

# How to Realize the Value of Stare Decisis: Options for Following Precedent

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When courts deliberate on the implications of a precedent case in the adjudication of a new dispute, they generally frame the issue as if there are three paths through—(1) follow the precedent, (2) overrule, or (3) distinguish—without acknowledging that option number one contains its own garden of forking paths. My chief aim in this paper is to delineate and evaluate several options for following precedent. I show that we can respect the doctrine of precedent or stare decisis without committing to any one particular method. I argue further that we have good reason to refrain from endorsing any single method for following precedent, and I propose instead a variable approach—one that is sensitive to the contextual factors that make one method preferable to another. My analysis reveals the methodological challenges that courts must face if they wish to make good on the promise of stare decisis when they go about their business of following precedent. I conclude with the suggestion that we should be open to considering a no stare decisis regime; at least in some types of case, adherence to precedent comes with considerable costs and only tenuous benefits.

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## INTRODUCTION

The most salient judicial disagreements about precedent turn on the question of whether or not to follow some past case.<sup>1</sup> Once the court has decided to follow a precedent, the application of that precedent often comes across as a formulaic (even if at times complex) operation. That said, no single method of following precedent has been universally adopted or endorsed by the judiciary, and courts in fact employ different methods depending on the details of a given case and its relationship to past cases.

As I will show, in the scholarly literature there is considerable disagreement as to the optimal method for interpreting and following precedent, and the possibilities that have been posed are unsatisfying. Despite the theoretical disagreement, commentators seem to share the assumption, which has gone largely unquestioned, that there is a single correct way for courts to handle precedent. Accordingly, commentators have generally neglected the possibility of multiple co-existing methods or, put differently, a variable method.

When legal reasoners seek to determine the relevance of some past case for the decision of a new one, they interpret the past case—mainly through the judicial opinion of that past case. The interpreter looks for the meaning of the precedent with respect to the present dispute. There are many intelligible ways in which this interpretive activity could be conducted: for example, the interpreter might look for a clear statement of a low-level rule in the past case and then determine whether the present dispute falls under the rule; alternatively, she might look for a higher-order rationale behind the clearly-stated rule, and determine whether and how that rationale applies to the present case.

If we wish to evaluate the relative merits of each interpretive method, we need to know what would make an interpretation successful—we need a meta-interpretive method. In Part I of this paper I propose such a method. My meta-interpretive method is functionalist or instrumental: I suggest that a method of precedential interpretation succeeds to the extent that it serves the justifying principles or values underlying *stare decisis* itself.

Although various models of precedential interpretation have been proposed in the theoretical literature, no comprehensive scheme for classifying these models has been developed. This is very different from

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1. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991) (where the opinions issued illustrate the judicial debate over whether *Booth v. Maryland*, 482 U.S. 496 (1987) should be overruled, rather than the alternative ways in which it might be followed); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (debating whether *Roe v. Wade*, 410 U.S. 113 (1973) should be overruled).

the field of statutory interpretation, where camps have been labeled and well defined, and key players identified according—Justices Scalia and Gorsuch as textualists, for example. By *model of precedential interpretation* (which I'll just call *model of precedent*) I mean a picture (inevitably simplified) of how judges ought to follow—that is, interpret and apply—precedent. In Part II, I provide a taxonomy of precedential models, and I evaluate each according to my meta-interpretive criteria.

Drawing on my conclusions from Part II, in Part III I suggest that settling on a method for precedential interpretation requires making trade-offs among the values underlying *stare decisis*. The attempt to maximize one value will often mean sacrificing a different one. And yet, it is the totality of these values that both judges and scholars suppose that a system of precedent supports. I suggest that it is difficult to justify any unified or consistent approach to following precedent; no single method does a good job at realizing the key values or goals underlying *stare decisis*. Moreover, even if we focus on maximizing only one value, the optimal method will depend on the type of case under consideration and the relationship of the given case to previous ones, a point I illustrate through a series of case studies. I suggest that we can best serve the values underlying *stare decisis* by embracing a variable approach, albeit in a systematic way.

Finally, I conclude Part III by questioning whether maintaining a system of precedent is, on balance, desirable in all types of dispute. The case for precedent is perhaps the least compelling in the context of statutory interpretation, and yet courts purport to give special deference to precedents interpreting statutes. I suggest that this practice comes at the cost of democratic values, and does not deliver enough benefit to offset that cost.

Nevertheless, I assume that the doctrine of *stare decisis* is more or less a fixture of the U.S. legal system and kindred systems. Moreover, I take the key principles that have been invoked to justify *stare decisis*—including predictability and equality—to be worthy values. Accordingly, I think we would benefit from a better understanding of which methods for following precedent do relatively better or worse to serve these values, and under what conditions. My main purpose here is to make progress toward that end.

## I. APPRAISING COMMON LAW REASONING

### A. A Meta-Interpretive Method

In this section, I set out a meta-interpretive method for precedential interpretation. My meta-interpretive method takes as inputs first-order

methods of precedential interpretation—that is, methods of interpreting precedent itself—and both interprets and evaluates those first-order methods. The point of the meta-interpretive step is to provide a means by which we can determine whether, and why, one interpretive method at the first order is better than another. In *Legality*, Scott Shapiro distinguishes between interpretive and meta-interpretive methodologies of legal texts in general.<sup>2</sup> My argument here draws on his analysis of these categories. An interpretive methodology is a “method for reading legal texts.”<sup>3</sup> Examples of interpretive methodologies are textualism, purposivism, and originalism. These methods, however, do not themselves tell us how to resolve interpretive disputes. For that we need a meta-interpretive method: a tool “for determining which specific methodology [at the first order] is proper.”<sup>4</sup>

It is under *stare decisis*, or the doctrine of precedent, that legal cases make law. Pursuant to *stare decisis*, judicial decisions constitute legal norms that people are bound to follow and that courts are bound to interpret and enforce. I wish to keep the justificatory question separate from the explanatory one. The existence of the doctrine of precedent might be explained by historical and social facts; we might have the doctrine just because a convention happened to develop where courts follow one another’s decisions. But that explanation would not justify the practice. To justify the practice we need to show that it has some value.

Why have case law? The rationales—which include protecting reliance or expectation interests and ensuring fair or equal treatment—are relatively clear and settled. They are widely cited in both judicial opinions and legal scholarship. These rationales, each of which refers to a basic and intuitive value, reveal the point of treating similar cases the same—or in other words what the legal system purports to accomplish with the doctrine of precedent. If the stated values behind precedent are to justify the doctrine, then the practice of following precedent had better in fact align with them. Accordingly, I propose that a particular interpretive method for case law is a good one if, and to the extent that, interpreting case law according to that method serves the values that *stare decisis* is supposed to serve. If we wish to assess interpretive methodologies, then, we need to be clear on the values that it is the purpose of *stare decisis* to serve, as well as the relative importance of these values. In the next section, I delineate the *stare decisis* values, and in addition, discuss their acceptance and endorsement among courts, lawyers, and legal scholars alike.

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2. SCOTT, J. SHAPIRO, *LEGALITY*, 248 (2013).

3. *Id.* at 304.

4. *Id.*

Moreover, for a model of following precedent to be successful, it must be (to some extent) realistic, in that the method the model describes must be feasible for courts to apply. I call this the *reality constraint* on interpretive models. The idea behind this constraint is that attempts to articulate interpretive methods should be practical, meaning that they should give guidance that courts could actually implement.

On my view, a proper comparative evaluation among interpretive methodologies involves evaluating the extent to which the different methods would further the values of stare decisis in total. However, some of these values are more important than others. Moreover, some of the values that have been cited as distinct seem in fact to be derivative of others. Accordingly, when I evaluate models of precedent according to how well they serve stare decisis values, I weight the values differentially, according to their importance relative to one another.

My approach to selecting, ranking, and weighing the stare decisis values is largely deferential to other sources. Although I believe that these values are real, that they are important, and that a legal system should promote them, I do not advance independent arguments for any of these claims. My aim, rather, is to demonstrate that actors operating within our legal system, and commentators writing about it, seem to think that the doctrine of precedent does in fact serve the values I elaborate and that it should serve these values.

### *B. Values or Goals of Precedent*

The most prominent rationales for stare decisis are predictability and equality, followed by judicial restraint or appropriate distribution of power, credibility, and judicial efficiency. These are the five justifications I have found to be most widely and confidently endorsed by theorists, lawyers, and courts alike.<sup>5</sup> Moreover, commentators generally suppose that stare decisis serves all or many of these goals.<sup>6</sup> For example, Steven Burton lists equal treatment, predictability, judicial efficiency, judicial

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5. For a similar, but not coextensive list of justifications for stare decisis, see Earl M. Maltz, *The Nature of Precedent*, N.C. L. REV. 367, 368-72 (1988). For a longer, but undeveloped, catalogue of possible justifications for stare decisis, see Jeremy Waldron, *Stare decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012) (listing the following as considerations to justify stare decisis: "importance of stability, respect for established expectations, decisional efficiency, the orderly development of the law, Burkean deference to ancestral wisdom, formal or comparative justice, fairness, community, integrity, the moral importance of treating like cases alike, and the political desirability of disciplining our judges and reducing any opportunity for judicial activism.").

6. Unsurprisingly, some economists focus on the reliance or predictability justification exclusively, which makes sense given that the protection of reliance interests is widely thought to promote efficiency in transactions. See, e.g., Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI-KENT L. REV. 63 (1989). Randy Kozell has developed a theory of constitutional stare decisis meant to promote stability and impersonality in particular. RANDY KOZELL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT*, 6 (2017).

restraint, and credibility as mutual justifications (among others) for stare decisis.<sup>7</sup>

The rationales I focus on here could be described differently<sup>8</sup> and further rationales could be added to the list.<sup>9</sup> For example, some people have suggested that stare decisis serves a teaching or educational function, where courts learn from one another how to adjudicate better; others have suggested similarly that the doctrine promotes dialogue among courts.<sup>10</sup> I leave these and other potential justifications aside here, for the sake of expediency, but also because I think that including additional possible justifications would not significantly affect my main conclusions. I intend to show that it is very difficult to justify any particular method of stare decisis based on the values I identify. That task is likely to be even more difficult if the doctrine is meant to serve further values still. Moreover, the possible justifications that I set aside seem to overlap to a large extent with the justifications that I include, so that discussing the former specifically would be somewhat redundant even if more comprehensive. For example, the teaching idea, as I understand it, is captured at least in part by the appropriate distribution of power justification: precedent enables some courts (higher and past courts) to exercise power or control over others (lower and present courts) by showing them—or educating them on—how to decide new cases.

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7. Steven Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication* 35 CARDOZO L. REV. 1687, 1696-97. See also *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 236 (2003) (Sweeney, J., dissenting) (“[a]dherence to precedent has several laudatory goals, including certainty, equality, efficiency, and the appearance of justice”); STEVEN BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 17, 26 (2007) (justifying stare decisis with reference to predictability or reliance and also equality or fairness); RONALD DWORCKIN, *TAKING RIGHTS SERIOUSLY* (1977) at 37 (referring to the doctrine of precedent as a “set of principles reflecting the equities and efficiencies of consistency”); Karl Llewellyn, in 3 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 449 (1931) (listing together several justifications for stare decisis, including “time and energy saved”, “predictability”, and equality); Stephen R. Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787, 793 (1997) (listing “consistency and predictability” as among “the values underlying a doctrine of following precedent”); Kent Greenawalt, *Policy, Rights and Judicial Decision*, 11 GA. L. REV. 991, 1008 (1976-1977) (suggesting that stare decisis supports reliance, fairness, and convenience mutually); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 2, n.11 (1983) (offering the judicial efficiency justification as well as impartiality and perceived impartiality).

8. See, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in A Common Law System*, 86 IOWA L. REV. 601 (2001) (dividing arguments for stare decisis into the categories of “instrumental” and “intrinsic”).

9. Stare decisis also seems to serve rhetorical functions in judicial opinions. For example, judges might appeal to stare decisis to reinforce the authority of a decision or to give the impression of neutrality, or they might invoke precedent in an effort to buck responsibility for a decision (*Don't blame us—we're just following precedent*). These are functions of a different type from those I discuss here, and I set them aside for the purposes of this paper. Moreover, as far as I am aware, they have not been explored in any detail in the literature, and unlike the other, more conventional and uncontroversial functions that I discuss here; there is reason to question whether stare decisis or the notion of stare decisis should be used for these rhetorical purposes. I intend to examine them independently in future work.

10. Thanks to Ying Hu for bringing the point to my attention.

*(1) Predictability or Reliance*

Predictability and equality receive the most attention in the literature discussing justifications for stare decisis; commentators widely agree on the importance of these values. For example, Arthur Goodhart wrote that “the most important reason for following precedent is that it gives us certainty in the law.”<sup>11</sup> When the law is predictable, people can rely on it; this means that an individual can organize her affairs under more or less correct assumptions about how courts would treat her should she be involved in a legal dispute. A system of precedent allows people to rely on past judicial decisions, and thus protects reliance interests.<sup>12</sup> Stare decisis is valuable, then, insofar as it both creates expectations concerning legal outcomes and fulfills these expectations.

Courts also often cite predictability, certainty, or reliance as one of the more important justifications for the doctrine of stare decisis. For example, the Federal Circuit has declared that, “[t]he doctrine of stare decisis enhances predictability and efficiency in dispute resolution and legal proceedings, by enabling and fostering reliance on prior rulings. . . . By providing stability of law that has been decided, stare decisis is the foundation of a nation governed by law.”<sup>13</sup> Moreover, many courts have maintained that stare decisis is particularly important in contract and property cases, the assumption being that litigants in these types of case are more likely to have relied on past rulings in making the decisions that led to the disputes than are litigants in other sorts of cases—those involving tort, criminal, and constitutional issues, for example.<sup>14</sup>

11. Arthur Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 58 (1934). See also David Lyons, *Formal Justice and Judicial Precedent* 38 VAND. L. REV. 495, 496 (1985) (“The reason most often given for the practice of precedent is that it increases the predictability of judicial decisions.”); Maltz, *supra* note 5, at 368 (“The most commonly heard justification for the doctrine of stare decisis rests on the need for certainty in the law.”).

12. See, e.g., BENJAMIN N. CARDOZO, *THE PARADOZES OF LEGAL SCIENCES* 29-30 (1930); NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 118-19, 160-61 (2008); Max Radin, *Case Law and Stare Decisis: Concerning “Präjudizienrecht in Amerika”* COLUM. L. REV. 199 (1933).

13. *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1281 (Fed. Cir. 2014), cert. granted, judgment vacated sub nom; see also *CSX Transp. Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011); *Thomas v. Wash Gas Light Co.*, 448 U.S. 261, 272 (1980) (stating that stare decisis “serves the broader societal interests in even handed, consistent, and predictable application of legal rules”); *George v. Ericson*, 250 Conn. 312, 318 (1999) (explaining that, “[s]tare decisis is justified because it allows for predictability in the ordering of conduct, [among other reasons]”); *Metro Renovation, Inc. v. State Dep’t of Labor*, 249 Neb. 337, 345 (1996) (“Adherence to settled law promotes stability and certainty.”).

