Part III concludes by presenting two other proposals addressing inconsistency in statutory interpretation and explaining how they complement this Note's proposal to extend stare decisis to statutory interpretation subdecisions.

#### I. SUPREME COURT STARE DECISIS: ORIGIN, PURPOSE, OPERATION

The doctrine of stare decisis entrenches a judicial decision in the legal regime of its jurisdiction in order to serve the "social policy" of "continuity in law . . . rooted in the psychologic need to satisfy reasonable expectations."<sup>15</sup> The doctrine's origins and the policies underlying its application to judicial opinions will prove instructive in discussing its application to methodological subdecisions.

This Part presents the relevant background on stare decisis required for a discussion about its scope. Part I.A examines the origins of stare decisis in an attempt to gauge the susceptibility of the doctrine to tinkering. Part I.B discusses the purposes of stare decisis, and Part I.C explains how the doctrine currently operates. Finally, Part I.D analyzes the differences between stare decisis and other explanations for judicial consistency. This final discussion will prove relevant to Part II's effort to distinguish between instances when the Supreme Court does and does not apply stare decisis.

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13. The application of stare decisis to constitutional interpretation, on the other hand, involves some but not all of the same arguments related to statutory interpretation. See *infra* Conclusion.

14. As an initial matter, this Note attempts to simplify this discussion by limiting its inquiry to the Supreme Court and the Court's treatment of horizontal stare decisis. Horizontal stare decisis is the binding effect that Supreme Court opinions have on subsequent cases before the Supreme Court.

15. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

A. *Origins of Stare Decisis and Susceptibility to Change*

The U.S. legal system inherited stare decisis from its English common law ancestor.<sup>16</sup> While there are many reasons a judge might follow the reasoning of an earlier decision,<sup>17</sup> English courts, in the early eighteenth century, “began to speak of a qualified obligation to abide by past decisions.”<sup>18</sup> William Blackstone’s *Commentaries*, written during the same period, began to refer to “an established rule to abide by former precedents, where the same points come again in litigation.”<sup>19</sup> By the late eighteenth century, when the Founders were designing the U.S. judicial system, stare decisis was “firmly in place” in England.<sup>20</sup>

Although the Constitution contains no reference to stare decisis, ample evidence suggests that the Framers and commentators at the time of ratification contemplated its application and supported some manner of its use.<sup>21</sup> For instance, several influential scholars argue that stare decisis is necessary and thus implicit in the common law system itself.<sup>22</sup> Perhaps, when Article III proclaims “[t]he judicial Power of the United States,

16. See William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 Utah L. Rev. 53, 66 (2002); see also Sir Matthew Hale, *The History of the Common Law of England* 45–46 (Charles M. Gray ed., Univ. Chi. Press 1971) (1713) (discussing stare decisis in English common law).

17. See *infra* Part I.D.

18. See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 645, 661 (1999) (noting English common law judges had duty to provide some rationale for disregarding prior case). Professor Lee’s article provides an excellent description of the development of the stare decisis doctrine in the 18th and 19th century United States, which proved helpful in writing this section.

19. William Blackstone, 1 *Commentaries* \*69.

20. Consovoy, *supra* note 16, at 66; see also Wallace Jefferson, *Stare Decisis*, 8 Tex. Rev. L. & Pol. 271, 271–72 (2004) (providing background on historical foundations of stare decisis).

21. Consovoy, *supra* note 16, at 67–69; see also Lee, *supra* note 18, at 665 (quoting Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), in *The Mind of the Founder: Sources of the Political Thought of James Madison* 497 (Marvin Meyers ed., rev. ed. 1973)). Madison supported his position using two arguments. First, Madison stated that a stable society required that “the rules of conduct of its members should be certain and known.” *Id.* This would not be so if judges were allowed to individually interpret every law. *Id.* Second, once the judiciary interprets a law, and the legislature accepts that interpretation, it can be fairly said that the legislature has sanctioned the rule. *Id.*

22. As William Lile argues:

Under the common law system . . . lacking as it does a scientifically constructed code as a basis, or, indeed, any code in a true sense, we are *ex necessitate* more dependent on the influence of previous decisions. If we strip these of all mandatory force, our unwritten law would be evidenced by no authoritative declaration, and every court, from the lowest to the highest, would be law unto itself. The rule of stare decisis is, therefore, a rule of necessity and a natural evolution from the very nature of our institutions.

W.M. Lile, *Some Views on the Rule of Stare Decisis*, 4 Va. L. Rev. 95, 97 (1916); cf. Roscoe Pound, *Interpretations of Legal History* 1 (1923) (“Law must be stable and yet it cannot be still.”).

shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,”<sup>23</sup> it necessarily implies that the “judicial Power” means such power conceived of at the time the Constitution was ratified.<sup>24</sup> According to one originalist view, this would fix stare decisis in the United States, giving it the meaning it had in 1789 absent a constitutional amendment specifying an alternative meaning.<sup>25</sup>

Other constitutional scholars argue that, in failing to specify much, if anything, about the nature of the judicial grant of power in the United States, the Constitution seems to provide for an evolving judicial power.<sup>26</sup> This dynamic view of constitutional text would allow the doctrine of stare decisis to follow changing conceptions of adjudication.<sup>27</sup>

23. U.S. Const. art. III, § 1.

24. This would reflect the originalist view of stare decisis. For a court decision reflecting such a view, see Judge Richard Arnold’s opinion for the Eighth Circuit in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated as moot on reh’g en banc, 235 F.3d 1054 (8th Cir. 2000). Judge Arnold’s opinion rested on his view that the rule of stare decisis was inherent in the Framers’ conception of the “judicial power” delegated to the courts by Article III. *Id.* at 900. Underlying the Framers’ conception of the judicial power was, he argued, a clear and well-established view that respect for precedent lay at the heart of the judicial function. *Id.* Despite the fact that Judge Arnold’s opinion was vacated en banc, his decision “continues to have persuasive force,” *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001), and at least one other federal court has agreed with its reasoning. See *Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 159–60 nn.9–10 (D. Mass. 2004). For academic commentary on the originalist view of stare decisis, see William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 *Vt. L. Rev.* 5, 9–11 (1994) (arguing that “Blackstonian style of reverence for precedent[ ] was rooted in Article III”); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. Rev.* 204, 204 (1980) (describing strict textualism and strict intentionalism as two branches of strict originalism); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *Geo. L.J.* 1765, 1766 (1997) [hereinafter Dorf, *Original Meaning*] (“Under [strict intentionalism], any departure from the understandings of those discrete periods [when the Constitution was ratified or amended] robs constitutional interpretation of its claim to legitimacy.”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 754–55 (1988) [hereinafter Monaghan, *Stare Decisis*] (noting effect of originalist understanding on power of Congress to limit stare decisis).

25. See Joseph Story, *Commentaries on the Constitution of the United States* 126–27 (Carolina Academic Press 1987) (1833) (“A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.”); Harlan F. Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4, 6 (1936) (describing stare decisis as “the most significant feature of the common law, past and present, and the essential element in its historic growth”).

26. See 1 Laurence H. Tribe, *American Constitutional Law* 248–49 (3d ed. 2000) (“By its very design, the Constitution guarantees the impermanence of judicial precedent.”); Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 63–64 (1991) [hereinafter Tribe & Dorf, *Reading the Constitution*] (arguing that Constitution is irreconcilable with itself in some instances and that Court should use “common law method of case-by-case formulation and reformulation”).

27. See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *American Exceptionalism and Human Rights* 90, 98 (Michael

One's view of the relevance of the original judicial conception of stare decisis is important to consider when proposing alternate conceptions. A strong conception of originalism would render the doctrine of stare decisis impermeable to alteration by statute or court rule.<sup>28</sup> However, few scholars adopt an extreme view of originalism.<sup>29</sup> As Professor Paul Brest explains, the dominant view is "moderate" originalism, which considers "the framers' intent on a relatively abstract level of generality."<sup>30</sup> This moderate view, while perhaps undecided as to the constitutionality of a statute abrogating stare decisis,<sup>31</sup> seems at least amenable to the Supreme Court tinkering with the doctrine.

### B. Purpose of Stare Decisis

Stare decisis advances a variety of social interests,<sup>32</sup> which can be grouped into two categories.<sup>33</sup> The first includes general fairness and legitimacy brought about by the role of stare decisis as a predictability-enhancing constraint on judges.<sup>34</sup> As the Supreme Court has articulated, "[s]tare decisis is the preferred course because it promotes the even-

Ignatieff ed., 2005) ("Constitutional change is often a product . . . of interpretation, leading to new understandings of old provisions."). See generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994) (explaining and advocating adoption of dynamic interpretation).

28. See Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. Cal. L. Rev. 755, 759 (2003) (collecting authorities on this issue); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 Const. Comment. 191, 194–95 (2001) (arguing that "Congress may not by statute tell the federal courts whether or in what ways to use precedent" as "Congress does not have the power to tell the federal courts how to go about their business of deciding cases"); Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 Ohio St. L.J. 645, 650–51 (2006) (finding that stare decisis cannot be abrogated by court rule).

29. See Dorf, *Original Meaning*, supra note 24, at 1766 ("[T]here are very few strict originalists . . .").

30. Brest, supra note 24, at 204–05, 214.

31. Legal scholars are divided on the question of whether a statute or judicial rule that completely abrogated the doctrine of stare decisis would be constitutional. Compare Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43, 120–21 (2001) (concluding that although rule abrogating stare decisis in all cases might be unconstitutional, properly structured rule abrogating stare decisis only in certain cases would be constitutional), and Thomas R. Lee & Lance S. Lehnof, *The Anastasoff Case and Judicial Power to "Unpublish" Opinions*, 77 Notre Dame L. Rev. 135, 173 (2001) (concluding that various federal appellate court nonprecedential decision rules are constitutional), with Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. Rev. 81, 118 (2000) (concluding that such rules are unconstitutional).

32. See Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. Rev. 419, 423–24 (2006) (detailing various values arguably advanced by stare decisis).