14. See, e.g., *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977) (“Substantive rules governing the law of real property are peculiarly subject to the principle of stare decisis.”); *Wilcox v. Wilcox*, 26 Wis.2d 617, 622 (1965) (explaining that, certainty “is less relevant in the law of unintentional torts, where conduct is not planned, then in the law of contracts or, more particularly, in the law of real property,” and implying that stare decisis is therefore less important in tort cases); *Conway v. Town of Wilton*, 238 Conn. 653, 661 (1996) (arguing that reliance is a weak justification for precedent in cases of tortious contact, since is unlikely that litigants based their conduct on past judicial decisions). See also *State v. Salamon*, 287 Conn. 523, 949 A.2d 1092

The common view of reliance seems to be that the law should enable and protect legal expectations; this is because decision making and negotiations will be more efficient if people are able to form reliable predictions about legal outcomes.<sup>15</sup> Accordingly, we might see the argument from reliance as a type of efficiency rationale. But, one might hold, alternatively or in addition, that frustrating such expectations is *unfair*, even aside from efficiency concerns. If I lead you to believe I am going to do X, and my doing X might affect you, then, if I do not do X, I do you an injustice—and this is regardless of whether any inefficiency is implicated.

Some scholars have pointed out that the precedent system inevitably fails to protect reliance interests, even if in theory it could. For example, John Austin believed that “every system of judiciary law has all the evils of a system which is really vague and inconsistent;” it “is nearly unknown to the bulk of the community, although they are bound to adjust their conduct to the rules or principles of which it consists.”<sup>16</sup> Austin’s complaint has some merit—the general public likely does not have comprehensive knowledge of the precedential landscape; however, some potential litigants (corporations for instance), and certainly their lawyers, are aware of the key precedents that might affect them. Of course, the extent to which people are able to rely on precedent will depend on the method that judges use to interpret and apply case law. If the method is obscure or complex—or if there is no settled method—it might be very difficult or impossible for people to determine their rights under the common law.

## (2) *Equality, Fairness, or Formal Justice*

The equality justification for following precedent is widely cited both in the scholarly literature and in case law, with many commentators suggesting that equality is the most important principle underlying *stare decisis*.<sup>17</sup> In *The Nature of the Judicial Process* Benjamin Cardozo

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(2008); *O’Connor v. O’Connor*, 201 Conn. 632, 644-45 (1986).

15. Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW 90, 91 (arguing that “people rely on past decisions in the sense that they make decisions and commit resources based on them”).

16. JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 652 (Robert Campbell, ed., Law Book Exchange, 5<sup>th</sup> ed., 2005) (1885).

17. See, e.g., DUXBURY, *supra* note 12, at 24-25 (“Perhaps the most commonly cited reason [for the authority of precedent] is that to accept precedents as authoritative is to facilitate consistency and fairness in decision-making”); DWORKIN, *supra* note 7, at 116 (asserting that fairness or equality “offers the only adequate account of the full practice of precedent.”); Neil MacCormick, *Why Cases Have Rationales and What These Are*, in PRECEDENT IN LAW 155, 160 (Laurence Goldstein ed., 1987) (asserting that, the requirement of following precedent “is a matter of formal justice”). For criticisms of the equality justification, see Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L. J. 2031 (1996); David Lyons, *Formal Justice*,

presented a vivid defense of the justification:

If a group of cases involves the same point, the parties expect the same decision. . . . If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.<sup>18</sup>

The equality justification is often described in terms of comparative or formal justice: regardless of whether people are otherwise treated badly (substantively unjustly), if they are treated equally, then justice in the formal sense is served.<sup>19</sup> This type of equality is not just a legal principle, of course, but a fundamental moral principle.<sup>20</sup> Many moral philosophers have articulated and elaborated on the idea that likes should be treated alike, perhaps most famously Aristotle in the *Nicomachean Ethics*.<sup>21</sup> William Frankena, in *Ethics*, puts it as follows:

The paradigm case of injustice is that in which there are two similar individuals in similar circumstances and one of them is treated better or worse than the other. In this case, the cry of injustice rightly goes up against the responsible agent or group; and unless that agent or group can establish that there is some relevant dissimilarity after all between the individuals concerned and their circumstances, he or they will be guilty as charged.<sup>22</sup>

To motivate the formal justice argument, theorists often appeal to the basic moral intuition that similarly situated people ought to be treated similarly: “The proposition that ‘likes should be treated alike’ is said to be a universal moral truth—a truth that can ‘be intuitively known with perfect clearness and certainty.’”<sup>23</sup> Karl Lewellyn referred to “that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances.”<sup>24</sup> The principle of

*Moral Commitment, and Judicial Precedent* 81 J. PHIL. 580 (1984); Peter Westen, *The Empty Idea of Equality*, HARV. L. REV. 537 (1982) (arguing that very idea of comparative justice is empty, because circular); Benditt, *supra* note 15, at 90; but see Steven Burton, *Comment on “Empty Ideas: Logical Positivist Analyses of Equality and Rules*, 91 YALE L. J. 1136 (1982) (both defending the equality justification against some of these critics); Greenawalt, *How Empty is the Idea of Equality?*, in FROM THE BOTTOM UP: SELECTED ESSAYS 184 (2016).

18. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33-34 (2010), quoting W.G. MILLER, *THE DATA OF JURISPRUDENCE*.

19. For a discussion of the equality justification, and a survey of theorists who have endorsed the view, see Hathaway, *supra* note 8, at 153.

20. See Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 298 (1974) (stating that, “many philosophers have even gone so far as to claim that all justice consists (essentially) in the absence of arbitrary inequalities in the distribution of goods and evils”).

21. ARISTOTLE, *NICOMACHEAN ETHICS*, V.2. 1121a-1121b (349 BC).

22. WILLIAM FRANKENA, *ETHICS* 49 (2nd ed., 1973).

23. Westen, *supra* note 17, at 12 (quoting Chaim Perelman).

24. Llewellyn, *Case Law*, in *ENCYCLOPEDIA OF SOCIAL SCIENCES* 249 (1930); see also A.D.

equality is often invoked without further justification; it carries axiomatic force. According to Joel Feinberg, “[t]he moral offensiveness of discrimination is *sui generis*.”<sup>25</sup> Kent Greenawalt likewise asserts that, “[t]he formal principle of equality is generally conceded to be self-evident . . . .”<sup>26</sup> The doctrine of precedent is taken to be the instantiation of this moral principle in the law.<sup>27</sup>

Courts in various jurisdictions and across levels of judicial hierarchy often appeal to the equality or fairness argument for *stare decisis*. For example, in *James B. Beam Distilling v. Georgia*, the Supreme Court held that the point of precedent is to ensure equal treatment, and not merely or fundamentally to protect reliance interests. Justice Souter, announcing the judgment of the Court, insisted that the law must treat people equally across time, *even if* reliance is not at issue: “[i]t is simply in the nature of precedent, as a necessary component of any system that aspires to *fairness and equality*, that the substantive law will not shift and spring on such a basis [i.e., on the basis of whether or not parties relied on a past case’s ruling].”<sup>28</sup> The Court of Appeals of Utah has described *stare decisis* as “crucial to . . . the fairness of adjudication.”<sup>29</sup> Justice Connolly of the Supreme Court of Nebraska has emphasized that, “[t]he fundamental value of equal treatment, requiring that persons in like circumstances be treated alike unless some relevant factor distinguishes their cases, is central to traditional notions of Anglo-American justice.”<sup>30</sup>

#### — *Conceptions of Equality*

We can achieve equality in some sense by treating alike all cases that have some feature in common. However, justice does not care about just any feature. If all litigants who were born on even days are given one type of treatment, and all litigants born on odd days given a different type, then individuals who are similarly situated in one intelligible sense would be treated alike. But that like treatment would not be in the service of comparative justice. Nevertheless, many cases are not so clear, and reasonable people can disagree as to whether some instance of likeness

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Woozley, *Injustice*, 7 AM. PHIL. QUART. 109, 115-16 (1973) 115-6, for a highly intuitionistic account of formal justice.

25. Feinberg, *supra* note 20, at 319.

26. Greenawalt, *supra* note 17, at 185.

27. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 596 (1987); *see also* BURTON, *supra* note 7, at 26; RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* 107-8 (1961); DUXBURY, *supra* note 12, at 60; DWORKIN, *supra* note 7, at 113; MacCormick, *supra* note 18 at 160.

28. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991).

29. *State v. Legg*, 2016 Utah. App. 168, 26, 380 P.3d 360, 369, cert. granted, 390 P.3d 719 (Utah 2017).

30. *Metro Renovation, Inc. v. State Dep’t of Labor*, 249 Neb. 337, 350 (1996) (Connolly, J., concurring).

between two cases matters for the sake of equality. I want to proceed as much as possible in this article without committing myself to a controversial conception of equality. Accordingly, I will sketch in broad strokes what I see as the two most compelling conceptions in the context of precedent—low-level and high-level equality. Ultimately, I think that some combination of the two is most in keeping with commonly held intuitions about equal treatment under the law.

Most simply put, under the low-level conception of equality, if a pair of litigants across two cases engaged in similar conduct, then they should receive the same legal outcome—even if the justification for the outcome in the first case does not apply to the second case. The higher-level conception of equality prioritizes consistency at the level of justification or rationale. If the justification for the decision in the first case does not support the same outcome in the second case, then equality does not require deciding the second case the same as the first.

An example might help clarify the competing conceptions. Imagine a dispute between a silence-lover and a noise-maker, neighbors. Suppose that the noise-maker enjoys practicing with his band at all hours, which causes great discomfort and distress to the silence-lover. The silence-lover sues the noise-maker for damages or an injunction. Should the noise-maker be required to satisfy the demands of the silence-lover? Let's say the court says *yes*. Maybe this is based on the policy reason that allowing noise-makers free reign would decrease social welfare. Now imagine that a subsequent dispute arises between a similar noise-maker and silence-lover. On the lower-level conception of equality, the case should come out in favor of the silence-lover, just because the silence-lover won in the previous case—regardless of the justification for the previous decision, and regardless of whether it applies in the present case. On the high-level conception however, equality demands that the second case come out the same as the first only if that would serve the justification underlying the past decision.

Both conceptions of equality seem to capture common-sense egalitarian intuitions. If I were the silence-lover in a noise dispute, I would find it unfair to lose the case if some past silence-lover who was subjected to similar noise won her case. However, let's say that the past silence-lover prevailed because in the circumstances of that case the noise-maker was the least-cost avoider. If in the current case the silence-lover is the least-cost avoider, but the court holds the noise-maker liable, then I think that the noise-maker could reasonably complain about the result on grounds of equality. Perhaps unequal treatment on the low-level is irrelevant as far as justice is concerned. The silence-lover in the present case might appear to be similarly situated to the past silence-lover; however, the appearance is superficial. In a deeper sense, perhaps the sense that matters, the present

silence-lover is similarly situated to the past noise-maker: they are both least-cost avoiders.

Ideally, the lower and higher-orders will be aligned: so that, for example, if the least-cost avoider is the noise-maker in the first case, the noise-maker in the second case will also be the least-cost avoider. However, this kind of consistency is not guaranteed: background conditions are subject to change. On my mixed conception of equality, it is best to have equality at both levels, and it is better to have equality at either level than no equality at all. I believe that equality at the higher lever is more important than at the lower level, although it's beyond my scope here to defend that claim in detail.

### (3) Consistency

Some theorists have claimed that stare decisis promotes consistency, or decision-making consistency in particular, and that consistency in itself is valuable. According to John Coons, “the legal system represents the central redoubt of normative consistency”—and moreover, “[r]ules of law constitute an order generally thought to value consistency for its own sake.”<sup>31</sup> Consistency itself is not as commonly cited in the case law as are some of the other stare decisis justifications, but opinions do sometimes mention it. For example, in *Conway v. Town of Wilton*, the Supreme Court of Connecticut said that, stare decisis “‘is the most important application of a theory of decisionmaking consistency in our legal culture’ and it is an obvious manifestation of the notion that decisionmaking consistency itself has normative value.”<sup>32</sup>

Theorists who take consistency to have independent value have not provided a satisfactory account as to why we should, or sufficient evidence that we do in fact, care about consistency in and of itself. Frederick Schauer claims that, “[i]n countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again;”<sup>33</sup> elsewhere he notes that, “it is sometimes desirable to recognize the values of settlement for settlement’s sake or of *consistency for consistency’s sake*.”<sup>34</sup> These claims beg for further explication.

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31. John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 73 (1987). See also Hathaway, *supra* note 8, at 152; Peters, *supra* note 177 (both discussing, although not endorsing, the idea that stare decisis as a practice of consistency is good for its own sake).

32. *Conway v. Town of Wilton*, 238 Conn. 653, 680 (1996); see also *State v. Peeler*, 321 Conn. 375 (2016) (Robinson, J. concurring) (saying the same).

33. Schauer, *supra* note 27, at 572.

34. Schauer, *Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) about Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454 (2008). However, Schauer has also described consistency as a means to achieving fairness: “We achieve fairness by decisionmaking rules designed to achieve consistency across a range of decisions.” Schauer, *supra* note 27, at 596.

We do not generally have reason to do something the same way we did it before just because we did it that way before. If we treat people equally, then we act consistently in some sense. But we can act consistently in many senses *without* treating people equally. Without the equal treatment part (and without other values that we might serve by acting consistently), I see no reason to promote or celebrate consistency. If I have two equally good routes that I can take to work, and yesterday I took route A, that fact in itself gives me no reason to take route A today. In the context of the common law, if  $\phi$ -ing is a particular way of dealing with a case—for example, holding for defendant if the arguments for both sides are equally compelling—then I *do* have reason to  $\phi$  in the future just because I  $\phi$ -ed in the past. But that reason is provided by the *equality* principle (and possibly other principles such as predictability).

The consistency justification for stare decisis is, I think, best understood as an alternative way of characterizing other justifications: consistency is good because it means that people are treated equally, or because it is conducive to reliance, or because it lends an air of legitimacy to the law.<sup>35</sup> Accordingly, I do not consider consistency as an independent value when, in Part II, I evaluate possible models of precedent according to how well they fit with the justifications for stare decisis. If one wishes to attach independent value to consistency, the evaluation of these models would have to be adjusted accordingly. However, if a method of precedent does well with respect to other justifications, it is likely to do well also with respect to consistency, and likewise if a method does poorly with respect to other justifications, it will do poorly also with respect to consistency. Consequently, taking consistency as a separate value is not likely to substantially affect my results.

#### (4) *Appropriate Distribution of Power*

Achieving an appropriate distribution of power is another frequently cited goal behind stare decisis, although it is not generally given as much weight as predictability or equality. If a court confronts a new case where

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35. Peters, *supra* note 17717, at 2038, describes two conceptions of consistency in the context of stare decisis: “consistency as integrity” and “consistency as equality” (on both conceptions, consistency is a way of describing some other value). In his later work (*e.g.*, DWORKIN, *LAW’S EMPIRE*, 184 (1986)), Ronald Dworkin puts the value of consistency in terms of integrity: judges are under a duty to exercise integrity, which means deciding new cases in ways that are consistent in terms of *principle* with their own past decisions, as well as the past decisions of other courts. I do not have the space here to do justice to Dworkin’s notion of integrity. On my view, however, both integrity and consistency, in the context of the common law, are best seen as proxies for other values. Sunstein says something similar to Dworkin, claiming that “[t]he supreme lawyerly virtue of integrity is connected with achievement of principled consistency among cases.” Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 784 (1993). If our system of precedent makes for virtuous lawyers, that is a nice byproduct of precedent, but I do not think the benefit holds much weight as a *justification* for precedent.

relevant past cases exist, then stare decisis might determine the outcome of the new case, thereby requiring the court to treat it the same as the past case(s). Consequently, when precedents are available, the doctrine limits judicial discretion and thereby “constrains the exercise of arbitrary power.”<sup>36</sup> As Justice Weaver of the Supreme Court of Michigan asserts, “the consideration of stare decisis . . . always includes service to the rule of law through an application and exercise of judicial restraint . . . .”<sup>37</sup>

Stare decisis supports a particular distribution of power, where the past has special force over the present, and higher courts have special force over lower courts. Many legal experts commend this power distribution. For example, Kenneth Abraham cites the circumscription of judicial authority as a key function of stare decisis: “anchoring the justification for . . . decisions in a past—in history and tradition—[it] circumscribes the authority of its judges, who must make decisions in the present.”<sup>38</sup> Lewis F. Powell (former Justice of the U.S. Supreme Court) similarly argued that an important aspect of the character of the Supreme Court’s power is the limitations that previous opinions impose on that power.<sup>39</sup>

Various plausible stories could help explain why we might want to constrain judicial power through a doctrine of precedent. According to Laurence Goldstein, if courts generally were entitled to disregard precedent, “then inconsistencies, abuses and injustices—in short, chaos—would indeed very likely ensue;” he concludes that the judicial right to diverge from precedent should be “strictly limited.”<sup>40</sup> Goldstein seems to believe that the restraint imposed on courts by precedent is necessary to preserve order in the legal system. Schauer says similarly that “some types of decision-maker, when empowered to consider certain kinds of facts, reasons, and arguments, [might] consider them unwisely and thus produce mistaken decisions.”<sup>41</sup> Precedent narrows the reasons available for a decision-maker to consider.

Justice Frankfurter emphasized the ability of the precedent system to unify a court over time; stare decisis, he claimed, is the doctrine “‘by whose circumspect observance the wisdom of this Court [the U.S. Supreme Court] as an institution transcending the moment can alone be

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36. Burton, *supra* note 7, at 1697; *but see* RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION* 75-79 (1961) (“questioning degree to which [the goal of] restraining judges’ discretion [is] served by system of stare decisis” (*cited in* Peters, *supra* note 177, at 2113, n.275).

37. *Regents of Univ. of Michigan v. Titan Ins. Co.*, 487 Mich. 289, 314 (2010) (Weaver, J., concurring).

38. Kenneth S. Abraham, *Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision*, 23 ARIZ. L. REV. 772 (1981).

39. Lewis F. Powell, *Stare decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286, 287 (1990).

40. Laurence Goldstein, *Some Problems About Precedent*, 43 CAMBRIDGE L. J. 88, 106 (1984).

41. SCHAUER, *PLAYING BY THE RULES*, 158 (1991).

brought to bear on the difficult problems that confront us.”<sup>42</sup> In other words, *stare decisis* enables a court to transcend differences—both synchronic and diachronic—among individual judges and to decide cases as a single, unified institution. The doctrine might accomplish the same, at least to some extent, over the judiciary as a whole.

### (5) *Credibility or Perceived Legitimacy*

Credibility or perceived legitimacy, although less often and less vigorously invoked than judicial restraint, is also widely cited both by scholars and courts as a justification for *stare decisis*. The idea is that the judiciary will appear consistent and stable, and will seem to be applying law rather than making it up, if judges are bound by precedent. Burton, for example, suggests that arguments based on precedent “tend, at the least, to be . . . perceived [as legitimate]. Even when the Justices disagree, the disagreement will be perceived to be one about the law when all of them reason from the same starting points.”<sup>43</sup> Moreover, the appearance of consistency and stability is thought to generate public trust.<sup>44</sup>

Courts have similarly appealed to the credibility justification for *stare decisis*. For example, the Supreme Court of Connecticut stated that, “[s]*tare decisis* is justified . . . because [among other reasons] it promotes the necessary *perception* that the law is relatively unchanging.”<sup>45</sup> In *Planned Parenthood v. Casey*, the U.S. Supreme Court asserted that, to break with *stare decisis* and overrule *Roe* would lead to “the country’s loss of confidence in the Judiciary.”<sup>46</sup>

To the extent that the doctrine of precedent promotes public trust in and respect for the judiciary and the law more broadly, the doctrine concomitantly serves to enhance the institutional strength of the legal

42. *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) (*quoted in Powell, supra* note 39, at 286).

43. Burton, *supra* note 7, at 1697; *see also* Stevens, *supra* note 7 at 2 (arguing that, “a rule that orders judges to decide like cases in the same way increases the likelihood that judges . . . will be perceived to be [administering justice impartially]”). For discussions of this view, *see* Schauer, *supra* note 27, at 599-600 and Hathaway, *supra* note 8, at 152.

44. *See, e.g.*, ARTHUR GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT*, 75 (1971), cited by Stevens, *supra* note 7, at 2, n.11 (“[S]*tare decisis* foster[s] public confidence in the judiciary and public acceptance of individual decisions by giving the appearance of impersonal, consistent, and reasoned opinions.”); Cardozo, *quoted in* Hathaway, *supra* note 8, at 152 (“[a]dherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts”).

45. *George v. Ericson*, 250 Conn. 312, 318 (1999) (emphasis added); *see also* *Westfield Ins. Co. v. Galatis* (Sweeney, J., dissenting), *supra* note 7 (listing “the appearance of justice” among the “laudatory goals” of *stare decisis*); *State v. Peeler*, 321 Conn. 375, 446-47, 140 A.3d 811, 851 (2016) (Zarella, J. dissenting) (“adherence to the doctrine of *stare decisis* creates the appearance, and at times the reality, that this court is guided and constrained by the law—both written law, the constitution and statutes, and decisional law, the rules set forth in the decisions of this court—and not the whim of its individual members.”).

46. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 836 (1992).

system.<sup>47</sup> Tom Tyler and others have shown, with extensive empirical support, that people's perceptions regarding the fairness of legal decision-making procedures are strong predictors of their perceptions regarding the legitimacy of the legal system: if people experience the system as fair, they are likely to see it as legitimate also.<sup>48</sup> Moreover, when people perceive the legal system as legitimate, they are more likely to obey legal authorities.<sup>49</sup> Tyler found that when legal authorities violate people's expectations regarding legal treatment, people perceive the legal system to be less fair.<sup>50</sup> Several studies have also shown that people perceive the legal system as fairer when people appear to be getting consistent treatment under the law.<sup>51</sup> To the extent that the doctrine of precedent makes the law appear consistent, then, the doctrine likely makes the law appear legitimate and in turn supports the effective exercise of legal authority.

Even aside from the value of institutional strength or public obedience, we might think that justice (where treating like cases alike is a form of justice) should be seen because it gives people the sense that they are, or would be, treated fairly under the law, which is valuable in itself. Moreover, the appearance of justice, created through judicial practices that treat similarly situated parties the same, might be desirable because it amounts to a public affirmation of equality, which has symbolic or expressive value.<sup>52</sup>

#### (6) *Judicial Efficiency*

The judicial efficiency justification also receives significant attention, although the consensus seems to be that it is less important than reliance, equality, or judicial restraint. Many legal experts have noted that

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47. See DUXBURY, *supra* note 12, at 95.

48. TOM TYLER, WHY PEOPLE OBEY THE LAW, 1990; Tyler, Kenneth A. Rasinski, and Eugene Griffin, *Alternative Images of the Citizen: Implications for Public Policy*, 41.9 AM. PSYCHOL., 970 (1986).

49. TYLER, *id.*, at 58-61.

50. *Id.* at 97.

51. See, e.g., William R. Fry and Gerald S. Leventhal, *Cross-Situational Procedural Preferences: A Comparison of Allocation Preferences and Equity Across Different Social Settings*, ANN. MEETING OF THE SOUTHEASTERN PSYCHOL. ASSOC. Washington, DC. (1979); Edith Barret-Howard and Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50.2 J. OF PERS. AND SOC. PSYCHOL. 286 (1986) (finding that consistent treatment across people is more important than consistent treatment of the same person across time); W. R. Fry and G. Cheney, *Perceptions of Procedural Fairness as a Function of Distributive Preferences*, ANN. MEETING OF THE PSYCHOL. ASSOC. Detroit (1981). However, in his Chicago study (presented in TYLER, *supra* note 48), Tyler did not find strong consistency effects on the perception of legitimacy. He notes that the finding is "puzzling," and offers some possible explanations, including that participants in the study (unlike participants in other studies that did find consistency effects) might not have had access to the information necessary to compare their own treatment to that of others in similar situations. *Id.* at 153, 175.

52. See Andrei Marmor, *Should Like Cases be Treated Alike?* 11 LEGAL THEORY 27, 31 (2005).

following precedent saves valuable judicial resources, thereby improving the efficiency of the judiciary. In reasoning from precedent, judges rely on their own or other judges' past work rather than deciding new cases from scratch.<sup>53</sup> As Justice Stevens put it, the doctrine "provides special benefits for judges. It obviously makes their work easier."<sup>54</sup> Justice Powell echoed the thought, noting that the system of precedent "makes our [i.e., judges'] work easier." He explained that the majority of cases that reach the Supreme Court are difficult: "Most involve hours of study and reflection . . . It cannot be suggested seriously that every case brought to the Court should require reexamination on the merits of every relevant precedent."<sup>55</sup> In an economic analysis of *stare decisis* in the U.S. legal system, William Landes and Richard Posner conceive of precedents as a "stock of legal capital," which "generates a flow of legal services . . . that may be defined as bodies of information on the types of behavior that will be subject to civil and criminal sanctions and the magnitude of these sanctions."<sup>56</sup>

The idea that following precedent saves on judicial resources also appears throughout U.S. case law. For example, according to Justice Sweeney of the Ohio Supreme Court, "[o]nce a previous court has addressed difficult policy questions, subsequent courts need not expend time and resources to readdress those issues, but can rely on the wisdom of the previous court."<sup>57</sup> Likewise, the Supreme Court of Connecticut has asserted that "[s]*tare decisis* is justified because [among other benefits] it saves resources and it promotes judicial efficiency . . . ."<sup>58</sup> However, the extent to which the doctrine of precedent saves on resources will depend on the interpretive method that judges employ in finding, interpreting, and applying the relevant common law.

## II. MODELS OF PRECEDENT

Through a survey of the literature on *stare decisis*, I have identified five distinct theories or models of precedential interpretation:<sup>59</sup> (1) Realism,

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53. See Schauer, *supra* note 27, at 599 (giving an account of this type of efficiency argument); DUXBURY, *supra* note 12, at 93-94 (asserting that, "[a] strong prudential argument . . . is that replicating an earlier decision on an issue rather than deciding the issue afresh is a good way of conserving adjudicative resources"). See also CARDOZO, *supra* note 12, at 149.

54. Stevens, *supra* note 7, at 2.

55. Powell, *supra* note 39, at 286.

56. William Landes & Richard Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 263 (1976). However, their analysis also highlights the extensive resources expended in the creation of precedent: "time of judges, attorneys, law clerks, court clerks, jurors, witnesses, and litigants, plus resources associated with the construction and maintenance of court houses, plus other scarce resources." *Id.* at 264.

57. *Westfield Ins. Co. v. Galatis* (Sweeney, J., dissenting), *supra* note 7, at 237.

58. *George v. Ericson*, 250 Conn. 312, 318 (1999); see also *State v. Peeler*, *supra* note 51.

59. A sixth type, the "result model" has been singled out by John Horty. John Horty, *The Result Model of Precedent*, 10 LEGAL THEORY 19 (2004); see also John Horty, *Rules and Reasons in the*

(2) direct-analogy, (3) balance-of-factors, (4) purposive or purpose-based, and (5) rule-based.<sup>60</sup> While there are views that combine types or fall in between types, the taxonomy I have settled on provides a general classification scheme for existing theoretical approaches to precedential reasoning. The categorization is meant to organize and clarify what is an incredibly rich but also very messy theoretical landscape. It should help to guide evaluations of the many views of precedent on offer, as well as attempts to extend or unify some of these views.

Each of the theoretical approaches to precedent offers distinct insights about precedential reasoning. However, these approaches have not generally been developed in close conversation with the purposes of stare decisis; nor have they been evaluated according to how effectively they would serve those purposes.<sup>61</sup> In this Part I aim to both describe and evaluate each model. I evaluate the models using the functionalist approach that I set out in Part I. A model succeeds to the extent that the practice it describes serves the justificatory principles of stare decisis: predictability, equality, appropriate distribution of power, credibility, and judicial efficiency. As I argued above, predictability and equality, as the

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*Theory of Precedent* 17 LEGAL THEORY1, 2 (2011) (“According to this model, what matters about a precedent case is not the rule it contains but first, the result of the case, and second, the strength of that case for its result. Precedential constraint is then thought to be a simple matter of a fortiori reasoning: a later court is constrained to follow the ruling of a precedent case when the facts confronting the later court are at least as strong for the winning side of the precedent case as were the facts of the precedent case itself.”) I do not discuss this particular view, since I think it is very close to the balance-of-factors view, and anyway best understood as some combination of a rule-based and balance-of-factors model. Larry Alexander has elucidated three models of precedent: the natural model, the rule model, and the result model. Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989). Alexander suggests that these three models are “exhaustive of the possibilities.” *Id.* at 5. As he shows, the natural model “is not really a model of precedential constraint at all.” *Id.* On his version of the rule model, the precedent-setting court must explicitly articulate the rule corresponding to a case, and precedent-bound courts cannot distinguish a precedent from a given case if the rule seems *prima facie* to apply. The version of the rule model that I offer, which I think is a more plausible option, rejects both of these constraints. Alexander’s “result” model resembles what I call a purposive model, and his nomenclature seems inapposite to me.

60. My typology takes as a starting point George Lamond’s identification of three different ways to understand precedent: “(1) as laying down rules, (2) as the application of underlying principles, and (3) as a decision on the balance of reasons.” George Lamond, *Precedent and Analogy in Legal Reasoning*, in THE STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2016). I revise Lamond’s second and third categories in my own characterization because it appears that what he means by principles is basically purposes or higher-order reasons. I think it is confusing, then, to have a separate category devoted to “balance of reasons” theories. What Lamond captures in the “balance of reasons” category is a view that takes all relevant factors presented in the past case into consideration—where a factor is relevant if it counts in favor or against the result of the case. In my own characterization I call this the *balance-of-factors* view. Moreover, I include Realism and direct analogy as additional categories, since each represents a distinct and influential way of conceiving precedent.

61. However, for an approach to constitutional stare decisis that is oriented around stability and uniformity, see KOZEL, *supra* note 5. Kozel’s approach is also notable for recognizing that at least under some theories of constitutional interpretation, the ideal scope for courts to give to precedents depends on the circumstances of adjudication. *Id.* at 87, 88. Nevertheless, Kozel still seems to assume that ultimately it would be best if the Court adopted a single, non-variable approach to stare decisis. *Id.* at 94, 145. See also Kozel, *The Scope of Precedent*, 113 MICH. L. REV., 179, 185, 226, 230 (2014).

most important justifications for *stare decisis*, deserve the most weight in evaluations; appropriate distribution of power comes next in importance, followed by credibility and judicial efficiency, which I take to be of roughly equal importance.