33. I do not present an exhaustive list but only the most common justifications for stare decisis.

34. Carol M. Rose cogently links predictability with fairness. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837, 907–08 (1983).

handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>35</sup> Stare decisis fosters the related aims of predictability, notice, perceived legitimacy, and fairness, because it provides that like cases will be treated alike.<sup>36</sup>

The second category of social interests concerns efficiency. As Benjamin Cardozo explains, “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”<sup>37</sup> By restricting the lens of reexamination, stare decisis allows the Court to benefit from the labor of its predecessors.<sup>38</sup> This reduces the amount of research and analysis required in cases analogous to cases the Court has ruled on before.<sup>39</sup>

Of course, these values are only advanced insofar as precedents are constraining.<sup>40</sup> The more freedom courts have to overturn precedent, the less effect stare decisis will have in advancing the values of fairness,

35. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (“A decision to overrule [precedent at issue] under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.”); Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 30 (1995) (“If the Constitution predominates because it is law, its interpretation must be constrained by the values of the rule of law, which means that courts must construe it through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied.” (footnote omitted)).

36. See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 169 (1999) (arguing that stare decisis “ensure[s] that the judiciary follows known rules [and] does not make arbitrary decisions”); Healy, *supra* note 31, at 108, 111 (arguing that stare decisis promotes fairness and equality by “treating like cases alike”); Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 572, 595–97 (1987) (“To fail to treat similar cases similarly, it is argued, is arbitrary, and consequently unjust or unfair.”); Strang, *supra* note 32, at 424 n.40 (“Persons inevitably order their lives based on the legal rules enunciated in previous cases and could suffer harm if those rules are regularly or lightly changed.”). For criticism of the claim that stare decisis advances equality, see Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 1, 9–13 (1989) (“[T]here is no intertemporal equality value of sufficient weight to support precedential constraint . . .”).

37. Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921).

38. See Whittington, *supra* note 36, at 169 (noting that respect for precedent helps ensure judiciary “is not forced constantly to reconsider the same issues but can move on to new concerns”); Healy, *supra* note 31, at 109 (“By basing their decisions on precedent, courts avoid the need to reexamine all legal principles from scratch.”); Monaghan, *Stare Decisis*, *supra* note 24, at 744 (explaining that, because of stare decisis, “[m]any constitutional issues are so far settled that they are simply off the agenda”).

39. Strang, *supra* note 32, at 424 (“By allowing judges (and potential and actual litigants) to concentrate on one or a handful of issues in a given case, instead of relitigating all potential issues in a case, stare decisis promotes judicial efficiency.”).

40. See *id.* (“[T]he extent to which these related Rule of Law values are advanced [by stare decisis] depends on the constraining force of precedent.”).

legitimacy, and efficiency.<sup>41</sup> Conversely, when stare decisis applies with greater force, courts sacrifice contrary values such as flexibility.<sup>42</sup>

### C. Current Operation of Stare Decisis

Stare decisis is very much alive today. In the United States, the federal courts and forty-nine of the fifty states, excepting Louisiana's civil law system, recognize some form of the doctrine.<sup>43</sup> The common law system of citing one case's holding to support a decision in another case "fits uniquely well" within a system that attaches binding legal effect to precedent.<sup>44</sup> Many cases merely require analogical reasoning from principles established by prior decisions.<sup>45</sup> As Lewis Powell writes, "[o]verrulings occur with some frequency, but when considered in light of the business of the Court as a whole, they are rare. . . . [T]he Court . . . considers thousands of cases a year. The vast majority involve nothing more than application of previously decided cases. This is stare decisis."<sup>46</sup>

This Note focuses on the scope of stare decisis. Several commentators have previously attempted to broadly articulate this topic. In 1916, William Lile said that stare decisis "means not that the rule which is to be followed in the future is to be found in the language of the court, but in the principle necessarily resulting from the decision."<sup>47</sup> Henry Monaghan has elaborated on exactly what principles become entrenched by a judicial decision. In Monaghan's words, stare decisis binds the Court to "all points of significance."<sup>48</sup>

Principles established by previous cases are not, however, inviolable.<sup>49</sup> When a court is sufficiently convinced that a previous decision was

41. *Id.*

42. *Id.*

43. Mary G. Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 *La. L. Rev.* 775, 785 (2005) ("The forty-nine states in the United States, other than Louisiana, as well as the United States federal court system follow a version of the doctrine of stare decisis that is similar to the English respect for precedent and its consideration of precedent as a source of law.").

44. Cass R. Sunstein, *On Analogical Reasoning*, 106 *Harv. L. Rev.* 741, 790–91 (1993).

45. *Id.* at 745–49 (describing use of analogical reasoning in law)

46. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 *Wash. & Lee L. Rev.* 281, 284 (1990).

47. Lile, *supra* note 22, at 99; see also Cardozo, *supra* note 37, at 116 (describing process of adhering to precedent as "extract[ing] from the precedents the underlying principle, the *ratio decidendi* . . . [and] then determin[ing] the path or direction along which the principle is to move and develop, if it is not to wither and die").

48. Monaghan, *Supreme Court Opinions*, *supra* note 3, at 22.

49. One commentator calls this a "hybrid model" of stare decisis because precedents are entrenched but not completely. Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 *St. Mary's L.J.* 417, 430 (2006). However, most courts in the United States that adhere to stare decisis recognize limited circumstances where precedents should be overruled. *Id.* at 430–31.

erroneous, the court may overrule that decision.<sup>50</sup> For instance, from 1987 until 1997, the Supreme Court explicitly overruled, on average, 2.55 cases per term.<sup>51</sup> Admittedly, this percentage is small considering that, during that time, the Court wrote opinions for an average of 126 cases per term and disposed of a total of 6,653 cases.<sup>52</sup> The existence of the Court's overruling power nonetheless exerts a legitimizing and stabilizing influence<sup>53</sup>—stare decisis operates to entrench the principles underlying judicial decisions, but not to render them “inexorable command[s].”<sup>54</sup>

Just as the Constitution entrenches its provisions against the assault of a simple majority, stare decisis protects the principles underlying Supreme Court decisions from constant reevaluation.<sup>55</sup> And just as the Constitution can be amended by a two-thirds vote in both houses of Congress, stare decisis can be overruled by a “special justification.”<sup>56</sup>

50. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (“[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”); *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (stating that stare decisis “carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification’” (citations omitted)); see also William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 Mich. L. Rev. 2450, 2453–66 (1990) (discussing justifications for overturning precedent); Monaghan, *Stare Decisis*, supra note 24, at 757 (“[P]recedent binds absent a showing of substantial countervailing considerations.”). For an account of how this standard of “sufficiency” has changed in the Court’s rhetoric over time, see generally Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court’s Overruling Rhetoric*, 63 U. Cin. L. Rev. 1119 (1995).

51. Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 Akron L. Rev. 233, 252 tbl.5 (1999).

52. *Id.* at 252 tbl.5, 253 tbl.6.

53. See Robert E. Keeton, *Venturing to Do Justice 15* (1969) (“Restraint in exercising the judicial power to overrule precedents is essential to the stability of law. Yet abstention from exercising this power defeats stability itself.”); see also Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. Rev. 1389, 1417 (2005) (“[W]here a precedent does not ‘fit’ with the surrounding legal landscape, there will be strong countervailing reasons to revisit the original interpretation. Thus . . . [s]tatutory precedents should be abandoned only where wholly out of sync with the legal fabric . . .”).

54. *Casey*, 505 U.S. at 854 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)).

55. Richard Fallon suggests that one purpose of stare decisis is settling certain legal questions, which is reminiscent of Stephen Holmes’s discussion of the virtue of entrenchment associated with the Constitution. Compare Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 573 (2001) (explaining that among “greatest effects of stare decisis is to justify the Court in treating some questions as settled,” which “liberates the Justices from . . . obligation to reconsider every potentially disputable issue as if it were being raised for the first time”), with Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 215–18 (1995) (arguing that constitutions take contentious issues off table).

56. See *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Justice Scalia explains that “the doctrine [of stare decisis] would be no doctrine at all” if it did not require overruling judges to “give reasons . . . that go beyond mere demonstration that the overruled opinion was wrong.” *Hubbard v. United*

The comparison between stare decisis and constitutional entrenchment is not perfect. Constitutional entrenchment is firmer because it is rooted in procedure—that is to say that it is procedurally more difficult to amend the Constitution than it is to amend the U.S. Code.<sup>57</sup> Stare decisis is not solidified by any such procedural constraints. But stare decisis entrenches precedents because it “with some frequency require[s] a judge to follow, and indeed to extend . . . precedents that the same judge would overrule if . . . unconstrained by the pull of previously decided cases.”<sup>58</sup> Although it takes no more than a five-to-four vote to overrule a previous decision, the doctrine itself acts as the fortification for established precedents.<sup>59</sup>

It is important to note that there is considerable gray area, if not discretion, inherent in the judicial act of synthesizing previous cases.<sup>60</sup> Justices can, and do, distinguish the facts or circumstances of a case at issue from previous cases.<sup>61</sup> In some cases where commentators feel the case for stare decisis is compelling, Justices find ways to pay mere lip service to stare decisis by distinguishing the facts or circumstances and thereby limiting the reach of precedents.<sup>62</sup> An alternative strategy is that

States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in judgment). But see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 1–4 (2001) (outlining argument that stare decisis doctrine is coherent without conceding that some erroneous opinions must be upheld).

57. See U.S. Const. art. V (requiring two-thirds vote in both Houses to amend Constitution).

58. Tribe, *supra* note 26, at 83.

59. See generally Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518 (1986) (examining thought process of judicial decisionmaking and explaining how legal doctrine constrains judges).

60. Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 98–109 (1991) (discussing variety of techniques for “weakening precedents,” including narrowing or distinguishing previous precedents).

61. See, e.g., *id.* at 106, 107 & n.163 (describing four cases through which Supreme Court distinguished precedent in *National League of Cities v. Usery*, 426 U.S. 833 (1976), thereby weakening precedent without explicitly overruling it).