Theories of precedent generally aim both at descriptive truth—to capture to some extent how courts actually handle precedent—and normative truth—to articulate an ideal type, where it would be better if this model were actualized rather than possible alternatives. While some theories are more on the descriptive side and some more on the normative side, my evaluations of them are mainly normative. I do impose a *reality constraint*, which posits that a model should be rejected if it would be infeasible to implement its method of interpretation in actuality. However, aside from that constraint, I evaluate each model according to how well it aligns with the values underlying *stare decisis*, rather than how well it aligns with observed practice. I conclude this Part with a chart summarizing my findings.

Since some of the proposals that I examine seem more concerned with capturing how the doctrine in fact operates than how it ought to operate, my analysis might seem at times to miss the point. To the extent that a model is meant to be descriptive, I do not mean to criticize its proponents for its normative deficiencies. However, given that my agenda here is normative, the degree to which each method is capable of realizing value is of primary concern for my purposes.

### A. *The Realist Model*

#### (1) *Definition and Examples*

Legal Realists believe that judicial decisions are functions of the propensities, preferences, and values of the judges who make them. Accordingly, judgments of precedent are not determined by rules.<sup>62</sup> Brian Leiter suggests that all Legal Realists adopt “‘the Core Claim’ of Realism: in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to some legal rules and reasons.”<sup>63</sup> Moreover, judges are able to find rules in past cases to justify whatever conclusions they prefer.<sup>64</sup> Some Legal Realists believe that judicial decisions are products of personal predilection only—this notion has been called the “hunch” model.<sup>65</sup> Others hold, similarly but less extremely, that judges rely more

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62. See Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 65 (ed. M. P. Golding and W.A. Edmundson, 2005).

63. *Id.* at 52.

64. See Karl Llewellyn *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431, 444 (1930).

65. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Jerome Frank, *Are Judges*

on intuition than legal rules to reach what they perceive to be just decisions.<sup>66</sup>

For example, on the realist model, in the case of the silence-lover and noise-maker<sup>67</sup>, a judge might decide in favor of the silence-lover just because she herself appreciates silence or has an intuition that silence-lovers are more deserving of legal protection. For many Realists, the fact that judicial opinions often depict “rules” is irrelevant: “judges’ published opinions at best hint at and at worst conceal the real nonlegal grounds for decision.”<sup>68</sup>

A more sanguine branch of Realism maintains that judges tend to decide cases according to what they believe wise policy requires, and that judges are capable policymakers. Oliver Wendell Holmes endorsed this view, which I will call *policy-based* Realism.<sup>69</sup> Holmes believed that a judicial decision “can do no more than embody the preference of a given body in a given time and place.”<sup>70</sup> Nevertheless, judges recognize that they have a duty to “[weigh] considerations of social advantage” and figure out which outcomes are most “expedient for the community” affected; accordingly, judicial preferences tend to track good policy.<sup>71</sup>

For Holmes, precedential rules can be effective devices for administering policy; accordingly, judicial opinions often do set out or follow precedential rules. If judges make decisions that are optimal on policy grounds, then in general, when facts repeat, a judge should follow the outcome of an earlier case; that practice will generate the best results in new cases. Moreover, for circumstances that often recur, having clear common law rules enables people to adopt the necessary precautions to limit their risk of legal liability.<sup>72</sup> However, judges do not apply rules because they are bound to do so; rather, they apply rules in the event that rules are in the service of the public good and for that reason. If some

*Humans? Parts I & 2*, 80 PENN. L. REV. 17 (1931) (both cited in Leiter, *supra* note 62).

66. See, e.g., Herman Oliphant, *A Return to Stare Decisis*, 14 AM. BAR. ASSOC. J. (1928); see also DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991).

67. See *supra*, Part I, Sec.B.2.

68. Leiter, *supra* note 62, at 60. See, e.g., JULIUS STONE, *LEGAL SYSTEM AND LAWYER’S REASONING* (1964) (arguing that the system of precedent offers a guise of logic under which judicial creativity is concealed); Felix S. Cohen *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824 (1934) (claiming that the very question, “[w]hat is the holding or *ratio decidendi* of a case?” is “meaningless. . .”). For a discussion of Stone’s view, see McCormick, *supra* note 18.

69. See OLIVER WENDELL HOLMES JR., *THE COMMON LAW* (2013) (ebook). For example, Holmes attests that, “[a] judge who has long sat at nisi prius ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury.” *Id.* at 124; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897);

70. See Holmes, *id.*, at 466.

71. *Id.* at 467. See also HOLMES, *supra* note 69, at 35-36.

72. See, e.g., *id.* at 112; *Lorenzo v. Wirth*, 170 Mass. 596 (1898).

common law rule fails on grounds of public policy, an able judge will reject or revise the rule.<sup>73</sup>

## (2) *Evaluation of the Realist Model*

My evaluation will focus on policy-based Realism, represented by Holmes, since the more skeptical Realists believe that precedent has little or no substantive role to play in judicial reasoning.

### (a) *Reliance*

On Holmes's view, a line of precedent comes over time to stand for a rule, which judges do and should follow when deciding new cases, provided the rule continues to serve defensible policy objectives. In many situations, then, people will be able to rely on common law rules and organize their affairs accordingly. Even if they are not in a position to discern the policy grounds for some rule or evaluate how well the rule serves the collective good, they might still be able to make out what the rule requires of them.

However, during periods of social and economic change, a rule that served a particular policy goal previously might not continue to serve that goal presently. According to Holmes, under these conditions a judge will either apply a pre-existing rule but base it on a new rationale, or will revise the rule itself.<sup>74</sup> If judges were to revise rules as social conditions change, ordinary citizens would likely have difficulty predicting judicial outcomes. People would be unable to form appropriate expectations unless they were especially talented and prescient in the realm of policy. The protection of reliance interests would presumably be one piece of input in a judge's policy-based decisions, given that those interests are a component of the collective good; however, those interests could easily be outweighed by other costs and benefits.

For example, consider again the stylized case of a silence-lover and a noise-maker, neighbors. The noise-maker enjoys practicing with his band at all hours, which causes great discomfort and distress to the silence-lover. Assume that other such cases have arisen, and that courts have held in favor of the silence-lover, declaring that the noise-maker must either cease making noise or compensate the silence-lover, and thus establishing a rule where noise-makers are to bear the costs in disputes involving noise pollution. The underlying rationale for the rule—whether or not it is apparent—might be that the noise-maker is the least-cost avoider.

But now consider the advent of a new technology: noise-cancelling

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73. HOLMES, *supra* note 69, at 37.

74. *Id.* at 36-37.

headphones. Arguably, the headphones enable silence-lovers to preserve their silence despite the noise-making of their neighbors. That preservation comes with some cost, but the cost might be less than the cost that noise-makers incur when forced to give up noise-making. With knowledge of this new technology, a court decides a new neighborly dispute between a silence-lover and a noise-maker in favor of the noise-maker. Let's assume this is the first instance of a pro-noise-maker outcome in this type of dispute. The change in background conditions justifies, on policy grounds, an outcome that appears to depart from previous decision. The collective good will be served best with a ruling in favor of the noise-maker, at least until further technological innovation or other social change dictates otherwise. However, the silence-lover had relied on the established common law rule that favored her position; suppose that she sued the noise-maker because she believed that she had a legal right to her silence. The expectations of the parties were thwarted, even if the outcome had a better cost-benefit profile than the conventional outcome.

*(b) Equality*

The silence-lover in our contemporary noise dispute was treated differently from previous silence-lovers. Other litigants were granted an entitlement to silent air space in their own homes, whereas the present litigant was denied that right. Moreover, she must bear the cost of buying, wearing, and maintaining the headphones. Perhaps in its policy-based reasoning, the court would factor in these equality concerns, and would require the noise-maker to compensate the silence-lover for her adjustment costs. However, I do not think that there is good reason to believe that requiring the noise-maker to compensate the silence-lover would be optimal on a public cost-benefit analysis. The calculations themselves might be costly to perform, and allowing such compensation might encourage excessive litigation. In general, rights trump cards have no place in policy-based accounts of judicial reasoning. However, sometimes it seems that the judiciary ought to protect rights, and in particular the right to formal or comparative justice, even if doing so would not produce the most public good.<sup>75</sup>

*(c) Appropriate Distribution of Power*

Holmes believed that judges have a duty to advance social interests and that social interests are often advanced through the development of, and

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75. See generally DWORKIN, *supra* note 7, for a vigorous defense of this position.

adherence to, precedent.<sup>76</sup> In this sense, then, precedent serves to constrain judicial power in a desirable way. However, the constraint is a loose one. On the policy-based view, judges should disregard or revise common law principles and rules whenever they deem it socially expedient to do so. Holmes had a great deal of faith in judicial capacities and placed a lot of trust in the propriety of judicial motives; in particular, he believed that judges have the ability and tendency to make decisions in the best interests of the public. On his model, precedent does not have much of a role to play in limiting judicial discretion or allocating power among courts.

(d) *Credibility*

To the extent that judges following a policy-based method of precedent appear to be unbound by legal sources, the judiciary's credibility will likely suffer. The primary role of the judiciary, as commonly understood, is to apply and interpret law, rather than make it up. Some people see policy-making as beyond the role or capabilities of the judiciary. Even if we assume that the public would perceive judicial policymaking as legitimate, judicial opinions often do not delineate clear and compelling public policy arguments. Holmes acknowledged that judicial opinions tend not to flesh out the policy grounds of their decisions:<sup>77</sup> "under our practice and traditions," said Holmes, common law principles are "the unconscious result of instinctive preferences and inarticulate convictions, but [are] none the less traceable to views of public policy in the last analysis."<sup>78</sup>

Even if judicial preferences and intuitions ultimately track sound public policy, then, that would not necessarily be apparent to the public, since the policy grounds of decisions are not readily, if at all, publically accessible. If case outcomes are sometimes inconsistent—in the sense that even though facts between two cases seem similar, in one case the plaintiff prevails and in the other the defendant prevails—the public might perceive that inconsistency to be a result of the biases or whims of judges, even if it is justified ultimately on grounds of public policy.

Finally, Holmes believed that judicial decisions follow the "inclinations of the . . . community" and that experienced judges are adept at "represent[ing] the common sense of the community in ordinary

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76. See Holmes, *supra* note 69 at 467; HOLMES, *supra* note 69, at 36-37, 112-22.

77. Holmes did think, however, that judges should openly discuss policy considerations: "the ease with which the law may be changed to meet the opinions and wishes of the public . . . make[s] it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy . . . ." HOLMES, *supra* note 69, at 78.

78. *Id.*, at 35-36.

instances.<sup>79</sup> If judges aptly represent the values and interests of the public broadly, their decisions might well be perceived as legitimate, because they would appear to be right decisions all things considered. However, most judges serve many and diverse communities, with differing and conflicting values and interests. It is difficult to see how judicial decisions could generate agreement among, or track the inclinations of, all communities affected; consequently, the judiciary would have to rely on grounds other than communal agreement for its credibility.

*(e) Judicial Efficiency*

On the assumption that judges are good policymakers, judges deciding new cases can rely on past cases as exemplars of sound policy. Barring changes in social conditions, judges would do well on policy grounds to replicate past decisions, and would not need to perform the policy analysis themselves, thereby conserving valuable resources. However, on the policy-based view, judges are bound by precedent only to the extent that following precedent will serve the public interest. Background conditions change, in some domains frequently and drastically; consequently, even if a past decision was in the public interest, repeating that decision in the present might not be. Accordingly, judges bear the cost of re-evaluating the policy-based merits of previous judicial holdings in their determinations and applications of precedent.<sup>80</sup>

*B. The Direct-Analogy Model*

*(1) Definition and Examples*

Proponents of what I call the *direct-analogy* model of precedent emphasize the role of direct comparisons or similarity judgments between cases. Several theorists have suggested that precedential reasoning is largely or wholly a matter of perceiving similarities between particulars and treating cases the same based on those similarities. Just what makes a similarity relevant, or sufficiently relevant, is a subjective matter—basically, whether the similarities resonate with the observer as relevant or persuasive. For example, let's suppose a precedent-setting court decided a noise dispute between neighbors against the noise-maker. In the precedent case, the noise-maker was part of a heavy-metal band that practiced in the backyard, disrupting the peace of her neighbor. Suppose that a new dispute arises where the implicated noise-maker keeps several dogs in her backyard, and the neighbor complains about their barking. A

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79. See Holmes, *supra* note 69, at 466.

80. See HOLMES, *supra* note 69, at 36-37.

judge adjudicating the new case might perceive the facts as highly similar to those of the past dispute and accordingly decide against the dog-owner, without deciphering and applying any rule or principle.

Edward Levi advanced a direct-analogy view in *Introduction to Legal Reasoning*, a classic text on reasoning in the common law. Although Levi did believe in common law rules, he emphasized the importance of similarity judgments in the process of determining and applying those rules. For Levi, a concept is "given meaning by the examples to be included under it."<sup>81</sup> "The scope of a rule," he wrote, "and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced."<sup>82</sup> For example, when determining whether a defendant in a new case is liable under a theory of negligence, we do not start by applying the rule of negligence from the top down; instead, we look at past cases and ask which of them seem most similar to the case under consideration: those that held for the defendant, or those that held for the plaintiff.<sup>83</sup>

For Levi, "[t]he finding of similarity or difference [between cases] is the key step in the legal process."<sup>84</sup> The direct-analogy view can be seen as co-extensive with the *I-know-it-when-I-see-it* approach to decision making, famously exemplified by Justice Stewart in his *Jacobellis v. Ohio* concurrence (denying that a film in question was an instance of "hard-core pornography").<sup>85</sup> The idea is that we might not need, and that there might not even exist, a set of necessary and sufficient conditions for category inclusion; if we have examples of category members, we can use our sense of similarity to determine whether or not some novel case belongs to the category. Scott Brewer refers to proponents of the direct-analogy account as "mystics," but nonetheless credits the view for recognizing that "there is inevitably an uncodifiable imaginative moment" in the process of precedential reasoning.<sup>86</sup> The striking property of the

81. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING, 27 (1949).

82. *Id.* at 124.

83. *Id.*

84. *Id.* at 2.

85. Justice Stewart expressed the point in the closing lines of his short concurrence: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ['hard-core pornography'], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

86. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 954 (1996). For further discussion of direct-analogy accounts of legal reasoning, see Vincent Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 82-84 (1985). For an elaborate direct-analogy-type account, which employs Wittgenstein's family resemblance theory, see Roy Stone, *Ratiocination not Rationalization*, 74 MIND 463, 481 (1965) (arguing that, "'legal decisions' . . . 'consist of non-necessary truths which are obtained by reflection: reflection upon the likenesses and dissimilarities of particular instances . . .").

direct-analogy account is its embrace of perceptions of similarity as the primary input of precedential reasoning.

(2) *Evaluation of the Direct-Analogy Model*

(a) *Reliance*

Some commentators take for granted that precedential reasoning involves perceiving and judging similarities between fact situations, and conclude that reliance on precedent cannot be reduced to “reliance on substantive normative rules.”<sup>87</sup> The “condition creating the presumption” of precedential constraint is similarity itself, and similarity is not a logical relationship but rather a perception based in part on cultural and subcultural factors.<sup>88</sup> If we think that the general public is attuned to judicial decisions and will perceive the same similarities and differences among cases as courts do, then a direct-analogy approach to precedent would seem conducive to the protection of reliance interests. I am not sure that we should expect the public to share a similarity sense with the judiciary, given that the judiciary is highly non-representative of the general population; but we might more reasonably expect lawyers to be attuned to judicial sensibilities.