62. For example, Michael Gerhardt criticizes the Court for “grossly mischaracteriz[ing]” its ruling in *Dennis v. United States*, 341 U.S. 494 (1951), for the purposes of weakening its holding without expressly overruling it. See *id.* at 108 n.169. Another example of this judicial maneuverability is the Court’s holding in *Solem v. Helm*, 463 U.S. 277 (1983). An earlier 1980 opinion had upheld, against an Eighth Amendment “cruel and unusual punishment” challenge, a Texas statutory requirement of a mandatory life sentence for certain defendants convicted of three felonies. *Rummel v. Estelle*, 445 U.S. 263 (1980). *Solem v. Helm* involved a nearly identical punishment scheme to that upheld in *Rummel*, but the Court invalidated the scheme in a majority opinion that tracked very closely to the dissenting opinion in *Rummel*. The Court’s language in *Solem* was so similar to that of the dissent in *Rummel* that Chief Justice Burger’s dissent accused the majority of overruling *Rummel* sub silentio. *Solem*, 463 U.S. at 304 (Burger, C.J., dissenting) (complaining that “[a]lthough today’s holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*”). For an argument that the decision to read a case narrowly or broadly is not necessarily arbitrary, see Tribe & Dorf, *Reading the Constitution*, *supra* note 26, at 112–17 (asserting that no case can dictate, on its own terms, proper level of generality at which it should be read); Laurence H. Tribe &

Justices can take advantage of the ambiguity in the distinction between holding and dictum,<sup>63</sup> to “avoid[ ] the consequences of . . . legal pronouncements.”<sup>64</sup> This is all to say that recognition of stare decisis hardly reduces the Justice to the role of a robot in the application of law;<sup>65</sup> in fact, Justices maintain significant discretion.

#### D. *Detecting Stare Decisis*

Before an analysis of the current application of stare decisis to various methods of statutory interpretation can prove useful, it is important to understand one significant difficulty in such an analysis. Namely, consistency alone does not prove application of stare decisis. There could be many reasons besides stare decisis to explain judicial consistency in statutory interpretive method. For instance, the “appeal of rightness,” common backgrounds, and respect to colleagues are among the reasons why Supreme Court Justices employ similar judicial methodologies.

“The appeal of rightness” is the notion that, whether one believes there is a “right answer” to every judicial question,<sup>66</sup> there are certainly better answers and worse answers.<sup>67</sup> Some answers and methods are more persuasive than others, and a particular answer being the best answer might explain its consistent adoption.<sup>68</sup>

Similar educational and professional backgrounds in the U.S. legal tradition also might explain consistency.<sup>69</sup> Supreme Court Justices have a

Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1067–68 (1990) (same).

63. Dictum is any part of an opinion that is “unnecessary” to the outcome of the case. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572–73 (1993) (Souter, J., concurring in part and concurring in judgment) (applying concept of dictum to distinguish prior holding).

64. Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2005 (1994) [hereinafter Dorf, *Dicta*].

65. See Major B. Harding, *Judicial Decision-Making Analysis of Federalism Issues in Modern United States Supreme Court Maritime Cases*, 75 Tul. L. Rev. 1517, 1526–28 (2001) (arguing that, although legislature may wish judges to “operate as robots,” adjudication “must not[ ] become too scientific”).

66. Some scholars, including Ronald Dworkin, believe there is usually a “best” answer. See Ronald Dworkin, *A Matter of Principle* 162 (1985).

67. Cf. David Luban, *Reason and Passion in Legal Ethics*, 51 Stan. L. Rev. 873, 893 (1999) (“[W]hether or not legal questions have right answers, they do have wrong answers.”).

68. *Id.*; see also Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. Pa. L. Rev. 371, 406 (1992) (“The [judicial] practice is bounded not by a single shared style of reasoning but by familiar, if unspecifiable, criteria for the kinds of reasoning that count. In the absence of such criteria, the practice would fall apart.”).

69. See Stanley Fish, *Fish v. Fiss, in Interpreting Law and Literature: A Hermeneutic Reader* 251, 262 (Sanford Levinson & Steven Mailloux eds., 1988) (“Since [judges] are already and always thinking within the norms, standards, criteria of evidence, purposes, and goals of a shared enterprise, the meanings available to them have been preselected by their professional training . . .”); Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy*

lot in common.<sup>70</sup> Virtually all of them attended one of a handful of elite law schools and either taught at one of these same schools, practiced with an elite law firm, or served in one of a handful of sought-after government positions.<sup>71</sup> This consistency in background might contribute to consistency in adjudication.<sup>72</sup>

Finally, respect for one's colleagues and predecessors might also account for consistency in some contexts. Occasionally Justices have been purported to have cast their votes against their substantive views, due to reluctance to disagree with their colleagues.<sup>73</sup> It seems the collegial nature of the Court deliberation process may promote consistent notions about what is right, or promote agreement based on respect for the opinions of other Justices.<sup>74</sup>

Thus, this Part indicates that while stare decisis plays a substantial role in adjudication on the Supreme Court, consistency is not sufficient evidence to demonstrate that a particular legal question is currently given binding legal force. As Part II examines which, if any, statutory interpretation subdecisions have stare decisis effect, it must probe beyond the outcomes of the cases to the underlying reasoning the Justices employ. Part II will build on the nature of traditional stare decisis as it seeks to describe its current reach.

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Making and Litigation Against the Government, 5 U. Pa. J. Const. L. 617, 664 (2003) (explaining existence of "common background, common set of experiences and common approach to diagnosing and solving problems that shape judges' visions, constrain their actions, and lead them, even when most aggressively making policy, to embrace norms that are conventional").

70. Tracey E. George, Court Fixing, 43 Ariz. L. Rev. 9, 27 (2001) ("Judges as well as potential judges share meaningful, transformative educational experiences, namely college and law school matriculation, and consequently they will be more alike than different when compared to a random cross-section of Americans.").

71. See Henry J. Abraham, Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton 44–45 (rev. ed. 1999); Mark A. Graber, Does it Really Matter?: Conservative Courts in a Conservative Era, 75 Fordham L. Rev. 675, 692–93 (2006).

72. See George, *supra* note 70, at 27–28 ("[J]udges who attend[ ] elite law schools more frequently describe[ ] themselves as innovative decision-makers.").

73. Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Cal. L. Rev. 1, 2 (1993) (describing two cases in which "single Justice, in deference to views of his colleagues, chose to cast his vote against his own substantive view of case").

74. See *id.* at 4 ("*Collegial enterprises [like the Supreme Court] . . . are like team enterprises in that each participant must consider and respond to her colleagues . . . . Collaboration and deliberation are the trademarks of collegial enterprise, and the objective of collegial enterprise often reaches beyond accuracy to other measures of quality.*"). Also, note that Justices do not like to be overruled. See Richard S. Higgins & Paul H. Rubin, Judicial Discretion, 9 J. Legal Stud. 129, 130 (1980). Given the collegial nature of the judicial profession, it makes sense that Justices would want to do unto other Justices as they would have those other Justices do unto them.

## II. DESCRIPTION OF SUPREME COURT'S APPLICATION OF STARE DECISIS TO STATUTORY INTERPRETIVE METHODS

Statutory interpretation is a central element of our legal system. Together, the sheer number of statutes, their expansive reach, and the growth of delegated legislation have forced the judiciary to rely more and more on interpreting statutory meaning.<sup>75</sup>

An interpretive method is crucial to understanding statutes. Statutes are merely codified strings of words.<sup>76</sup> As Professor Nicholas Rosenkranz illustrates with popular childhood interpretive methodologies, Pig Latin and opposite day, the meaning of words “derives from the interaction of a text and an interpretive regime.”<sup>77</sup> Consequently, scholars have produced a multitude of descriptive and normative accounts of the judicial system’s interpretive regime.<sup>78</sup>

The statutory interpretation arsenal on which the judiciary relies is vast and varied.<sup>79</sup> Justices employ discrete tools like the maxim of *expressio unius est exclusio alterius*<sup>80</sup> or the canon of constitutional avoidance.<sup>81</sup> Other rules govern the weight accorded to specific sources of meaning

75. See James Willard Hurst, *Dealing with Statutes* 1 (1982) (“More than constitutional law or common law, legislation and interpretation of legislation by lawyers, executive and administrative officers, and judges provide the bases for those parts of legal order which enter most broadly into people’s everyday lives as well as into grand designs of public policy.”).

76. See Stanley Fish, *There Is No Textualist Position*, 42 *San Diego L. Rev.* 629, 632 (2005) (“Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language.” (emphasis omitted)).

77. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *Harv. L. Rev.* 2085, 2141–42 (2002) (noting that children can understand otherwise incomprehensible language such as Pig Latin through reference to interpretive regime).

78. The relevant literature concerning statutory interpretation is vast. Three useful overviews are: William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* (2000); Abner J. Mikva & Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* (1997); Scalia, *supra* note 9.

79. Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 *Geo. L.J.* 2225, 2233 (1997) (referring to “wide variety of ‘tools of statutory construction’ available to judges” (quoting Kenneth Culp Davis & Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 2.6 (1994))).

80. The maxim of *expressio unius*, for short, means that inclusion of one thing indicates exclusion of the other. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 730–31 (1989) (O’Connor, J.) (arguing that inclusion of “and laws” in section 1983 indicates that the section is not limited to violations of constitutional rights); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 132 (1989) (holding that existence of right of action for one form of harm suggests exclusion of implied right of action for another form of harm).

81. The constitutional avoidance canon means that ambiguous statutes should be construed, whenever possible, to avoid potential constitutional conflicts. See, e.g., *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979) (interpreting National Labor Relations Act in such way as to avoid potential conflict with the First Amendment Religion Clauses “in the absence of a clear expression of Congress’ intent [to the contrary]”).

like dictionaries<sup>82</sup> or committee reports.<sup>83</sup> Justices also create presumptions about congressional intent in specific contexts.<sup>84</sup> Moreover, Justices and scholars alike often adopt and endorse entire theories of statutory interpretation consisting of one or more of these more specific rules.<sup>85</sup>

This Part examines the Supreme Court's application of stare decisis to various methods of statutory interpretation. The intent is not to provide an exhaustive analysis of the application of stare decisis to every interpretive tool (there are simply too many tools to provide such a thorough analysis here). Rather, the goal is to provide enough examples to demonstrate that there is no cognizable theory to explain the Supreme Court's jurisprudence as to the application of stare decisis to statutory interpretation subdecisions. The Part proceeds by examining three categories of interpretive tools.<sup>86</sup> Part II.A outlines a methodology for deter-

82. Court reliance on dictionaries has increased dramatically in the past twenty-five years. "In the 1981 Term, only one majority opinion referred to a dictionary in resolving a question of statutory interpretation. The number had grown to nine by the 1988 Term (13% of all statutory interpretation opinions) and jumped to twenty-two (33% of statutory interpretation opinions) in the most recent Term." Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 357 (1994).

83. "Most judges and scholars agree that committee reports . . . should be given great weight" for purposes of interpreting statutory meaning. William N. Eskridge, Jr., et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 947 (3d ed. 2001) [hereinafter Eskridge, Legislation]. For a compelling argument for the use of other forms of legislative history, see Breyer, *supra* note 9, at 848–61.

84. A notable example in administrative law was established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* held that, when courts are interpreting ambiguous statutes, they should presume that Congress intended implementing agencies rather than courts to fill any gaps in the statutory text. Thus, courts should defer to the authoritative interpretation of an implementing agency so long as it is reasonable, regardless of whether or not it is the best interpretation. See *infra* notes 138–149 and accompanying text.

85. The three main theories of statutory interpretation today are textualism (emphasis on the literal commands of the statutory text), intentionalism (emphasis on the presumed intent of the enacting legislature), and purposivism (emphasis on the presumed purpose of the statute). See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 324 (1990) [hereinafter Eskridge & Frickey, Practical Reasoning]. For a discussion of the merits of textualism, see John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1 (2001); Scalia, *supra* note 9. For a discussion of intentionalism, see Eskridge & Frickey, Practical Reasoning, *supra*, at 325–32; Fish, *supra* note 76. For a variation on intentionalism, see Richard A. Posner, The Federal Courts: Crisis and Reform 286 (1985) (arguing that judge should imagine she is talking to enacting legislature and should reconstruct how legislators would have answered interpretive question at issue, given their values and concerns at time of enactment). For a discussion of purposivism, see Eskridge & Frickey, Practical Reasoning, *supra*, at 332–39.

86. This Part is divided into categories in order to illuminate differences in how the Supreme Court applies stare decisis to various tools of statutory interpretation. Note that this is not a complete list of the tools of statutory interpretation. For a more exhaustive list, see Eskridge, Legislation, *supra* note 83, at 818 (identifying textual canons, substantive canons, and reference canons as the three basic types of canons). Textual canons govern the way an interpreter reads statutory text independent of other sources of interpretation. A common example is *expressio unius*. See *supra* note 80.

mining whether the Supreme Court is treating a particular category of statutory interpretation subdecisions as bound by law. Part II.B finds that the Court considers some of its subdecisions on common textual canons of statutory interpretation to be bound by precedent.<sup>87</sup> Part II.C analyzes extrinsic source canons, contrasting the apparent application of stare decisis to extrinsic reliance on agency interpretations with the refusal to apply stare decisis to legislative history subdecisions. Part II.D concludes by proposing and then rejecting an organizing neutral principle explaining the uneven treatment of stare decisis and interpretive methodology.

### A. Methodology

This Part offers a descriptive account of Supreme Court practice on applying stare decisis to statutory interpretation. However, two problems preclude this examination from employing the most basic methodology—simply observing what the Supreme Court explicitly states on the subject. First, it is not clear that the Supreme Court has considered the scope of stare decisis as it applies specifically to subdecisions on statutory interpretation.<sup>88</sup> Second, the Supreme Court often authors opinions with less than complete candor.<sup>89</sup> As a result, there is no clear statement from the Court on the application of stare decisis to statutory interpreta-

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Substantive canons direct an interpreter to resolve ambiguity in a statute's text a certain way based on some extrinsic policy. See Eskridge, *Legislation*, supra note 83, at 848–51. Traditionally, the main canons in this category call for a “liberal” or “strict” interpretation of specific kinds of statutes. For example, criminal statutes should be construed strictly, *id.* at 851–73, whereas civil rights statutes should be construed liberally. *Id.* at 848. Clear statement rules and presumptions that cut across different types of statutory schemes are other subcategories within the substantive canon category. See *id.* at 850–51.

Finally, reference canons direct the interpreter to sources of interpretation found outside the statutory text such as the common law, legislative history, or agency interpretations. See *id.* at 818–19.

87. For simplicity's sake, this section focuses on textual canons as opposed to substantive canons in order to avoid some of the potential constitutional entanglements with the rule of lenity, federalism interpretive canons, and constitutional avoidance.

88. Compare *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (“When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”), with Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 *Tex. L. Rev.* 339, 385–86 (2005) (“Time and again one sees the Court stating a principle of statutory interpretation without apparent qualification in one case, only to ignore it in the next.”).

89. See Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 *Harv. L. Rev.* 1, 39 n.122 (1957) (referring to “time-honored place of fictions in the law”); Dorf, *Dicta*, supra note 64, at 2064 (arguing that “a lack of candor with respect to the holding/dictum distinction manifests itself when judges purport to be less constrained by precedent than a fair reading of prior cases suggests”). See generally David L. Shapiro, *In Defense of Judicial Candor*, 100 *Harv. L. Rev.* 731 (1987) (arguing that “a good case can be made that the obligation to candor is absolute”).

tion. Since consistency alone is insufficient evidence of the reach of stare decisis,<sup>90</sup> this Part must use an alternative inquiry.

The current literature on statutory interpretation does not supply a methodology because it fails to consider thoroughly the extent to which stare decisis influences interpretive doctrines. Scholars either bracket these questions,<sup>91</sup> address them sparingly,<sup>92</sup> or do not address them at all.<sup>93</sup> As a result, there is no accepted methodology for defining Supreme Court practice with regard to the scope of stare decisis.

This Part focuses its inquiry on two factors derived from the above discussion about the nature of stare decisis.<sup>94</sup> First, since stare decisis serves efficiency,<sup>95</sup> this Part examines whether the Supreme Court cites precedents in place of analysis to justify subdecisions about particular interpretive tools.<sup>96</sup> Second, this Part examines whether the Court, when deviating from earlier subdecisions, engages in the same distinguishing or narrowing behavior that the Court often employs when trying to distinguish traditional precedents.<sup>97</sup> If the Court does treat a particular statutory interpretation subdecision as having stare decisis effect, it should feel the need to explain why previous precedents applying different interpre-

90. See *supra* Part I.D.

91. See, e.g., Siegel, *supra* note 88, at 389 (“One might well ask why the Court regards itself as less bound by its decisions regarding methods than by the results of the methods as applied. That question, however, interesting though it is, is reserved for some other article.”).

92. For example, Professor Rosenkranz asserts that “Justices do not seem to treat methodology as part of the holding of case law.” Rosenkranz, *supra* note 77, at 2144. For support, he cites an example in which Justice Scalia seems to treat a subdecision on legislative history from a previous case as not being bound by law. *Id.* at 2145 n.267. However, Professor Rosenkranz does not extend his inquiry beyond the realm of legislative history, where, as this Note will demonstrate, *infra* Parts II.B and II.C.1, there is significant evidence of Justices giving precedential value to subdecisions on statutory interpretation. To be fair to Professor Rosenkranz, he does concede his uncertainty with regard to the central question of this Note. See Rosenkranz, *supra* note 77, at 2145 n.267 (“Does [nonbinding approach to legislative history subdecisions] suggest . . . [Justice Scalia] views choice of interpretive methodology not merely as an inalienable component of the judicial power but rather as an inalienable prerogative of each individual Article III judge? Or do the policies underlying stare decisis not apply to interpretive methodology?”).

93. For example, Adrian Vermeule discusses the impact of stare decisis with regard to interpretive tools in his model of the cycles of statutory interpretation, but he does not discuss whether the Supreme Court applies stare decisis in this way. Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. Chi. L. Rev. 149, 174 (2001) [hereinafter Vermeule, *Cycles*].

94. See *supra* Part I.C.

95. See *supra* notes 37–39 and accompanying text.

96. That is, if the Court acts as though a subdecision about statutory interpretation in a previous case relieves the Court of the burden of explanation on that issue, that would add weight to the proposition that the Court considers the subdecision to be binding.

97. See *supra* notes 60–65 and accompanying text.

tive rules do not apply to the case at hand.<sup>98</sup> Alternatively, evidence that the Court consistently breaks with previous statutory interpretation practices without explanation would suggest that the Court does not consider *stare decisis* to apply.

### B. *Textual Canons*

It is generally agreed that the starting point of statutory interpretation is the text of the statute.<sup>99</sup> However, as Judge Richard Posner puts it, “language is a slippery medium in which to encode a purpose.”<sup>100</sup> Textual canons provide “rules of thumb” to enable interpreters to draw inferences from the text and structure of statutes.<sup>101</sup>

An examination of several cases and the literature on statutory interpretation suggests that Justices and scholars consider *stare decisis* to apply to at least some textual canons. The methodology discussed above reveals specific evidence that the Supreme Court cites precedents in place of reasoning related to textual canon subdecisions. Also, when the Court breaks with previous practice related to textual canons, it frequently distinguishes the facts of the case at hand to avoid overruling earlier cases.

For an example of a Justice citing precedent on a subdecision about a textual canon in lieu of analysis, consider the opinion by Chief Justice Warren in *Jarecki v. G.D. Searle & Co.*<sup>102</sup> The dispute in *Jarecki* was whether income from the sale of certain new products fell within the statutory definition of “abnormal income” in the Excess Profits Tax Act of 1950.<sup>103</sup> Since § 456(a)(2)(B) defined “abnormal income” as “income resulting from exploration, discovery, or prospecting,” the case hinged on the scope of the meaning of the word “discovery.”<sup>104</sup> Chief Justice Warren cited *Neal v. Clark*<sup>105</sup> for the proposition that “[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” Thus, the word “discovery,” in the context of § 456(a)(2)(B), was limited to the discovery of mineral resources, and the sales of new products fell outside that definition.<sup>106</sup> While, admittedly,

98. See Kennedy, *supra* note 59, at 522 (explaining that judges are neither completely “bound” nor completely “free” when they write opinions, as they are “limited by the pseudo-objectivity of the rule-as-applied,” which requires legal reasoning to distinguish).

99. See *Smith v. City of Jackson*, 544 U.S. 228, 248 (2005) (“Our starting point is the statute’s text.”); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (“Our precedents make clear that the starting point for our analysis is the statutory text.”).

100. *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989).

101. See Eskridge, *Legislation*, *supra* note 83, at 818.

102. 367 U.S. 303 (1961).

103. See *id.* at 304–05.

104. 64 Stat. 1137 (1951) (repealed 1954).

105. 95 U.S. 704 (1877).

106. *Jarecki*, 367 U.S. at 307.

Chief Justice Warren did not indicate that he had no freedom to refuse the maxim of *noscitur a sociis*, he cited *Neal v. Clark* for its subdecision about a textual canon the same way he would cite any other holding. The decision by a previous Court on the issue replaced any extensive analysis about whether the decision to use the canon was sound.