(b) *Equality*

The equality principle presents serious difficulties for the direct-analogy account. Why do similarity judgments as such matter? Doesn't the kind of similarity matter? After all, according to the equality or fairness principle, people ought to be treated similarly if they are similarly situated in justice-relevant ways, not just if they appear somehow to be similar.<sup>89</sup> Tall people with blond hair are similar to one another, but that provides no reason for them to receive the same outcomes in court. Vincent Wellman criticizes Levi and others for failing “to provide useful criteria by which we might evaluate judicial argumentation and assess . . . analogies.”<sup>90</sup> “What makes one similarity relevant, but another not?” asks

87. Schauer, *supra* note 27, at 587.

88. *Id.* at 587, 588.

89. Michael Moore criticizes rule-based theories along the same lines, for leaving values out of the picture (*see* this Part, *infra*, Sec. D.1.).

90. Wellman, *supra* note 86, at 82. Several commentators have noted the absence of a similarity metric as a problem for the doctrine of precedent in general. *See, e.g.*, SHAPIRO, *supra* note 2, at 248 (“The obvious deficiency of the method of precedent is that, while the exemplar is identified, the relevant standard of similarity is not.”); DUXBURY, *supra* note 12, at 143 (“The notion of treating like cases alike is . . . incomplete or empty until supplemented by criteria of likeness or difference.”); Wellman, *supra* note 86, at 99 (“The issue for a theory of judicial justification is what warrants one analogy over the host of other comparisons which could have been drawn.”).

Wellman.<sup>91</sup> Every judgment of similarity or dissimilarity between cases inevitably picks out certain similarities or differences and not others. Missing from the direct-analogy model is an account of why and to what extent we should care about some commonalities and differences but not others. Theorists have not shown how the direct-analogy account of precedent—as grounded in direct similarity judgments between cases—would promote the kind of equal treatment that matters for justice. We perceive all kinds of similarities that have no relevance for justice, and we might well miss similarities and differences that matter.

*(c) Appropriate Distribution of Power, Credibility, and Judicial Efficiency*

On the direct-analogy view, judges are highly constrained by legal sources (in the form of precedents), even though that constraint is a function of perceived similarities across cases rather than the extraction and application of rules or principles. However, it is unclear why similarity perceptions themselves provide an appropriate constraint. On the one hand, if commentators who claim that judges' similarity judgments reflect those of the community are correct,<sup>92</sup> then the public might perceive the constraint that the direct-analogy model imposes as legitimate, since in that event the judiciary would reflect the community's views. However, on the other hand, if judges' similarity judgments are the same as the community's, that should give us cause for concern, since judges should presumably be better than ordinary citizens at recognizing relevant similarities and differences—for example, we might reasonably expect judges to be less susceptible to experiencing some likeness as significant when it is in fact irrelevant from the perspective of justice.

According to Sunstein, an advantage of the direct-analogy approach is that people more readily agree at the level of particulars than at the level of rationales, principles, or theories.<sup>93</sup> Although limited empirical support has been presented for that claim, the idea that agreement is easier to achieve in the judgment of particular facts than higher-level legal constructs is intuitively plausible. For example, we might agree that the facts of Case A are very similar to those of Case B and that, since we are required to treat like cases alike, we should treat B the same as A. This agreement does not depend upon any further agreement as to what rule

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91. Wellman, *supra* note 86, at 45, 82, 84.

92. For example, Levi supposed that judicial judgments of similarity reflect the views of society or the community broadly. *Supra*, LEVI note 81 at 104.

93. Sunstein, *supra* note 35. The same claim has been made in field of practical ethics: in the context of moral decision making, people are more likely to agree on the concrete decision about a case than on a higher-order theory that would justify the decision. See, e.g., ALBERT R. JONSON & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* (1990).

Case A should be taken to represent, or what rationale or theory justifies its outcome. Furthermore, if the prescriptions of precedent are conducive to agreement, then a system of precedent might help to conserve judicial resources in courts with multiple judges, since judges would not expend much time or labor arguing opposing views.

### *C. The Balance-of-Factors Model*

#### *(1) Definition and Examples*

On the balance-of-factors view, precedents represent a set of facts and rationales that, taken together, weigh in favor of a particular outcome. What matters is not some rule that a past opinion sets out, but rather all the reasons that the case contains both for and against the outcome reached.<sup>94</sup> Although the balance-of-factors view is similar to the rule-based view I discuss below, George Lamond suggests that the former is superior because it better represents legal practice.<sup>95</sup> According to Lamond, cases do not typically specify legal rules. Moreover, even when a judicial opinion explicitly announces that some rule is being applied to the facts, the opinion might include reasons that are extraneous to the rule but that still seem to play a role in the decision.

Another alleged appeal of the balance-of-factors model is that it can readily accommodate the practice of distinguishing.<sup>96</sup> According to this model, a judge deciding a new case is bound to follow a particular past case only if there are no differences between the cases that would justify a different result. Two cases, then, can be very similar, with the new case even falling under the rule enunciated in the past case, but if some fact present in the new case was not present in the past case, that difference might permit or require the judge in the new case to reach a different conclusion—that is, if the additional fact pushes the balance of factors to favor the other side. To return to the example of the heavy-metal musician and her silence-loving neighbor, imagine that a precedent-setting court decided against the noise-maker. Now suppose a new case arises with facts that largely overlap with those of the previous case; under the rule articulated by the previous court, the new case should come out against the noise-maker. However, in the present case, unlike the previous one, the disputants have been neighbors for over twenty years and the musician has been practicing at home with his band for the whole period. The court reasons, perhaps on an adverse-possession analogy, that this fact tips the balance in favor of the noise-maker, even though the court in the past case

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94. Harty, *Rules and Reasons in the Theory of Precedent*, *supra* note 59.

95. Lamond, *Do Precedents Create Rules?*, 11 *LEGAL THEORY* 1 (2005).

96. See Lamond, *supra* note 70.

articulated no such exception to the pro-silence rule.

*(2) Evaluation of the Balance-of-Factors Model*

*(a) Reliance*

The balance-of-factors approach seems to put unreasonable demands on people who wish to form legal predictions with confidence. To rely on precedents, an individual would need to consider all the factors that count as reasons both in favor and against the decisions in those precedents. The error rate would likely be high and the space for reasonable disagreement large. For similar reasons, the balance-of-factors approach would not do much for judicial efficiency, since any element of a past case might affect whether that case controls a subsequent dispute; even if the rule articulated in the past case does not apply to a given case, the cases might contain enough factors in common for the past case to control the present one.

*(b) Equality*

If we expect that judges would consider the recurrence or non-recurrence of past case factors in a given case as *reasons* to treat people similarly, or differently, if and only if (and to the extent that) those factors matter for justice, then a balance-of-factors method of precedent would presumably work well to realize equality. Such an expectation would place a lot of trust in judges and would make them responsible for extensive moral reasoning. It is conceivable that this method is appropriate to higher court judges (in the context of horizontal stare decisis) but not lower court judges (in the context of vertical stare decisis), since our system places greater trust in courts at the top of the judicial hierarchy.

*(c) Appropriate Distribution of Power, Credibility, Judicial Efficiency*

The model does not exclude much material from the practice of precedent; consequently, we might think that under such a system judicial discretion would not be sufficiently limited. For example, judges might more readily find a legal justification for whatever outcome they prefer if they are permitted to construe any factors present in a past case and any present in the given case as relevant to the decision of whether to follow the precedent.

Without empirical investigation into the matter, it is difficult to say whether the public would perceive a judiciary that practiced a balance-of-factors method to be legitimate. However, if I am right to think that people would have trouble predicting legal outcomes under such a system,

then the system would likely lack credibility, since the application of precedent would appear arbitrary and inconsistent. I suspect that the credibility of the common law depends on at least the appearance of a somewhat formulaic or rules-based system. To the extent that the practice of precedent seems to deny the existence or importance of rules, credibility suffers.

Finally, for reasons already discussed, the balance-of-factors model makes out precedential reasoning as an incredibly resource-intensive endeavor. In deciding a new case, judges would take into account all factors that were present in plausible precedent cases, determine the weight of each factor for or against the outcomes of the cases, and compare the results to the present facts. While theoretically reasonable, the method might be impracticable.

#### *D. The Purposive Model*

##### *(1) Definition and Examples*

On the purposive approach to *stare decisis*, the purposes, rationales, or justifications underlying past judicial decisions, or then *stare decisis* itself, play a definitive role in precedential reasoning. Where the rationales behind a decision are policy-based, the purposive model overlaps with policy-based Realism. The purpose behind a decision is distinct from a concrete or low-level rule that might be derived from a decision in the sense that the purpose is what justifies the rule. For example, a judicial opinion might state its holding or rule as follows: "In the event that a resident disturbs the peace by creating unusual levels of noise, the resident must either cease or compensate his neighbors for the disturbance." The purpose behind the rule might be to promote community welfare. A judge who takes a purposive approach to precedent would decide against the noise-maker in a subsequent case if she determines that doing so would promote community welfare, regardless of whether or not the noise-maker prevailed in precedent case.

Burton argues that, while precedents stand for rules, those rules are to be derived, and interpreted, in light of the purposes that justify legal decisions.<sup>97</sup> Judges depend on the justifications behind rules when making determinations as to what rule some case stands for, and also whether a particular rule covers a new case. As an example, Burton asks us to consider a rule such as the following: a valid will must be witnessed and signed by two people.<sup>98</sup> He asks what we should make of a case where the

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97. See BURTON, *supra* note 7; Burton, *supra* note 17, at 1144.

98. Burton, *id.* at 1148.

will in question was signed by three people. Given the purpose of the rule—where the purpose is typically although not necessarily derived from the reasoning presented in past judicial opinions—the will in our novel case should be considered valid. After all, the point of the witness rule is “to assure due deliberation and the exercise of free will by the testator, and three is *better* than two for that purpose.”<sup>99</sup> On Burton’s view, the purposes that justify a rule instruct legal reasoners as to its proper application.

One might think that if we want the practice of precedent to serve the purposes of *stare decisis* optimally, then courts should just apply those purposes directly. A handful of theorists, including Michael Moore, Dworkin, and Stephen Perry, have embraced some version of this view. Moore rejects the common conception of precedential reasoning as an interpretive or hermeneutic enterprise, arguing that this conception is inevitably insensitive to the values behind *stare decisis*, in particular the principle of equality.<sup>100</sup> He argues that judges have a duty to consider the principle of equality directly (along with the other key principles that justify *stare decisis*) whenever they decide a common law case.

The ideal judge does not try to figure out and apply the rules that previous courts followed or laid out, nor the purposes for these rules, but rather seeks to identify the fairest outcome in the present case, given the outcomes that other litigants have received. “Real equality,” says Moore,

is given only when *morally relevant* likenesses and dissimilarities are used as the benchmark for like treatment. What the precedent court stated to be its holding, its material facts, or its reasons, cannot be allowed to fix a case’s holding without offending one of the main ideals that gives precedent its point, namely, equality.<sup>101</sup>

Moore believes that the conventional, interpretive conception of precedent supports an “overly formalistic idea of equality,” where cases similar in arbitrary ways are to be treated the same just because of those arbitrary similarities.<sup>102</sup> The proper work of judges is not to interpret and apply rules or even principles that were applied in past cases, but rather to determine the morally optimal outcome in the present case, according to the values of *stare decisis* itself.

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99. *Id.*

100. Michael S. Moore, *Precedent and Non-Hermeneutic Legal Reasoning*, PRECEDENT IN LAW 183, 185-6 (1987).

101. *Id.* at 186.

102. *Id.*

## (2) *Evaluation of the Purposive Model*

### (a) *Reliance*

Purposive methods of interpreting precedent present predictability problems. First of all, the higher-order purposes used to justify decisions typically leave considerable room for interpretation and often require value judgments, making them prone to ambiguity as well as interpretive disagreement. As Joseph Raz has argued, an important difference between rules and the principles or policies that justify them is that the latter “tend to be more vague and less certain.”<sup>103</sup> Moreover, a particular purpose of justification is likely to cover a greater range of situations than a particular rule (which typically picks out a specific situation type and prescribes particular conduct in that situation) and many justifications might apply with similar strength to a particular case; the deliberation that purposes encourage is accordingly more complex and extensive than rules-based deliberation.

Even if the purpose behind a past decision can be located without much difficulty, it might be more difficult to determine what action or outcome the purpose requires. For example, if I have a dispute with my neighbor over noise levels, I can easily tell which of us is the silence-lover and which the noise-maker. Let’s say that I am the silence-lover and he the noise-maker. And suppose I have knowledge of a previous case involving a noise dispute between neighbors where the silence-lover prevailed. If the courts follow a rule-based approach to precedent, I know I am in luck. If the courts follow a purposive approach though, it is unlikely that I can be so sure. The purpose behind the holdings of the previous cases might be to make the least-cost avoider pay the price. I would likely have a difficult time determining who, between my neighbor and me, is the least-cost avoider.

### (b) *Equality*

If low-level equality matters—roughly, treating person A the same as B if they performed the same actions—then a purposive approach is unlikely to be ideal in terms of equality. This is because treating people equally at the low level does not guarantee equality at the high-level, and sometimes requires unequal treatment at the high-level.<sup>104</sup> On the higher-level conception of equality, where someone is entitled to the same outcome another person received on grounds of equality only if the rationale behind granting the outcome to the first person applies in the

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103. Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L. J.* 823, 841 (1972).

104. See *supra*, Part I, Sec. B.2., for a discussion of low- versus high-level equality.

case of the second person, a purposive model of stare decisis looks promising on equality grounds. Since I believe that treating people equally at the level of principle or policy is most or all of what matters for equality as a value, I think that the purposive approach to precedent is well aligned with the equality justification for stare decisis. This assumes, though, that adjudicators can extract purposes effectively from past cases and apply them appropriately to novel cases. Some adjudicators undoubtedly can, at least in some cases.

Here is an example. In the New York case of *Hynes v. New York Central Railroad*, a child was preparing to dive into public waters from a plank, when a pole supporting electric wires fell on top of him.<sup>105</sup> The child was electrocuted, knocked from the plank, and killed. The defendant railroad company owned the plank, pole, and wires, but the plank extended for more than seven feet over the water. The lower courts held that the child was a trespasser and that accordingly the defendant was not liable for injuries to the child.<sup>106</sup> As Justice Cardozo explained in the opinion of the Court of Appeals (New York's highest court), the courts below "thought it of no significance that [the plaintiff] would have met the same fate if he had been below the board and not above it."<sup>107</sup> He criticized the formalistic reasoning that generated a conclusion in favor of the defendant.<sup>108</sup>

Cardozo targeted the intermediate court's application of an ancient doctrinal rule whereby the title to a structure is unaffected by the protrusion of that structure beyond the title-holder's land. The protrusion rule was developed in cases involving branches of fruit-bearing trees that extended beyond the land of the tree-owners: the opinions of those cases held that the tree-owner maintained property rights to the whole tree, despite the encroachment. The intermediate court reasoned that under this rule the plank remained the property of the defendant, that accordingly the child was a trespasser, and that therefore the defendant was not liable. On this line of reasoning, if wires were to fall on two children, where one of them happened to be in a stream below a tree owned by the wire-owner and the other happened to be perched on a lower bough of the tree, then the owner is liable only to the former child.<sup>109</sup> However, whatever rationale we might have for protecting the child under the tree extends to

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105. *Hynes v. N.Y. Cent. R. Co.*, 231 N.Y. 229 (1921).

106. This was before the rise of the attractive nuisance doctrine.

107. *Id.* at 232.

108. *Id.* at 233 ("The conclusion is defended with much subtlety of reasoning, with much insistence upon its inevitableness as a merely logical deduction"; and, "[t]his case is a striking instance of the dangers of ... the extension of a maxim or definition with relentless disregard of consequences to a 'dryly logical extreme.'").

109. Judge Cardozo proposed the hypothetical, which is based on another New York case—*Hoffman v. Armstrong*, 48 N. Y. 201 (1872). *Id.* at 234.

the child on the tree, just as it would extend to a child swimming in public waters and also to the child on the plank in the case at hand. If we want to protect children who are playing in public spaces, it ought to make no difference whether those children are on top of some structure that is formally private property. Whether or not a plaintiff in such a case is a trespasser, the defendant created a public hazard and ought accordingly to be liable for the resulting harms. Cardozo rejected a formulaic rule-based approach to precedent in favor of one based on higher-order principles, reaching a result that seems irreproachable on comparative justice grounds.

*(c) Appropriate Distribution of Power*

A system of precedent constrains judicial discretion to some extent whether or not higher-order purposes are in the picture, but a method that excludes or limits the role of purposes will likely constrain judicial decisions to a greater extent than one that prioritizes the role of purposes. This is because the latter approach depends on the consideration of higher-level, more abstract concepts, which often allow for significant ranges of interpretation and are prone to interpretive disagreement.

Take a precedential rule that bars a prospective inheritor from receiving his inheritance in the event that he has murdered his testator, where the purpose or justification for the rule is that the law should not reward wrongdoers.<sup>110</sup> If a legal reasoner who seeks to follow the precedent makes her decision based on the rule's purpose, she would have to interpret the meaning of *wrong*, which would seem to open up a greater range of possible meanings (and allow for greater disagreement) than, for example, the terms *testator* or *murder*. To the extent, then, that we have limited trust in courts, and believe that judicial decision making should be constrained, we have good reason to limit the degree to which high-level rationales enter precedential reasoning.<sup>111</sup>

*(d) Credibility*

A system that is consistent first and foremost at the level of low-level concepts might appear more legitimate than a system that tolerates low-level inconsistency and prioritizes consistency at a higher level. For one, low-level inconsistency might be more visible than inconsistency at the level of rationale. Moreover, if Sunstein and others are right in their conjecture that people are more likely to agree on outcomes given some

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110. The example is based on the famous New York civil court case of *Riggs v. Palmer*, 115 N.Y. 506 (1889).

111. See SHAPIRO, *supra* note 2, at 387 (explaining that, "bottom-up, case to case reasoning is generally associated with lower levels of trust, than reasoning based on high-level principles").

set of facts than they are to agree on the principles that would justify such outcomes, then a system of precedent focused on facts and rulings might be capable of generating substantial agreement even where people disagree at the level of rationale.

However, the rote application of rules is sometimes blatantly unjust; when legal authorities enforce rules without regard to the rationales behind those rules or the consequences of their enforcement, rules can work to reduce the credibility of the legal system broadly. Monica Bell has documented several examples of young black people whom police officers have targeted unjustly for violating legal rules. For example, one individual was cited for “loitering or some other minor offense” while he was waiting outside his younger brother’s school toward the end of the school day, so that he could accompany his brother home.<sup>112</sup> In another example, an officer stopped a group of young black people for breaking a Maryland state law against walking in the street.<sup>113</sup> Presumably, the purpose of this law is public safety. The young people were in the street because, as one of them explained, it was safer under the circumstances to walk in the street than on the sidewalk.<sup>114</sup> In these examples, although the individuals were technically violating rules, they were doing so with defensible purposes in mind. Moreover, the purposes behind the rules did not apply under the circumstances. When authorities ignore higher-order rationales in this type of situation, the legitimacy of the legal system suffers.

(e) *Judicial Efficiency*

If the rationales underlying judicial decisions were to constitute binding law, the judicial decision-making process would likely be highly resource-intensive, particularly if no additional material was binding along with those rationales. Many potential principles might be relevant to the decision of a case. And often principles can be found that point in opposite directions.<sup>115</sup> Moreover, if we keep purposes out of precedent, then judges with differing views on the justifications for some treatment of a case might still be able to agree on the outcome. Different judges, and different courts, might disagree on the rationale for a ruling, or the values

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112. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054, 2111 (2017). See also Bell’s discussion of traffic violations as bases for physical searches, *id.* at 2141.

113. *Id.* at 2101.

114. *Id.*

115. Dworkin argued that this is a key distinguishing feature between principles and rules: principles take on varying weights and can compete with one another; in contrast, rules are either applicable or not in an all-or-nothing manner and no two valid rules can conflict with one another. *Supra*, note 7 at 43. However, Raz has argued to the contrary that valid legal rules can prescribe opposing outcomes in a case. Raz, *supra* note 103 at 830-32.

it stands for, but still agree that the ruling is correct.<sup>116</sup> This might save time and energy, since judges would not need to convince each other of the principles or policies that their legal decisions should be serving.

Theorists who recommend a method of precedent where judges engage directly with *stare decisis* values place a great deal of faith in the abilities and virtues of adjudicators. Judges would consider which of all past decisions should govern a novel case as well as how those decisions should govern by consulting the totality of values that justify the doctrine of precedent. Even if someone were capable of the task, the reasoning would take a great deal of time and effort—likely more than judges have at their disposal when they decide cases.

Consequently, I imagine that an enlightened adjudicator would come up with some method to make judgments about precedent easier on judicial resources and good for the other *stare decisis* values as well. In that event, we would be back where we started: trying to come up with a method of precedent that is optimal in terms of the justifying principles behind the doctrine. Finally, even if there are some Herculean judges, we cannot reasonably expect this degree of skill and virtue from all judges; accordingly, we would want an alternative method, one that we could reasonably expect decision-makers to employ successfully.

### *E. The Rule-Based Model*

#### *(1) Definition and Examples*

The basic idea behind the rule-based model is that precedents or lines of precedent establish rules, which courts are obligated to apply in subsequent disputes. On this view, when judges follow precedent, they exercise deductive reasoning. The past case lays out the rule in a form such as the following:

*If A, B, C, and not-D, then O; where A, B, C, and D are generalized facts, and O is the outcome (typically a holding for plaintiff or defendant).*

This is a compelling and intuitive understanding of the operation of precedent in the common law.<sup>117</sup> Judicial opinions often treat precedents

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116. Shapiro makes the same point in the context of statutory rules: if a rule is kept distinct from its purposes, then that rule can satisfy a diversity of higher-order principles, even when those principles are in tension; accordingly, a rule laid out in a statute might not be indicative of higher-order agreement among those who settled on the rule. See SHAPIRO, *supra* note 2, at 380.

117. My target here is a non-strict version of the rule-based view, where precedents are distinguishable, which seems to be the most widely accepted version. See HORTY, *Rules and Reasons in the Theory of Precedent*, *supra* note 59 at 2. On the less popular *strict* rule view, precedents are not distinguishable; the strict view has been developed by Larry Alexander. See Alexander, *supra* note 59; Alexander, *Precedent*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (D. Patterson ed., 1996), at 503–513; LARRY ALEXANDER & EMILY SHERWIN, *THE RULES OF RULES*:

as though they stand for rules, which are to be applied deductively to new cases.

For example, in *Bang v. Charles T. Miller Hospital*, the well-known spermatic cord severance case, the Minnesota Supreme Court rearticulated, and applied, a rule “well established” by previous case law: “where a physician or surgeon can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed of the alternative possibilities and given a chance to decide before the doctor proceeds with the operation.”<sup>118</sup> The opinion then clarified as follows: “we mean that, in a situation *such as the case before us* where no immediate emergency exists, a patient should be informed before the operation that if his spermatic cords were severed it would result in his sterilization . . .”<sup>119</sup> The court concluded that, if the facts alleged by plaintiff were true, then the physician defendant was liable for failure to obtain consent.<sup>120</sup> We can simplify the reasoning here as follows:

*If A and B and (not-C or not-D), then hold for plaintiff, where A = physician could ascertain chance of alternative situations in advance of the operation; B = no immediate emergency existed; C = patient was informed of alternative possibilities; D = patient had chance to decide.*

The rule tells us that, if the antecedent is true, the defendant is liable. When a new case arises, the court has the task of determining whether or not the facts fall under the terms of the rule.

Judges often generate or derive rules, and so “follow,” past cases, even when no rules are explicitly delimited in those past cases. On Goodhart’s rule-based view, precedential rules are not generally stated as such in the opinions of precedent case; a precedential rule consists of the facts treated by the precedent judge as material together with the outcome of the case.<sup>121</sup> For Goodhart, it does not matter what a judge says or even thinks is the rule at play; to determine the precedential effect of a case we must isolate only and all the *material* facts of the case, plus the case’s outcome.

Goodhart emphatically rejects the idea that the *reasons* behind a judicial decision play any role in the precedential effect of the decision.<sup>122</sup>

MORALITY, RULES & THE DILEMMAS OF LAW (2001).

118. *Bang v. Charles T. Miller Hosp.*, 251 Minn. 427, 434 (1958).

119. *Id.* (emphasis added). See also *City of Buffalo v. Cargill*, 374 N.E.2d 372, 378 (1978), where the court clearly articulated a rule from a past case (*Matter of Ueck*, 286 N.Y. 1, 35 N.E.2d 624) and took that rule to control in the case at hand—stating that, “the rule announced in *Ueck* is to be followed.”

120. The court reversed the lower court’s dismissal of plaintiff’s action against defendant, and ordered a new trial to determine the facts.

121. See Goodhart, *supra* note 11.

122. Others, however, have developed rule-based approaches that seem to leave space for the

Rather, the process of reasoning from precedent involves finding the material facts of the past case and then determining whether those material facts are present in the new case. “If these are identical,” says Goodhart,

then the first case is a binding precedent for the second, and the court must reach the same conclusion as it did in the first one. If the first case lacks any material fact or contains any additional ones not found in the second, then it is not a direct precedent.<sup>123</sup>

Goodhart does not offer a method for distinguishing the material facts from the immaterial; he notes only that if an opinion does not state which facts are material, “then all the facts set forth in the opinion must be considered material with the exception of those that on their face are immaterial.”<sup>124</sup> Some facts mentioned in court opinions are undeniably irrelevant to the legal claims at issue; perhaps Goodhart just means that we should exclude these, and only these, when deriving a rule from an opinion where the material and immaterial facts are not explicitly established as such.

H.L.A. Hart adopted a type of rule-based account, but he made an exception for “penumbral” cases; these are cases with facts that do not fit inside the core meaning of terms given in existing rules.<sup>125</sup> For example, suppose a new case arises in the jurisdiction of *Bang v. Charles T. Miller Hosp.* (the spermatic cord severance case): let’s say the facts of this new case are basically the same as in *Bang*, except that in the new case the operation was more urgent. The doctor had a finite amount of time, one to two hours, to complete the operation safely. The doctor argues that this was an emergency situation and that therefore the *Bang* rule does not apply. However, it is not clear that it was an *emergency* situation; the emergency character of the situation might be indeterminate. Even though there are cases squarely in the *emergency* category, and cases outside of it (such as *Bang*), the new case might be neither an emergency nor a non-emergency. In that event it would be a penumbral case with respect to the concept of emergency.

On Hart’s view, judges inevitably exercise discretion when it comes to resolving penumbral disputes; in these cases, rules themselves do not determine outcomes.<sup>126</sup> Problems of the penumbra arise because of the open-textured nature of legal concepts: open-textured terms have a “core

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possibility that reasons (principles or policies that justify outcomes) operate as terms of rules. See Joseph Raz, *Law and Value in Adjudication*, in *THE AUTHORITY OF LAW* 180 (1979). We might think of this approach as one that combines purposive and rule-based methods.

123. *Id.* at 180.

124. *Id.* at 178.

125. H.L.A. HART, *THE CONCEPT OF LAW* 12-13, 123, 251 (Leslie Green, ed, 2012).

126. See *id.* at 127; see also SHAPIRO, *supra* note 2, at 251.

of settled meaning” but also furry-edged boundaries. Consequently, although there are many determinate instances of any legal term, instances falling within the settled core, there are also borderline instances. When a case includes a factor that is penumbral with respect to a term in some rule, judges must exercise discretion in deciding whether or not to apply the rule (and this is regardless of whether it is a statutory or common-law rule).<sup>127</sup> Hart’s indeterminacy, though, is a marginal phenomenon; most cases are *not* penumbral and instead fit neatly into the legal rules set out in statutes and precedents.

## (2) *Evaluation of the Rule-Based Model*

### (a) *Reliance*

Rules are relatively effective at producing predictable outcomes. Here I have adopted what I take to be a common-sense conception of rules as relatively low-level constructs, which tell rule-followers what to do or how to act under specified sets of circumstances. They are more closely tailored to behavior than the policies or principles that might justify them, and are more conducive than those policies or principles “to uniform and predictable application.”<sup>128</sup> On the rule-based model, precedents take the form of instructions for how to act; this is not the case with any of the other models I examine here.

### (b) *Equality*

Lamond offers a criticism of the rule model that sounds a lot like Moore’s criticism of interpretive methods in general. On a rule-based approach, a precedent “restricts the later court in a fairly haphazard manner, turning on what facts happened to be present in the precedent case (or, more precisely, which facts are mentioned in the precedent case).”<sup>129</sup> The presence or absence of such facts are not necessarily relevant for equality as a matter of justice.

Schauer has argued similarly that rules in general (not just in the legal context) inevitably neglect differences that are relevant and pick out

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127. See Brian Bix, *H.L.A. Hart and the “Open Texture” of Language*, 10 *LAW & PHIL.* 51 (1991) for an extensive account of the role of open-textured concepts in Hart’s theory of precedent. See Brewer, *supra* note 86, at 1000, for an account of open-textured terms more generally and their prevalence in Western law.

128. See Section D.2 of this Part. See also SCHAUER, *supra* note 41, at 137, 181-2, 137 (noting that legal systems tend to justify their dependence on precedent by appealing to many of the same merits that rule-based decision making in general is known for, and suggesting that “the protection of reliance interests is the most common argument in favor of rules”); Raz, *supra* note 103, at 841.

129. Lamond, *supra* note 95, at 11.

differences that are irrelevant when applied to particular cases.<sup>130</sup> If we want to be sure to treat people equally, says Schauer, we need a particularist method, which does not depend on any generalizations: only particularism can draw “all the distinctions some substantive justification indicates ought to be drawn.”<sup>131</sup> He concludes that, “[i]f we are searching for arguments to support rule-based decision-making . . . we will have to search elsewhere than in the moral force of consistency, fairness, or justice.”<sup>132</sup> However, often we do not have available substantive justifications that would indicate, in the absence of rules, where we ought to make distinctions between cases—and, even when we do have access to such justifications, they might be too abstract or involved to reason from reliably. If we had more time, information, and intelligence with which to make decisions, then it might be that a particularist method would best serve the kind of equality that matters for justice. Given the limited resources with which courts make decisions, particularism does not seem promising in the context of the common law.