Justice Scalia, writing in *Kungys v. United States*, seemingly applied stare decisis to another textual canon.<sup>107</sup> He criticized Justice Stevens's competing construction of the statute at issue<sup>108</sup> as "violat[ing] the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."<sup>109</sup> To support his claim, he cited three cases in which subdecisions regarding this "rule against redundancy"<sup>110</sup> had been decisive.<sup>111</sup> Similar to Chief Justice Warren's opinion above, Scalia's citation of precedent replaced extensive analysis about why Justice Stevens's use of a canon was incorrect. It was incorrect, for Scalia, because it violated methodological precedent.

Indeed, Justices commonly cite cases for their holdings about textual canons.<sup>112</sup> At least with regard to some textual canons, Justices cite previous cases for their methodological holdings in place of more extensive analysis.

One might argue that textual canons are not mandatory but rather are guides that "need not be conclusive."<sup>113</sup> Perhaps the apparent fact that courts have more discretion in applying textual canons than they do with traditional precedents is a function of the extension of stare decisis to the latter but not the former.<sup>114</sup> Indeed, many notable scholars have criticized courts for selectively applying canons to reach whatever out-

107. 485 U.S. 759 (1988).

108. *Id.* at 784–801 (Stevens, J., concurring in judgment).

109. *Id.* at 778 (Scalia, J.).

110. The "rule against redundancy" is also called the "Rule to Avoid Surplusage." See Eskridge, *Legislation*, *supra* note 83, at 833.

111. *Kungys*, 485 U.S. at 778 (citing *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), *Jarecki*, 367 U.S. at 307–08, and *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

112. For more examples, see *Field v. Mans*, 516 U.S. 59, 69 (1995) (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), and *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)), for proposition that "[i]t is . . . well established that where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms" (citations omitted); *United States v. Ron Pair Enters.*, 489 U.S. 235, 250 (1989) (O'Connor, J., dissenting) (citing *Constanzo v. Tillinghast*, 287 U.S. 341 (1932), and *Barrett v. Van Pelt*, 268 U.S. 85 (1925), for proposition that punctuation is minor and not controlling element in statutory interpretation).

113. See *Chicasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

114. See Siegel, *supra* note 88, at 388–89 (arguing that apparent judicial discretion in applying scrivener's error canon suggests that stare decisis does not apply).

comes they preferred for political or policy reasons.<sup>115</sup> Famously, Karl Llewellyn suggests that the use of canons in judicial opinions is often contradictory by presenting a selection of opposing judicial canons that support contradictory outcomes.<sup>116</sup> Legal process theorists argue that Justices use canons as post-hoc rationalizations for their decisions only after they reach conclusions for other reasons.<sup>117</sup> And, in a similar vein, many modern commentators have criticized the wide discretion courts have in employing various interpretive canons.<sup>118</sup>

However, these criticisms, though important, do not suggest that *stare decisis* is not perceived to apply to textual canons of statutory interpretation. Rather these are similar to criticisms offered in response to the application of *stare decisis* in other contexts.<sup>119</sup>

Textual canons are not mandatory in the sense that they always apply or cannot be outweighed, but they still seem to be legally binding. It is true that canons only apply in specific circumstances, and even when they do apply, they can be overcome by other considerations.<sup>120</sup> However, this judicial discretion to apply the canons reflects the complicated set of factors inherent in statutory interpretation,<sup>121</sup> and the ability to distinguish cases,<sup>122</sup> rather than the inapplicability of *stare decisis*. When the Court rejects an argument based on some textual canon, it does not necessarily reject the canon altogether. Such a Court frequently refuses to apply a

115. See, e.g., Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla. L. Rev. 1, 3–20 (2004) (reviewing instances of selective application of canons of construction).

116. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401–06 (1950).

117. See, e.g., Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 864 (1930) (explaining that courts often select particular canon of construction and accompanying statutory meaning “after—rather than before—the effect of such an interpretation on the decision [is] known”).

118. See, e.g., Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 Ala. L. Rev. 789, 816 (2002) (“[T]he Justices can, through the selective use of various statutory interpretation theories . . . manipulate their arguments and statutory interpretations to obtain desired substantive outcomes . . . .”); Rosenkranz, *supra* note 77, at 2148 (“[C]hoosing interpretive canons is like ‘entering a crowded cocktail party and looking over the heads of the guests for one’s friends.’” (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring))).

119. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (“[W]e should be consistent rather than manipulative in invoking [*stare decisis*]. Today’s opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to *stare decisis* coauthored by three Members of today’s majority in *Planned Parenthood v. Casey*.”); see also *supra* note 62 and accompanying text.

120. See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993) (holding that canon of avoiding scrivener’s errors overcame mandate of canon against repunctuation).

121. See Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 Cornell L. Rev. 1609, 1632 (2000) (“Statutory interpretation is a complicated business.”).

122. See *supra* notes 60–65 and accompanying text.

canon for one of two reasons: Either the Court argues that other interpretive tools or textual canons provide support for an alternative inference that outweighs the support provided by the textual canon,<sup>123</sup> or the Court distinguishes the interpretive question at issue from previous cases in which the textual canon was treated as decisive.<sup>124</sup>

For example, Professor Jonathan Siegel argues that the Court's decision in *U.S. National Bank v. Independent Insurance Agents of America, Inc.*<sup>125</sup> supports his contention that the Supreme Court does not seem to give precedential effect to methodological subdecisions.<sup>126</sup> He explains that, since the Court had previously stated "it is beyond our province to rescue Congress from its drafting errors,"<sup>127</sup> the Court's subdecision to correct a "drafting error" in *U.S. National Bank*<sup>128</sup> demonstrates that the Court refuses to apply stare decisis to methodological questions.<sup>129</sup> But the scrivener's error at issue in *U.S. National Bank* was an error in punctuation.<sup>130</sup> Thus, the Court distinguished previous scrivener's error canon cases by invoking an exception for punctuation errors, also bound in precedent.<sup>131</sup> This example Siegel refers to is therefore an excellent example of the Court distinguishing a particular methodological subdecision from precedent in the area.<sup>132</sup>

Thus, it appears that, for the statutory interpretive tools of textual canons, the Supreme Court often synthesizes precedents on subdecisions across various substantive areas of the law, rather than simply synthesizing traditional precedents. This suggests that the application of stare decisis to statutory interpretation is at least familiar as applied to some textual canons.

123. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 582–84 (2000) (accepting canon of *expressio unius* based on application in previous cases, but refusing to find canon decisive because of counter considerations involving statutory context); *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000) (declining to follow rule against redundancy when other textual canons provided more compelling support for alternative interpretation); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509–10 (1989) (refusing to interpret statute consistent with its "plain language" in light of "odd result" such interpretation would create).

124. See, e.g., *United States v. Turkette*, 452 U.S. 576, 581 (1981) (refusing to apply textual cannon *eiusdem generis* because, unlike previous cases in which canon was invoked, statutory language and structure did not convey uncertain meaning).

125. 508 U.S. 439 (1993).

126. Siegel, *supra* note 88, at 388 & n.243.

127. *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)).

128. *U.S. Nat'l Bank*, 508 U.S. at 455, 462 (correcting "a simple scrivener's error" that caused "punctuation marks [to be] misplaced").

129. Siegel, *supra* note 88, at 388.

130. 508 U.S. at 454–55.

131. *Id.* ("No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning.").

132. See *supra* notes 61–62 and accompanying text.

### C. *Extrinsic Source Canons*

Statutory interpretive tools are not restricted to the four corners of the statute. When statutory text is ambiguous, most Justices turn to extrinsic sources to help derive the meaning of the text.<sup>133</sup> These extrinsic sources include the legislative history of the statute at issue as well as related statutes and administrative interpretations of the statutes they are empowered to implement.<sup>134</sup> This section focuses on two extrinsic sources of statutory interpretation: agency interpretations and legislative history. The two categories provide a striking contrast regarding the way *stare decisis* is currently applied to tools of statutory interpretation.

1. *Agency Interpretations*. — The modern administrative state has seen Congress delegate extensive rulemaking power to administrative agencies.<sup>135</sup> Thus, administrative agencies, valued for their expertise concerning the policy areas in which they regulate,<sup>136</sup> are frequently compelled to interpret the bounds of their statutory mandates.<sup>137</sup> The Supreme Court, in reviewing agency action, has developed a series of doctrines to help interpret the degree of deference properly accorded to agency interpretations of statutes.

The central doctrine in this area is the *Chevron* doctrine, named for the groundbreaking<sup>138</sup> administrative law case: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>139</sup> *Chevron's* substantive holding upheld the Environmental Protection Agency's (EPA) regulation construing a Clean Air Act (CAA) provision<sup>140</sup> despite concerns of environmental groups that the agency interpretation was contrary to the meaning of the language in the CAA.<sup>141</sup> However, *Chevron's* impact on the legal system has been felt far beyond the environmental context.<sup>142</sup> *Chevron* has been

133. See Eskridge, *Legislation*, supra note 83, at 920.

134. For a full taxonomy of extrinsic source canons, see William Eskridge, Jr. & Philip Frickey, *The Supreme Court, 1993 Term—Forward: Law as Equilibrium*, 108 *Harv. L. Rev.* 26, 99–108 (1994) [hereinafter Eskridge & Frickey, *Equilibrium*].

135. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 *Harv. L. Rev.* 467, 583 (2002) (referring to “thousands of federal statutes containing tens of thousands of rulemaking grants”).

136. Exec. Order No. 12,866, 3 *C.F.R.* 638 (1993) (basing its mandate on fact that “[f]ederal agencies are the repositories of significant substantive expertise and experience”).

137. See Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 *UCLA L. Rev.* 1157, 1192 (1995) (“An agency frequently has occasion to interpret the meaning of statutes or other legal texts such as its own regulations, judicial decisions, or the common law.”)

138. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 *Colum. L. Rev.* 2071, 2075 (1990) (“*Chevron* has established itself as one of the very few defining cases in the last twenty years of American public law.”).

139. 467 U.S. 837 (1984).

140. *Id.* at 839–40.

141. See *id.* at 842 n.7.

142. See, e.g., Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 *Tulsa L.J.* 221, 241 (1996)

cited by numerous cases<sup>143</sup> for its two-step test in reviewing an agency's construction of a statute that it administers.<sup>144</sup> The inquiry at step one asks "whether Congress has directly spoken to the precise question at issue."<sup>145</sup> If Congress has not done so, the Court asks at step two whether the agency's interpretation is a "permissible construction of the statute."<sup>146</sup> The EPA regulation at issue in *Chevron* was found to be a permissible construction of an ambiguous provision of the CAA, and so the Court upheld the EPA interpretation.<sup>147</sup> Thus, the *Chevron* doctrine involves a presumption about congressional intent, much like some textual canons.<sup>148</sup> The Court presumes that Congress intended to delegate gap-filling authority in ambiguous statutes to the agencies implementing them rather than the courts.<sup>149</sup>

What is important for this discussion is that *Chevron* stands principally for its subdecision about statutory interpretation. That subdecision, which was decisive in the context of the CAA, has been used by the Court to resolve other questions about statutory interpretation.<sup>150</sup> The Court, when determining the proper methodology for considering what weight to give an agency interpretation of a statute it is charged with implementing, cites *Chevron* in lieu of an independent analysis.<sup>151</sup> For example, in *Barnhart v. Thomas* the Court cited *Chevron* for the proposition that a court should defer to the Social Security Administration's reasonable interpretation of a particular provision of the Social Security Act.<sup>152</sup> In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court gave deference to the Federal Communication Commission's inter-

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("Chevron, in my view, is as much of a landmark decision as exists in administrative law." (footnote omitted)).

143. See Peter L. Strauss et al., Gellhorn and Byse's Administrative Law 1033 (rev. 10th ed. 2003) (finding *Chevron* to be most cited administrative law case in U.S. Circuit Courts of Appeals decisions in Westlaw search conducted September 22, 2002).

144. *Chevron*, 467 U.S. at 842-43.

145. *Id.* at 842.

146. *Id.* at 843.

147. *Id.* at 845.

148. Elliot Greenfield, A Lenity Exception to *Chevron* Deference, 58 Baylor L. Rev. 1, 8-9, 21-24 (2006) (describing rule of lenity, other canons, and *Chevron* doctrine as presumptions about congressional intent).

149. See Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803, 822-23 (2001) (describing *Chevron* as associated with "obedience" model of agency oversight, where "courts encountering agency decisions [that the courts] conclude the agencies were authorized to take must accept the conclusions they embody rather than displace them with their own independent judgment on the matter" as long as agency interpretations are "reasonable").

150. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002) (applying *Chevron* doctrine to Social Security Act); *Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of Interior*, 526 U.S. 86, 92 (1999) (applying *Chevron* doctrine to Federal Service Labor-Management Relations Statute).

151. See *Walton*, 535 U.S. at 217-18.

152. 540 U.S. 20, 26 (2003).

pretation of the Telecommunications Act of 1996 because the *Chevron* subdecision about deference to agency interpretations governed its analysis.<sup>153</sup> In these cases, the Court cited to *Chevron* for the extrinsic source canon it established, and the Court followed that precedent.

Furthermore, in the stare decisis tradition, when Justices decide not to grant *Chevron* deference to agency interpretations of statutes, they assume the burden of distinguishing the agency interpretation or statute. For example, in *United States v. Mead Corp.*, the Court held that a United States Customs Service tariff classification ruling did not deserve *Chevron* deference.<sup>154</sup> However, the Court did so without overruling the methodological holding in *Chevron* about deference to agency interpretations.<sup>155</sup> Instead, the Court distinguished the Customs Service tariff classification from the Environmental Protection Agency regulation at issue in *Chevron* on the basis of, inter alia, the level of formality of the tariff classifications.<sup>156</sup>

The Court's treatment of the *Chevron* doctrine as just that—a doctrine—closely parallels the Court's treatment of textual canons. *Chevron* has been generally cited for its methodological holding, and when the Court has failed to apply that holding, it has provided an explanation distinguishing its facts from those of *Chevron*. This further adds support to the proposition that the Court is familiar with synthesizing the principles of subdecisions relating to statutory interpretation across multiple cases.

2. *Legislative History*. — Legislative history, like an administrative decision, may provide guidance to judges about statutory interpretation.<sup>157</sup> However, unlike the *Chevron* subdecision, legislative history subdecisions do not appear to bind the Court.

For example, one important issue with regard to the use of legislative history is whether or not a Justice is permitted to review the legislative history<sup>158</sup> of a statute she deems to be unambiguous.<sup>159</sup> The answer to this question creates a subtle but important difference in how a Justice approaches statutory interpretation.<sup>160</sup> Should Justices only consult legis-

153. 545 U.S. 967, 986 (2005).

154. 533 U.S. 218, 234 (2001).

155. But see *id.* at 239–40 (Scalia, J., dissenting) (arguing that majority holding “replaced the *Chevron* doctrine”).

156. *Id.* at 231.

157. For a discussion of cases and scholarship on a variety of sources of legislative history, see Eskridge, *Legislation*, *supra* note 83, at 937–1060.

158. I use the broad term “legislative history” here, by which I mean the internal prehistory of a statute, including the institutional progress of a bill to enactment and the deliberation accompanying that progress. See *id.* at 937.

159. For an introduction to this area, compare William T. Mayton, *Law Among the Pleonasm: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 *Emory L.J.* 113 (1992) (arguing against use of legislative history), with Breyer, *supra* note 9 (explaining benefits of careful use of legislative history).

160. Compare *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required

lative history if they deem statutory text to be ambiguous, or should legislative history be treated as one of many factors at the initial inquiry?<sup>161</sup> If the existence of textual ambiguity provides a sort of on/off switch for the inquiry into legislative history, the initial question about the ambiguity of the text gains vital importance and the legislative history is rendered less important.<sup>162</sup>

Since the emergence of “new textualism” over the past twenty-five years,<sup>163</sup> the Court has repeatedly flip-flopped on the issue of whether to consult the legislative history behind unambiguous text. Neither side mentions the arguments traditionally invoked when the Court overturns precedent.<sup>164</sup> In 1992, the majority of the Court held in *Connecticut National Bank v. Germain* that “[w]hen the words of a statute are unambiguous, then . . . the judicial inquiry is complete.”<sup>165</sup> Justice Stevens concurred in that judgment because it was supported by the legislative history but wrote separately to explain that he thought it was proper to consider the legislative history in the case.<sup>166</sup>

One year later, in *Conroy v. Aniskoff*, Justice Stevens wrote for an eight-member majority, which included Justice Thomas, in an opinion that considered legislative history of a statute—despite the fact that the majority considered the statute to be “unambiguous, unequivocal, and unlimited.”<sup>167</sup> The Court found that the legislative history supported the unambiguous meaning of the text,<sup>168</sup> but nevertheless, Justice Scalia filed an eleven-page concurrence in judgment, taking issue with the majority’s inquiry into the legislative history of an unambiguous statute.<sup>169</sup> Justice Scalia voiced concerns that legislative history is generally confusing, ille-

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by the text is not absurd—is to enforce it according to its terms.” (internal quotation marks omitted) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))), with *Salinas v. United States*, 522 U.S. 52, 57 (1997) (explaining that only “most extraordinary showing” of intention in legislative history will justify departure from clear statutory text (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985))). The same distinctions between the aforementioned cases are drawn in Siegel, *supra* note 88, at 386–87.

161. See *Salinas*, 522 U.S. at 57.

162. See *Lamie*, 540 U.S. at 534.

163. See William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621, 623 (1990) (describing “new textualism” as judicial methodology that posits that “once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant”).

164. For a discussion of these arguments, see *supra* notes 49–54 and accompanying text.

165. 503 U.S. 249, 253–54 (1992) (internal quotation marks omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

166. *Id.* at 255–56 (Stevens, J., concurring in judgment).

167. 507 U.S. 511, 514 (1993).

168. *Id.*

169. *Id.* at 518–28.

gitimate,<sup>170</sup> and subject to manipulation.<sup>171</sup> Speaking for seven members of the Court, Justice Stevens responded to Justice Scalia's concurrence in a footnote in the majority opinion: "A jurisprudence that confines a court's inquiry to the 'law as it is passed,' and is wholly unconcerned about 'the intentions of legislators,' would enforce an unambiguous statutory text even when it produces manifestly unintended and profoundly unwise consequences."<sup>172</sup> Neither Justice Stevens nor Justice Scalia argued that his position was buttressed by *stare decisis*.

The evidence that the Court does not regard *stare decisis* as applying to this legislative history inquiry has only become more abundant since *Connecticut National Bank* and *Conroy*. Four Justices seem intent on remaining faithful to their own opinions regarding legislative history,<sup>173</sup> while the other Justices join majorities on both sides of the issue. Justices Scalia and Thomas routinely either dissent outright or file concurring opinions when they agree with the majority in judgment but disagree with a particular subdecision about legislative history,<sup>174</sup> and Justices Breyer and Stevens do the same.<sup>175</sup> All the while, there is no discussion of the implications of *stare decisis* to this debate.

Indeed, this tug-of-war has had a noticeable effect on the other Justices on the Court. For example, on June 5, 2006, the newest Justice to the Court, Justice Alito, wrote an opinion for the majority that found a particular statute clear but nevertheless engaged in an inquiry into the legislative history to confirm his view.<sup>176</sup> Not surprisingly, Justice Scalia concurred in part and concurred in the judgment but wrote separately to take issue with the majority's consideration of legislative history.<sup>177</sup> In Justice Alito's next opinion,<sup>178</sup> his approach was closer to, though more moderate than, that of Justices Scalia and Thomas. He stated that when everything other than legislative history suggests one thing, there is no

170. *Id.* at 519. Specifically, Justice Scalia argues that legislative history is a less legitimate source of meaning because, unlike statutory text, it is not subject to bicameralism and presentment pursuant to U.S. Const. art. I, § 7, cl. 2.

171. *Conroy*, 507 U.S. at 518–19.

172. *Id.* at 518 n.12 (citations omitted). Justice Thomas dissented from this footnote. *Id.* at 512.

173. Justices Breyer and Stevens continually advocate for permissive use of legislative history while Justices Scalia and Thomas continually argue that legislative history may not be consulted when the text is unambiguous.

174. See, e.g., *Zedner v. United States*, 126 S. Ct. 1976, 1990 (2006) (Scalia, J., concurring in judgment); *United States v. Booker*, 543 U.S. 220, 313 (2005) (Thomas, J., dissenting in part); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting).

175. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (joined by Justice Breyer); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 129 (2005) (Stevens, J., concurring in judgment).