A rule-based method of precedent would likely require judges, in some instances, to make decisions based on a set of factors that is not the most directly relevant set from the perspective of equality (for example, consider the reasoning of the lower courts in *Hyne*<sup>133</sup>). Accordingly, it might seem as though a rule-based method is insensitive to the requirements of the equality principle. However, acting with the conscious intent of serving some purpose is not the only way to serve that purpose and might not even be the best way to serve it. By applying a rule in a present dispute that was applied in past disputes, a judge might make a decision that is consistent with the principle of equality (and also consistent with the first-order principle behind the rule), without deliberately acting on or following those principles. The judge’s decision could successfully realize equality, even though that principle did not enter her reasoning directly.

If an authority has greater expertise than its subjects (those who follow its directives) or has better motivations, then the conduct that the authority orders will better realize the values underlying those rules than its subjects could or anyway would on their own. Effective authorities issue rules with the following property: subjects will better realize the values underlying the rules if they just follow the rules rather than trying to realize the values directly.<sup>134</sup> Accordingly, although a rule might appear to

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130. SCHAUER, *supra* note 41, at 136.

131. *Id.*

132. *Id.* at 138.

133. *See supra* Part 11, Sec. D.2.

134. *See* RAZ, PRACTICAL REASON AND NORMS 191-94 (1999).

a rule-follower to be unprincipled or ungrounded, following the rule might be the best way to realize worthy objectives.<sup>135</sup>

Nevertheless, precedents as rules will not necessarily pick out factors that are relevant for the purposes of equal treatment. Moreover, rules can function to conceal purposes or rationales that would not withstand public scrutiny.<sup>136</sup> Although rules are potentially useful devices for the realization of equality, nothing about their character ensures that they will be used for that end.

*(c) Appropriate Distribution of Power*

Stare decisis is supposed to support a particular distribution of power in which past cases have authority over new cases, and higher courts have authority over lower courts. One manifestation of that authority is the constraint that past decisions place on present decisions. As other have shown, the issuance of rules is a common and effective way for authorities to restrict and control their subjects' decision making; rules work to exclude some reasons for action from the consideration of the rule-follower—reasons that, in the absence of the rule, would be relevant for the agent to consider.<sup>137</sup>

Some commentators have stressed that in any given case judges decide only the particular dispute at issue and that subsequent courts have to make their own generalizations in finding the "rule" of the precedent; accordingly, precedents cannot really contain rules, and subsequent courts have a great deal of discretion in constructing the rules for which precedents stand. As Schauer explains, on this view, "[w]hat distinguishes reasoning from precedent from reasoning from rule . . . is the necessity in precedential reasoning of *constructing* the generalization/factual predicate that already exists in the case of a rule."<sup>138</sup> However, this kind of generalization typically does already exist in the case of precedents; it would be very awkward if not impossible for an opinion to discuss the facts of its case without making any generalizations. Courts typically state their decisions in the form of propositions general enough that they can be applied, more or less in the same form, to subsequent disputes.<sup>139</sup>

135. I discuss this property of rules in more detail, and from an empirical perspective, in Part III, Sec. B.1.b., *infra*.

136. See my discussion of credibility and the purposive model *supra*, this Part, Section D.2.a.

137. See SCHAUER, *supra* note 41, at 76, 159 (arguing that rules "operate as tools for the allocation of power"). See also RAZ, *supra* note 134, at 59 (citing the reasons given in JOHN STUART MILL, A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE 519 (1851), for having rules: "they point out the manner in which it will be least perilous to act, where time or means do not exist for analyzing the actual circumstances of the case, or where we cannot trust our judgment in estimating them").

138. SCHAUER, *supra* note 41, at 183.

139. For an alternative description of this view, see SCHAUER, *supra* note 41, at 185.

(d) *Credibility*

Ordinary citizens are generally accustomed to, and seem to be comfortable with, perceiving the law—including the common law—as a set of rules. In both everyday speech and the legal sphere we refer to *rules* even where no statutes are implicated. This perception of the common law as a set of rules might be difficult to maintain if rules did not in fact govern common law disputes. Moreover, rules are generally perceived as an appropriate means for institutions and individuals in positions of power to exercise their authority. Rules give the appearance that they are capable of generating impartial results in a way that many other methods—for example, direct analogy or policy-based Realism—do not. For these reasons, a rule-based method of precedent might help promote the credibility of the judiciary and the legal system more broadly.

However, on some occasions blatant incongruities exist between rules and their purposes; when authorities insist on enforcing the rules anyway, the result appears (and might well be) unjust.<sup>140</sup> Accordingly, the application of a strict rule-based method of precedent in some cases will likely damage the perceived legitimacy of the legal system.

(e) *Judicial Efficiency*

Given that rules exclude certain reasons from consideration, a decision based on a rule should be easier to make than a decision unconstrained by rules. As Schauer puts it, “when a decision-maker decides according to rules and therefore relies on decisions made by others, she is practically freed from the responsibility of scrutinizing every substantively relevant feature of the event.”<sup>141</sup> Rules therefore streamline deliberative efforts, and accordingly help to conserve decision-making resources, including time and labor.<sup>142</sup> However, narrower norms are subject to quicker depreciation or irrelevance than more general norms; as Landes and Posner have argued, “[a] general precedent is less likely to be rendered obsolete by a change in the social or legal environment in which the precedent is applied.”<sup>143</sup> Accordingly, even though rules are generally easier to apply than principles, rules might require judicial revision and replacement—which is taxing on judicial resources—more often than principles.

In this Part, I evaluated various models of precedential interpretation according to how well a practice of precedent that matched the model

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140. See my discussion of credibility and the purposive model *supra*, Sec. D.2. of this Part.

141. SCHAUER, *supra* note 41, at 145.

142. RAZ, *supra* note 134, at 59, at 59.

143. Landes & Posner, *supra* note 56, at 268.

would serve the justifying principles of stare decisis. My analyses have revealed that these principles are in tension with one another: when a method of interpretation does well for one value, that success often comes at the expense of another value. Moreover, although one method might align well with one of the values in some contexts, in other contexts the same method might defeat that value. These findings make it difficult to settle on a single method of interpreting and applying precedent that is worth endorsing. If we wish to use the set of basic principles I have identified (or some similar set) to justify precedent, we might have to accept that interpreters of precedent should employ different methods depending on the context. Nevertheless, some of the methods that I have examined here do better overall than others to satisfy the values underlying stare decisis. Rule-based and purposive models are generally superior to policy-based Realism, direct analogy, and balance of factors. The chart below summarizes my evaluations, providing a rough estimate of how well each model does according to each value.

		VALUES OR GOALS OF STARE DECISIS				
		Reliance	Equality	Judicial Restraint	Credibility	Judicial Efficiency
MODELS OF PRECEDENT	Policy-Based Realism	Moderate	Low	Very low	Moderate	Low
	Direct Analogy	Moderate	Low	Moderate	Moderate	High
	Balance of Factors	Very low	Moderate	Low	Low	Very low
	Purposive	Low	Moderate to high	Low to moderate	Low to moderate	Low
	Rules	High	Low to moderate	Moderate to high	Moderate to high	High

### III. OPTIONS FOR FOLLOWING PRECEDENT

I take on three tasks in this final Part of the paper. First, I further support my claim that we have reason to question the ability of any one method of precedent to realize the main values of *stare decisis*. Second, with a focus on the key value of equality or fairness, I explore how the optimal method of following precedent might change depending on the context of a case. Third, I suggest that a system of precedent might not be worth it in some domains of judicial decision making and in particular in the context of statutory interpretation.

#### A. *Value Trade-Offs*

My conclusion that no single method of following precedent does particularly well on the totality of key *stare decisis* values is consistent with various other studies on the advantages and disadvantages of different types of legal norm. For example, in an empirical study of regulatory contexts, Colin Diver evaluates the relative merits of different types of *administrative* rule.<sup>144</sup> He divides rule-types according to their degree of precision, and evaluates each type according to how well it does on the following: (1) “congruency” (how well does the rule realize the rule-setters’ policy objectives?); (2) “transparency” (how well-defined and universally understandable are the terms of the rule?) and (3) “accessibility” (how easy is it for the rule’s intended audience to apply the rule to concrete situations?).<sup>145</sup>

Diver sets out to determine the optimal degree of regulatory precision for administrative rules. Through an examination of actual rules in various contexts, where the rules differ in degree of precision, he finds that the optimal precision for administrative rules depends on the “peculiar statutory or doctrinal context in which they arise” and in particular “variables peculiar to the rule’s author, enforcer, and addressee.”<sup>146</sup> Diver notes significant trade-offs among his values of interest: for example, he finds that transparency “is usually bought at the price of incongruity . . . .”<sup>147</sup> Diver’s analysis leads him to conclude that, “generalizations about optimal rule precision are inherently suspect.”<sup>148</sup>

More generally, there is considerable disagreement among legal experts as to whether and in what contexts standards (open-ended or broad rules) are preferable to more precise and narrow rules.<sup>149</sup> Given the similarities,

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144. Colin Diver, *The optimal precision of administrative rules*, 93 YALE L. J. 65 (1983).

145. *Id.* at 67.

146. *Id.* at 107.

147. *Id.* at 91.

148. *Id.* at 65.

149. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590-99

and perhaps overlap, between standards and what I call the justificatory purposes behind rules, it is unsurprising that some of the value trade-offs between using standards and using narrow rules are the same as the trade-offs between a purposive method of precedent and a rule-based method. Most notably, even if the narrower type of norm often makes for more predictable outcomes, it does so at the expense of precision and consistency in realizing the values underlying the rules—accordingly, narrow norms sometimes produce unfair results.<sup>150</sup>

### B. Multiple Methods

In the remainder of this Part, I set value trade-offs aside. I suggest that even if we are concerned with only one of the *stare decisis* values, we would be better off with multiple methods of precedent rather than a fixed method for all cases.

In a study similar to Diver's, John Braithwaite evaluates rules against principles, but based only on their relative value in terms of reliance. Braithwaite uses the term *principle* to refer to norms that are more general or open-ended than the type of norm he refers to as a *rule*; however, he also conceives of principles as norms that justify rules, and he considers advantages of principles and rules factoring together into a norm-follower's deliberative process.<sup>151</sup>

Through case studies of diverse regulatory contexts (oversight of nursing homes in the U.S. and Australia, nuclear plant operation on Three Mile Island, and oversight of a coal mine), Braithwaite finds that, on reliance grounds alone, sometimes rules are preferable to principles and sometimes principles are preferable to rules. He calls into question the traditional assumption that "tightly specified rules increase legal certainty."<sup>152</sup> In particular, he suggests that narrow rules do better at protecting reliance interests when the regulatory context is relatively simple; as contexts get more complex, principles do better and at some point gain an edge over rules. Moreover, where principles are preferable to rules, binding principles supporting non-binding rules are better still.<sup>153</sup> Braithwaite's conclusions are broadly consonant with Diver's. Are narrower norms better than more open-ended ones in the regulatory context? It depends.

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(1988); see also Timothy Endicott, *The Value of Vagueness*, in *Philosophical Foundations of Language in the Law* (Andrei Marmor & Scott Soames, eds. 2011), for a discussion of value trade-offs between more and less vague legal norms.

150. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89.8 HARV. L. REV. 1685, 1689 (1976).

151. John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*. 27 AUSTL. J. LEG. PHIL. 47 (2002).

152. *Id.* at 50.

153. *Id.* at 75.

*(1) Four Case Studies in Legal Reasoning*

Here I focus on the value of equality or fairness, and analyze four different legal contexts with the aim of determining what kind of precedential interpretation would do best for equality in each context. I show that different settings call for different methods for following precedent on grounds of fairness alone. The optimal method depends on the circumstances of the case and its relationship to past cases. In my equality analysis, I appeal to intuitions about the requirements of fair treatment in well-specified situations; I try to avoid making broad claims about fairness that would commit me to a controversial theory of equality.

*(a) When Rules Defeat their Purposes*

When respecting a rule would defeat the purpose behind the rule, a purposive method of precedential interpretation is at least defensible, and plausibly optimal, on grounds of equality. If we assume that rules generally serve their purposes then, when people follow rules, they reap the benefits of those purposes. When people obediently walk on the sidewalk rather than in the street, they are better off because walking on the sidewalk is safer. It would be unfair to disallow some individuals that same benefit by compelling them to follow the letter of a rule when following the rule would be harmful to their safety.

I am thinking of the type of scenario we saw already in an example from Bell's study of unfair treatment by the police. A few young black people were walking together on a street late at night when they were stopped by a law enforcement officer, who reprimanded them for breaking a law against walking in streets. The purpose of that law is presumably to protect public safety. The individuals whom the officer stopped were walking in the street for the sake of their safety. It would have been more dangerous for them to walk on the dark sidewalk, which was lined with bushes, than in the empty and better-lit street. If the police, or a court, were to enforce the rule (using a rule-based method), they would contradict the very purpose behind the rule—the purpose that is served in the majority of cases to which the rule applies.

In this case, the contradiction is relatively transparent. The officer would not need to engage in involved deliberation to see the problem, especially since the young people walking in the street offered reasons for their conduct. Moreover, the reasons that one would walk in the street under the circumstances are simple and straightforward; ostensible law-violators would not need a sophisticated or complex argument to defend their conduct. I think that the obviousness part is important since otherwise this pathway to purposive interpretation would introduce opportunities for sophisticated disputants to game the system and for

judges to exercise considerable discretion—which can itself be harmful to equality. Moreover, the point is not to ensure that rules always align perfectly with their purposes, but only to prevent gross incongruities.

Courts would have the task of determining whether a dispute warrants a purposive approach. As a preliminary matter, in order to open the door to purposive interpretation on the grounds that a rule contradicts its own purposes, the purposes behind a rule should be readily accessible and widely agreed upon. But the court would still have to determine whether the contradiction is sufficiently obvious—perhaps for this purpose it could use a common-sense obviousness standard.

Indeed, courts have adopted purposive interpretive methods when a rule-based method generates openly perverse outcomes. In the canonical case of *Tedla v. Ellman*, the New York Court of Appeals pointed out that, “[s]eldom have the courts held that failure to observe a rule of the road, even though embodied in a statute, constitutes negligence as matter of law where observance would subject a person to danger which might be avoided by disregard of the general rule.”<sup>154</sup> In *Tedla*, the question for the court was whether the plaintiffs should bear the cost of their own injuries under the rule of negligence *per se*, given that they had apparently acted in violation of a statutory rule.<sup>155</sup> A vehicle struck the plaintiffs while they were walking on a road in the same direction as traffic. The statutory rule prohibited pedestrians from walking on the right side of the road. However, the facts of this case revealed that “‘there were very few cars going east’ at the time of the accident, but that going west there was ‘very heavy Sunday night traffic.’”<sup>156</sup> As the court suggested, no one could reasonably deny that walking in the direction of traffic under the circumstances was the safer and therefore more prudent alternative for pedestrians to take.<sup>157</sup>

The point of the negligence *per se* rule is to penalize imprudent behavior; if the plaintiffs in *Tedla* were found to be negligent *per se*, the rule would penalize the contrary. The court explains that “under usual circumstances” pedestrians who disobeyed the rule against walking on the left side of the road would be negligent as a matter of law if they were hit by a vehicle.<sup>158</sup> They would have acted imprudently, or it would be reasonable to assume they had acted imprudently. However, the circumstances of this case were unusual; “when the unusual occurs, strict observance may defeat the purpose of the rule and produce catastrophic

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154. *Tedla v. Ellman*, 280 N.Y. 124, 131-32 (1939). While this case involved statutory interpretation, the same reasoning would apply to a purely common law case.