176. *Zedner*, 126 S. Ct. at 1985 ("This interpretation is entirely in accord with the Act's legislative history.")

177. *Id.* at 1990.

178. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006).

need to look at legislative history to confirm the interpretation.<sup>179</sup> Justice Alito followed the pattern of the Justices he joined by failing to mention whether his shift in methodology was a permissible shift from his previous opinion. Perhaps the later case would have been easy to distinguish, but Justice Alito apparently did not feel compelled to do so.

The Supreme Court's treatment of legislative history indicates that its members do not consider themselves bound by stare decisis on the issue of when and to what extent legislative history is a permissible interpretive guide. This is based not just on the inconsistency of the majority holdings but also on the lack of any discussion of stare decisis or the costs of an unsettled methodology for Congress or other parties relying on the Court's decisions. When the Court breaks with the practice of a previous majority on legislative history, it does not engage in the same effort to distinguish previous cases that it does for subdecisions on textual canons or administrative interpretations of statutes.<sup>180</sup> Thus, the Court seems to extend the scope of stare decisis to some statutory interpretation subdecisions but not others.

#### D. *Neutral Principles*

In 1959, Herbert Wechsler famously wrote, "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."<sup>181</sup> The basic argument that judicial doctrines should be based on neutral principles is difficult to refute.<sup>182</sup> This section explains that no such principle can be offered to explain the Supreme Court's jurisprudence with regard to the application of stare decisis to subdecisions on statutory interpretation.

The first point to note is that the Court itself does not provide any explanation of why stare decisis applies to some statutory interpretation subdecisions but not others. There is a glaring lack of discussion of stare decisis even when the Court seems to apply it to the *Chevron* doctrine and textual canons.<sup>183</sup> Though the Court has stated generally that it is bound by portions of its opinions necessary to the outcome of the case,<sup>184</sup> it does not explain why it applies this principle sporadically.

179. *Id.* at 2463.

180. See *supra* Part II.B (discussing textual canons) and Part II.C.1 (discussing administrative interpretations).

181. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 19 (1959).

182. But see Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *Stan. L. Rev.* 169, 179–85 (1968) (arguing that Wechsler assumes his own conclusion and disputing Wechsler's interpretation of neutral principles); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)*, 92 *Colum. L. Rev.* 1, 5–13 (1992) (questioning baseline against which Wechsler measures neutrality).

183. See *supra* Parts II.B and II.C.1.

184. See *supra* note 3 and accompanying text.

The Court might conceivably have an unstated neutral principle governing its decisions on the scope of stare decisis. However, it is difficult to come up with a principle that justifies applying stare decisis to textual canons<sup>185</sup> and presumptions about legislative intent in the administrative context,<sup>186</sup> but not to subdecisions about legislative history.<sup>187</sup> One could imagine that the Court considers stare decisis to apply to all methodological subdecisions, but that it frequently finds substantial justifications in the legislative history context that justify overturning precedents.<sup>188</sup> However, this explanation is unsatisfactory because the cases on legislative history lack the analysis traditionally applied to similar reversals of precedent.<sup>189</sup> The most accurate explanation for a lack of a neutral principle explaining the jurisprudence in this area is likely that either the Court has not considered its own inconsistency or else it has purposefully avoided acknowledging it.

### III. POLICY ARGUMENTS FOR EXTENDING THE SCOPE OF STARE DECISIS

Part II reveals that the Supreme Court is familiar with treating methodological subdecisions as precedent, but the Court has done so unevenly and without explanation. This Part uses the policy arguments for a stare decisis doctrine in general, invoked by the Court and articulated in Part I, to make recommendations about where the Court should go from here.

As Part II.D emphasizes, the Court should adopt some neutral principle with regard to the scope of stare decisis. A coherent doctrine might involve eliminating all precedential effect of methodological subdecisions, granting stare decisis effect to all methodological subdecisions, or invoking a reasoned analysis to take some middle course.

As the first section of this Part makes clear, the purposes underlying the more traditional stare decisis doctrine apply with significant force to precedents involving statutory interpretive method. Furthermore, an additional policy interest in the legislative context strengthens the conclusion that applying stare decisis to all statutory interpretation subdecisions is the best solution to the Court's incoherent doctrine. Part III.B examines one difficulty with expanding the scope of stare decisis to statutory interpretation subdecisions—that is, the concern that each subdecision within a majority opinion cannot be considered the collective expression of the entire majority. This section concludes by observing that improved legal research technology as well as the recent prevalence of concurring opinions make the present a particularly appropriate time to apply stare decisis to all statutory interpretation subdecisions. Finally, Part III.C examines how expanding the scope of stare decisis compares with and com-

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185. See *supra* Part II.B.

186. See *supra* Part II.C.1.

187. See *supra* Part II.C.2.

188. For a discussion of the circumstances under which the Court overturns more conventional precedents, see *supra* notes 49–54 and accompanying text.

189. See discussion *supra* notes 61–65 and accompanying text.

plements other proposals to improve consistency in statutory interpretation.

A. *Policy Reasons Stare Decisis Should Apply to Statutory Interpretation Subdecisions*

As noted above, the principal purposes of stare decisis are consistency and efficiency.<sup>190</sup> Consistency is important for predictability, notice to parties with a reliance interest in the law, perceived legitimacy, and fairness.<sup>191</sup> The Supreme Court enhances efficiency by building on the foundations of reasoning laid by prior Justices.

Applying stare decisis to statutory interpretation subdecisions would serve the interest of predictability. In the status quo, where individual judges and Justices retain discretion over methods of statutory interpretation, there is little consistency or predictability in the way in which statutes will be interpreted. As Professor Rosenkranz states, “[t]he interpretive status quo is cacophonous. Every judge and scholar has his own theory of how best to interpret statutes, and this diversity renders the interpretive project unpredictable.”<sup>192</sup> The Court would improve predictability in the same way that it enhances predictability in traditional applications of stare decisis by solidifying statutory interpretation subdecisions with stare decisis.<sup>193</sup> A Court that uses consistent methods for interpreting statutes would improve predictability because parties could rely on statutory interpretation precedents to make predictions about the interpretations of other statutes, thereby enhancing fairness and legitimacy.<sup>194</sup>

Furthermore, in the same way the Supreme Court conserves resources by citing precedents in lieu of fresh analysis in traditional stare decisis cases,<sup>195</sup> the Court could avoid the “cacophony” of current unsettled interpretive doctrines by choosing winners and relying on their choices in the future.<sup>196</sup> If these purposes are persuasive in establishing the traditional stare decisis doctrine, they apply with no less weight here.

190. See discussion *supra* Part I.B.

191. See discussion *supra* Part I.B.

192. Rosenkranz, *supra* note 77, at 2088; see also Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”).

193. For a defense of another proposal to improve statutory interpretation based on the importance of improving predictability, see Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74, 81 (2000) [hereinafter Vermeule, *Interpretive Choice*] (arguing that judges should choose interpretive doctrines that minimize uncertainty).

194. See Rosenkranz, *supra* note 77, at 2157 (“The most important features of an interpretive regime are that it be clear, predictable, and internally coherent . . .”).

195. For a discussion of the efficiency gains of traditional stare decisis doctrine, see *supra* notes 37–39 and accompanying text.

196. Note that Benjamin Cardozo’s quote, *supra* note 37, applies with equal force irrespective of the manner of precedent at issue.

The case for applying *stare decisis* to statutory interpretation subdecisions is even stronger because it serves an additional policy interest in the legislative context. Consistency in statutory interpretation makes drafting and voting on bills less expensive and more precise. As Rosenkranz argues regarding the textual canon *expressio unius*:<sup>197</sup> “[i]t is relatively insignificant whether the expression of one thing in a statute implies exclusion of another.”<sup>198</sup> Rosenkranz goes on: “so long as all concerned—legislators, judges, and citizens—know what the rule is . . . [a] statutory interpretive regime may thus provide a rule-of-law boon to the public, while lowering the costs of drafting statutes to the legislature. These theoretical merits are uncontroversial.”<sup>199</sup> Congress must have “a background of clear interpretive rules, so that it may know the effect of the language it adopts.”<sup>200</sup> Based on these principles, it is not at all surprising that some textual canons are bound by legal precedent.<sup>201</sup> When Justices rule on subdecisions relating to these tools of statutory interpretation, they send important messages to Congress about how their legislation will be interpreted.<sup>202</sup>

This legislative efficiency benefit can be illustrated with an example. If the Court adopts a subdecision that states “the only reliable source of legislative history is a committee report published before a bill is enacted,”<sup>203</sup> this will enhance congressional precision.<sup>204</sup> A senator voting on an important bill will focus his energy on the Senate committee report before he votes yes or no.<sup>205</sup> The senator would not have to waste time consulting other forms of legislative history to be sure his intention is not obscured, because the Court’s consistent practice will be to ignore these

197. For a discussion of this particular textual canon, see *supra* note 80.

198. See Rosenkranz, *supra* note 77, at 2142.

199. *Id.*; see also Eskridge & Frickey, *Equilibrium*, *supra* note 134, at 67 (noting importance of not necessarily finding best theory of interpretation, but rather consistent theory).

200. *Finley v. United States*, 490 U.S. 545, 556 (1989).

201. See *supra* Part II.B.

202. While several commentators have noted that Congress is not currently aware of many of the Court’s decisions about statutory interpretation, see Eskridge, *Legislation*, *supra* note 83, at 409 (discussing disappointing results of “Corrections Day” process in House of Representatives under which Congress may consider and correct major judicial statutory interpretations), it seems at least plausible that one reason for this is that the doctrine is unpredictable. If *stare decisis* applied to statutory interpretation subdecisions, Congress would have greater incentives to gain awareness of the Court’s interpretive doctrines.

203. Committee reports are produced when legislation is in committee or subcommittee, which is the time when “[m]ost legislation is essentially written.” Eskridge, *Legislation*, *supra* note 83, at 947–49. For an introduction to current jurisprudence related to committee reports, see *id.*

204. Vermeule, *Cycles*, *supra* note 93, at 174 (explaining that *stare decisis* encourages legislators to respond to Court doctrines bound by law because they “believe that courts will do in the next period what they did in the last”).

205. Or more likely, such a rule will cause his staff to focus on the text and then summarize their findings for him before he votes.

other documents. This means Congress will be able to more precisely convey its intent to the Court at a lower cost than under the current inconsistent doctrine.<sup>206</sup> Such a senator, under the current system, would have to conduct considerably more research in order to understand how this law would be interpreted because the Court's treatment of legislative history is unpredictable.<sup>207</sup>

Even if the Court adopts a less restrictive subdecision, giving the subdecision precedential effect will provide efficiency-enhancing information for Congress. If the Court holds that "any source of legislative history is potentially relevant to the interpretation of statutory text," the senator in the example above would be able to work more efficiently if he knew he could rely on that holding in the future. His review of a particular bill would include more sources of legislative history and less scrutiny of the text. Over time, the Court's jurisprudence regarding statutory interpretation would likely provide more direction for members of Congress, rather than the fluctuating signals the Court currently offers.

As the above discussion makes clear, there are strong policy reasons to apply stare decisis to all statutory interpretation subdecisions. Since the policy interests underlying traditional stare decisis apply with equal vigor to statutory interpretation stare decisis, and the statutory interpretation context provides an additional "rule-of-law boon," it seems that the decision to implement a rule of stare decisis at all justifies extending it to statutory interpretation subdecisions.

#### B. *Subdecisions Reflect Collective Will of the Court*

One potential criticism of extending the reach of stare decisis to methodological subdecisions in general is that majority opinions cannot be reliably taken to represent the collective expression of the majority of the Justices with regard to each subdecision. However, for a variety of reasons this collective will problem is unlikely to cause significant concern.

First, as discussed above, the Court already applies stare decisis to some statutory interpretation subdecisions, and in these cases, the subdecisions underlying the opinions are attributed to each Justice who signs onto the majority.<sup>208</sup> This suggests that applying stare decisis effect to subdecisions is not foreign to the Supreme Court, and a more consistent doctrine is unlikely to create new problems regarding collective expression.

Second, improved electronic legal research technology suggests that majority opinions better reflect the collective will of the Court than they

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206. Vermeule, *Interpretive Choice*, supra note 193, at 140–41 (explaining argument that merely "picking canons" would obtain benefits of certainty and consistency in communication between courts and legislatures).

207. See supra Part II.C.2.

208. See supra Parts II.B and II.C.1.

did in the past. Henry Monaghan argued in 1979 that certain technological advancements like the photocopy machine in the late 1970s demonstrated that Supreme Court opinions reflected the collective will of the Justices more accurately than they had previously.<sup>209</sup> Monaghan's argument was that memoranda and draft opinions could be more easily circulated with "[m]odern" technology, and thus "the reflective interchange of views" could more productively achieve "collective expression."<sup>210</sup> Monaghan concluded that these technological advancements suggest that we should take seriously "all points of significance" evident in Supreme Court opinions.<sup>211</sup> If copy machines represented an improvement in the ability of Supreme Court Justices to circulate their opinions and reach a "collective expression" in 1979, then computers, e-mail, Westlaw, Lexis, and HeinOnline ought to significantly advance that goal. Since Justices can circulate and research their opinions faster than ever before, their words are likely to more precisely reflect the collective expression of the Court.

Furthermore, the number of concurring opinions has increased dramatically in the past thirty-five years,<sup>212</sup> providing more evidence that the reasoning that is agreed upon by the Court can be reliably considered the opinion of the Court. Since Justices more frequently concur in the judgment of a majority, but not in the majority's reasoning, there is more evidence that an opinion that *is* agreed upon by the Court actually represents a collectively-approved methodology. Consider that Justices Scalia, Thomas, Breyer, and Stevens already often write separate opinions when the majority reaches a disfavored subdecision on the use of legislative history.<sup>213</sup> This demonstrates that when they do sign on, they agree with not only the outcome reached by the majority but also with the "points of significance," to borrow Monaghan's phrase. If the Court extends *stare decisis* to subdecisions about legislative history, one would expect this practice to increase, at least until *stare decisis* settles the doctrine.<sup>214</sup> Thus, improved technology and the recent increase in concurring opin-

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209. Monaghan, *Supreme Court Opinions*, *supra* note 3, at 20.

210. *Id.* (internal quotation marks omitted).

211. *Id.* at 23.

212. See Artemus Ward & David L. Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* 45–46 (2006) ("After the cert pool was created and expanded [in 1973], the number of separate concurring and dissenting opinions issued by the justices exploded.").

213. See *supra* notes 174–175 and accompanying text.

214. This is because there will clearly be higher stakes to signing on to an opinion that adopts a subdecision on the use of legislative history. However, since Justices already engage in this practice of concurring in the judgment when they disagree with legislative history subdecisions, one should not expect an overwhelming increase in concurrences. The increased concurring opinions that would occur would probably simply disagree with the statutory interpretation subdecisions, which should not significantly obscure the other holdings in the case. As soon as subdecisions on legislative history are entrenched in precedent, one would expect concurrences in judgment to decrease because Justices will have to meet a higher burden of explanation to make the case for overturning precedent.

ions indicate that extending the scope of stare decisis should not be problematic due to the difficulties in achieving collective expression.

*C. Expanding the Scope of Stare Decisis Complements Other Reform Proposals*

This section presents two of the leading alternative remedies for inconsistent statutory interpretation and explains how they complement the solution proposed in this Note.

One of the leading scholars on statutory interpretation, Adrian Vermeule, suggests that the best method for addressing the current inconsistencies and confusion in construing statutory meaning is to adopt a formalist methodology with strict rules of interpretation. Vermeule's theory of statutory interpretation is based on three important premises. First, many controversies in the literature on statutory interpretation invoke empirical questions.<sup>215</sup> That is to say, the answer to the question—what is the “best” interpretive method—turns on “a complicated set of empirical and predictive questions about the consequences for institutional performance of choosing alternative doctrines.”<sup>216</sup> Second, courts will have much difficulty answering these empirical questions until “new information . . . becomes available or . . . crucial experiments can be conducted.”<sup>217</sup> And third, where, as in statutory interpretation, there is “irreducible empirical uncertainty,”<sup>218</sup> judges should adopt “simple, straightforward doctrines that minimize judicial decision costs.”<sup>219</sup> According to Vermeule, these premises suggest that judges should embrace strict rules for statutory interpretation, including a rule excluding legislative history, in order to avoid complicated empirical questions that are currently unanswerable.<sup>220</sup>

Professor Rosenkranz suggests that the best solution to the inconsistent statutory interpretation problem lies in the power of Congress.<sup>221</sup> Rosenkranz argues that “Congress can and should codify rules of statutory interpretation.”<sup>222</sup> If such a set of rules could constitutionally be established by Congress, and Rosenkranz argues that they could,<sup>223</sup> they would add to the predictability and legitimacy of the judicial system in

215. One of the leading arguments for this premise, on which Vermeule relies, was offered by Cass Sunstein. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. Chi. L. Rev. 636, 641 (1999) (arguing that formalism must be defended on empirical grounds). Vermeule presents Sunstein's argument in Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. Chi. L. Rev. 698, 699 (1999) [hereinafter Vermeule, *Interpretation*].

216. Vermeule, *Interpretation*, supra note 215, at 698.

217. Vermeule, *Interpretive Choice*, supra note 193, at 77.

218. Vermeule, *Interpretation*, supra note 215, at 698.

219. Vermeule, *Interpretive Choice*, supra note 193, at 128.

220. *Id.* at 74–75.

221. See Rosenkranz, supra note 77, at 2135.

222. *Id.* at 2156.

223. *Id.* at 2156–57.

many of the same ways as extending the reach of stare decisis to statutory interpretation subdecisions.<sup>224</sup>

Both Vermeule and Rosenkranz present convincing cases that the solutions they advocate would help solve some of the problems outlined in this Note. The Vermeule formalist rules solution is consistent with expanding the scope of stare decisis. This Note argues that the choice the Supreme Court makes on statutory interpretation subdecisions, whatever it decides, should be bound by law. Vermeule's argument for formalist rules advocates the adoption of a specific set of subdecisions. The thesis of this Note complements Vermeule's argument, as his formalist judicial rules of statutory interpretation would be strengthened if they were treated as binding precedent by the Court. Rosenkranz provides an alternative, though not conflicting solution, to the Court's inconsistent jurisprudence in this area. Both his solution and the one presented by this Note would help to resolve the problem, and there is no reason not to support both. However, persuading the Court to apply stare decisis more consistently is likely more plausible than congressional action to resolve the issue of the Court's methodology for statutory interpretation.<sup>225</sup>

#### CONCLUSION

This Note examines stare decisis and methods of statutory interpretation in a new light. By analyzing tools of statutory interpretation with the intent of determining the scope of stare decisis, it explains that the current doctrine on the application of stare decisis to statutory interpretation subdecisions is inconsistent and incoherent. This Note then uses the same policy arguments underlying the Court's application of stare decisis elsewhere to argue that the proper doctrinal reform would be to extend stare decisis rather than limit it. Furthermore, an additional efficiency gain from sending a clear indication to Congress about how its laws will be interpreted makes the case for extending stare decisis even clearer.

This Note's central recommendation is to apply stare decisis to all subdecisions about statutory interpretation, but a second goal is to open up the general discussion about the scope of stare decisis as applied to subdecisions. For instance, these arguments may implicate stare decisis application to constitutional interpretation. Stare decisis is regarded as a weaker doctrine when applied to constitutional doctrines because, whereas Congress can overturn Supreme Court precedents on the interpretation of statutes, it would take a constitutional amendment to over-

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224. *Id.* at 2157 ("The most important features of an interpretive regime are that it be clear, predictable, and internally coherent, and that both promulgator and interpreter of text agree on the regime beforehand. In most cases, the particular choice of rule will be less important than that some clear rule be chosen.").

225. Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 184 (2006) ("Past history shows that it is most unlikely that Congress will enact rules of interpretation that will generally resolve the disputed issues of interpretive choice.").

turn an unfavorable Court interpretation of the Constitution.<sup>226</sup> Perhaps this weaker constitutional version of stare decisis should be extended to constitutional interpretation subdecisions.<sup>227</sup> This Note intends to bring these and other questions about the scope of stare decisis to the forefront of debate.

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226. See *supra* note 57 and accompanying text.

227. However, this argument might be less convincing because extending stare decisis to constitutional interpretation subdecisions would not gain the same legislative efficiencies from a clear statement to the drafters of the law. Since the Constitution is fairly stable, the legislative efficiency benefit is much less dramatic in the constitutional context.