155. *Id.*

156. *Id.* at 128.

157. *Id.* at 128-34.

158. *Id.* at 130.

results.”<sup>159</sup> If the court were to hold them liable for their own injuries under the doctrine of *per se* negligence, the court not only would fail to serve the clear purpose of the doctrine; by penalizing prudent conduct and encouraging imprudence, the court would contradict that purpose. If the purpose of a rule is clear and applies to the majority of cases, it is unfair, and I think unjustifiable, to enforce the rule against an individual when doing so would openly contradict that purpose.

For a common law example from a different context, take the traditional warranty rule, which was meant to protect consumers. The New Jersey case of *Henningsen v. Bloomfield Motors* involved a dispute between defendant car dealer (Bloomfield) and plaintiff automobile purchaser (Henningsen) over the effect of an express warranty, the terms of which explicitly disclaimed an implied warranty of merchantability.<sup>160</sup> The New Jersey Supreme Court held that the express warranty was invalid because the warranty contradicted the very purpose of enforceable warranties. As the court explained, “[w]arranties developed in the law in the interest of and to protect the ordinary consumer.”<sup>161</sup> The effect of the warranty in question would be to protect the interests of the seller at the expense of consumer protection, since it would absolve the seller of legal responsibility for defects in the product that a consumer could not be expected to recognize in advance of purchase.

Clever manufacturers and dealers took advantage of the law of warranties to undermine consumer protection. The New Jersey court recognized this practice and, in an effort to counteract it, gave the warranty doctrine a purposive interpretation. This meant that some parties were treated unequally across time—Bloomfield was prohibited from benefiting from the predatory practice, whereas presumably earlier courts had permitted some sellers to benefit from the same practice, given that courts had traditionally taken a non-purposive approach to the rule.<sup>162</sup> However, Bloomfield was sufficiently differently situated from the majority of past merchant litigants, who had not devised warranties disclaiming implied merchantability, to justify different treatment without unduly contravening equality.

*(b) When Rules are Tried and Tested*

A purpose-based interpretation, with the purpose trumping the rule itself, is not necessarily ideal in terms of equality. In many cases, a rule such as the walking-in-streets rule should just be taken to mean that it is

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159. *Id.*

160. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 (1960).

161. *Id.* at 375.

162. *See, e.g.*, the U.K. case *L’Estrange v. F Graucob Ltd* [1934] 2 (K.B.) 394.

illegal to walk in the street and the rule should be either enforced to that effect, or not enforced, across the board. If a rule is generally consistent with its purposes—if it is well designed—then a rule-based method of interpretation and application will likely do better than a purposive method to serve the rule's purposes and to do so consistently. This counterintuitive result has been demonstrated empirically in various contexts. For example, when dieters adopt a norm against eating leftovers for the purpose of losing weight, they will be more successful at losing weight if they employ a rule-based method of interpretation—that is, if they take the intention just as a prescription against eating leftovers—as opposed to a purpose-based interpretation—*do not eat leftovers because that will serve the purpose of losing weight*.<sup>163</sup> The awareness of the reason for the prescribed action is counter-productive: dieters do better if they do not consider the point of the rule in the process of following it.<sup>164</sup> When it comes to tried and tested rules, we might reasonably expect litigants to receive equal treatment—in the sense that they are treated consistently at the level of rule *and* purpose—if judges focus on applying the rule and set the purpose aside.

Indicators that a common law rule is well-designed—that it consistently serves its purposes over the range of scenarios it covers—include that the legislature has not changed or replaced the rule, even though it has had opportunity to do so, and that higher courts have continued to apply the rule even though they have had opportunity to adjust or overturn it. If a rule has been subjected to repeated testing, then the factors it picks out are unlikely to be inconsistent with the principles behind the rule, or arbitrary in the way that, for example, Moore fears rules inevitably will be.<sup>165</sup> If legal authorities deliberate on the purposes behind rules whenever they enforce those rules, they will have more room to exercise discretion in determining outcomes. Given the prevalence of racial, gender, and other biases, when it comes to tried and tested rules in more or less normal circumstances, a rule-based method of interpretation might be the most promising for the purpose of equality or fairness.

*(c) When Rules have Unclear or Inconsistent Purposes*

Sometimes when courts employ purposive interpretations of a doctrine

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163. See Richard Holton, *We Don't Torture: Moral Resolutions, Temptation, and the Doctrine of Double Effect*, (unpublished manuscript) (on file with author), for a theoretical discussion of this phenomenon and possible applications in the realm of morality. For empirical findings in the weight-loss and other contexts, see Peter M. Gollwitzer, Frank Wieber, Andrea L. Myers, & Sean M. McCrea, *How to Maximize Implementation Intention Effects*, in *THEN A MIRACLE OCCURS: FOCUSING ON BEHAVIOR ON SOCIAL PSYCHOLOGICAL THEORY AND RESEARCH* 137 (2009).

164. I offered a conceptual account of this feature of rules already, in Part II, Sec. E.2., *supra*.

165. See my discussion of Moore's view *supra*, Part II, Sec. D.1.

the method seems unfair because the purposes they invoke are either unclear or inconsistent with other plausible purposes behind the doctrine. When the facts of a case fall squarely under some doctrinal rule, but the purposes behind that rule are debatable or in conflict with other purposes that could reasonably guide the case, a court that seeks to maximize equality should take a rule-based approach to precedent.

For example, consider the famous New York case of *Riggs v. Palmer*, where a prospective inheritor, Elmer Palmer, had murdered his grandfather with the object of effectuating the grandfather's will.<sup>166</sup> This case revolved largely around the interpretation of statutes, but the feature of the case that I am interested in can arise just as well in cases based on the interpretation of precedent. The New York Court of Appeals (the highest New York state court) rejected a rule-based interpretative method, and turned instead to the purposes behind the will statutes as well as common law purposes or principles broadly.

The majority opinion acknowledged that, "statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, . . . give this property to the murderer."<sup>167</sup> Nevertheless, the Court determined that the murderer was not entitled to his inheritance. According to Judge Earl, writing for the majority, the law governing wills was meant "to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view."<sup>168</sup> For Judge Earl, "it never could have been [the legislators'] intention that a donee who murdered the testator to make the will operative should have any benefit under it."<sup>169</sup> Accordingly, allowing the murderer in this case to benefit from the will would not fulfill the true purpose of the will rule.

The majority assumed, I think reasonably, that the testator would not have maintained as a final wish that his own murderer would collect an inheritance from him; given that the purpose of the law of wills is to fulfill the wishes and intentions of testators, Elmer Palmer should not be granted any inheritance, despite the language of the will in question. However, reasonable people could and in fact did disagree about the purpose of the law governing wills. In a dissenting opinion, Judge Gray insisted that the purpose of the statutory rules is to impose "strict and systematic" safeguards around "the execution, alteration and revocation"

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166. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

167. *Id.* at 509.

168. *Id.*

169. *Id.*

of wills.<sup>170</sup> On the dissent's view, the majority opinion undermines the purpose of the rules governing wills.<sup>171</sup>

Why does any of this matter for equality? The purposive approach generates conflicting results in the same case. If another case arises with the same facts, and a court uses a purposive method of interpretation, it may or may not arrive at the same result as the majority in *Riggs*. Moreover, the purpose that the majority relied on is not one that had been consistently applied in similar past cases, which involved the interpretation of the same kind of rules.<sup>172</sup> Wills often do not represent the final intentions of the deceased. Testators might, and probably often do, change their minds about their preferred inheritance schemes without recording the change in their wills; for example, they might not get around to making the change. If a testator does not record such a change, then the terms of the will as recorded will likely stand (even, presumably, in the event that there is evidence of a change in preference). So it seems that Elmer Palmer was treated differently. Perhaps he should have been treated differently—after all, he was a murderer and most potential heirs are not; however, as the dissenting opinion emphasized, it is for the criminal law to punish murderers, not the law of trusts and estates.<sup>173</sup>

In a case where there are multiple reasonable views regarding the purposes that underlie a single rule, a consistently purposive method will not generate consistent treatment—neither at the level of purposes nor at the level of rules. Consequently, when purposes are unsettled or when there are multiple purposes behind some rule, purposive interpretation becomes problematic for fairness or equality.

*(d) When Rules are Unclear or Indeterminate*

In some cases, rules fail to prescribe conduct on their own; in these

170. *Id.* at 516 (Gray, J., dissenting).

171. *Id.* at 518-19.

172. While the majority finds no case law in the area of wills to support its purposive application of the rule, the dissent finds several: *Dan v. Brown*, 4 Cow. 490, with support from *Goodright v. Glasier* (1770) 4 Burr. 2512, 2514 and *Pemberton v. Pemberton* (1807) 13 Ves. 290 (stating that, “[r]evocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation”; and, further, “[t]he rule is that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will”; *Gains v. Gains*, 2 A.K. Marsh. 190 (Ky. Ct. App., 1820) (where, as Judge Gray explains, “[t]he court held ... that as none of the acts evidencing revocation were done, the intention could not be substituted for the act. In that case the will was snatched away and forcibly retained); *Leaycraft v. Simmons*, 3 Bradf. 35 (N.Y. Ct. App., 1875) (where the testator wished to change his will to enlarge his daughter's inheritance, but his son, who was in possession of the will, refused to turn it over and the judge nevertheless admitted the original will to probate, explaining that, “[t]he whole of this subject is now regulated by statute, and a mere intention to revoke, however well authenticated, or however defeated, is not sufficient”); *Clingan v. Mitcheltree*, 31 Pa. 25 (Pa., 1857) (where a devisee under a will fraudulently protected the will from destruction, and yet the court refused to declare the will void against the devisee).

173. I do not mean to suggest that the *Riggs* decision was a bad one all things considered; that decision and other similarly reasoned decisions might be justified despite the concerns I have raised.

cases, legal reasoners will have to look beyond rules if they wish to determine the actions that rules require or proscribe. In this type of scenario, courts should adopt a mixed method for interpreting precedent, which combines rules and purposes. The problem arises in two types of situation: (1) when a court must decide a dispute where it is very difficult to determine whether a particular rule applies (although the rule in fact either does or does not apply), and (2) when a court must decide a dispute that is undetermined by rules.<sup>174</sup> Although these two situations are conceptually distinct, they have a problem in common: rules are an inadequate means to make a decision based on precedent.

A court can still realize equality in some form on these occasions by referring to purposes behind rules as interpretive aids.<sup>175</sup> If we assume that rules generally or often do serve their purposes, then on a purposive approach the parties to the difficult case will get an outcome that serves the same purposes as similar past cases. Notice that this method sneaks in elements of the direct-analogy approach: if a given set of facts does not squarely meet the conditions of a rule from a precedent case, how do we know whether they are similar enough that we should care to treat them the same? Perhaps the best that judges can do in this scenario is use their sense of legal similarity or proximity to make a call as to whether the cases are sufficiently close to warrant or require equal treatment.

For example, take the tort rule of respondeat superior, where employers are vicariously liable for the actions of their employees provided the employees are acting within the scope of employment. Imagine that a case arises where an employee has negligently caused some harm to a third party; even though all the facts of the case are known, it is unclear whether the employee was acting within the scope of his employment when he caused the harm. The rule's purpose is (perhaps among other things) to encourage employers to exercise care in their hiring decisions and training practices, as well as to encourage employers to monitor and if necessary control their employees' conduct.<sup>176</sup> Let's say that in the current case there was nothing that the employer could have done to prevent the harm that her employee caused (and that the prospect of that harm was utterly unforeseeable at the time of hiring). On a purposive interpretation of the doctrine, the employer should not be liable for that harm. If we assume that the respondeat superior rule is generally well-suited to its

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174. A case is undetermined by rules when, in Hart's terminology, its facts are in the *penumbra* of legal terms (see *supra*, Part II, Sec. E.2.).

175. As Schauer notes, the basic strategy is a natural one for dealing with rules under uncertainty: "when a rule first appears unclear, it seems unimpeachable to look initially to the justifications lying behind the rule." SCHAUER, *supra* note 41, at 222.

176. See RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006) ("*Respondeat superior* creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct.").

underlying purposes, then the parties in this case would be treated in conformity with the same purposes as parties to past *respondeat superior* disputes, even if those disputes were resolved according to a rule-based method of interpretation.

### (2) *Downsides of Multiple Methods*

While there are significant virtues of allowing multiple methods for precedential interpretation, there are also possible downsides. First of all, the optimal method might not be readily apparent on each occasion of adjudication; accordingly, we might need an additional method for determining which method to employ! Here are a few other possible ways in which embracing multiple methods might backfire: (1) people might have a hard time predicting what method will be used in their prospective legal cases, leading to problems of uncertainty; (2) the adoption of a changeable method could undermine perceived legitimacy, since the lack of consistency might give the appearance of an inconstant or even capricious judiciary; (3) on some conceivable conception of procedural fairness, which emphasizes the *formal* in formal equality, *stare decisis* should look the same for everyone on all occasions. Nevertheless, and even if we consider a single level of the judicial hierarchy, in practice adjudicators do employ different methods of precedent across different disputes.<sup>177</sup> In this section, I have shown how such variation might be warranted by the principle of equality alone. Incorporating the other *stare decisis* values, and considering a wider array of cases, would significantly complicate the matter, but I suspect that the analysis would point in favor of an inconstant approach to precedential interpretation—one that varies between a more rule-based approach and a more purposive approach, sometimes incorporating elements of other approaches such as the direct-analogy model.

### C. *Questioning Stare decisis*

For the most part in this article I have focused on how courts might make the most of *stare decisis*. I have taken for granted that courts are going to follow some system of precedent. However, I have found that, despite the ease with which courts enumerate the objectives of *stare decisis*, crafting a doctrine of precedent that would realize these goals effectively and simultaneously is a formidable task. My analysis reveals the methodological complexities that courts must face if they wish to make good on the promise of *stare decisis* when they go about their business of following precedent. In light of these findings, I wonder if the

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177. For a critical discussion of this reality, see KOZEL, *supra* note 5, at 81, 94.

insistence on maintaining a doctrine of stare decisis across all types of case is warranted.

Strict adherence to precedent in the realm of statutory interpretation seems particularly questionable.<sup>178</sup> And yet this is an area where various courts, state and federal, insist that precedential force is at its strongest.<sup>179</sup> For example, the Supreme Court of Texas has maintained that, “in the area of statutory construction, the doctrine of stare decisis has its greatest force’ because the Legislature can rectify a court’s mistake, and if the Legislature does not do so, there is little reason for the court to reconsider whether its decision was correct.”<sup>180</sup> Likewise the U.S. Supreme Court on multiple occasions has expressed its commitment to strict stare decisis with respect to statutory cases. In *Patterson v. McLean Credit Union*, for example, the Court declared that,

the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.<sup>181</sup>

Courts afford extra deference to statutory precedent because they believe that the legislature should and will step in if something is amiss in judicial interpretations of a statute.

Accordingly, under the dominant stare decisis jurisprudence, statutes are generally filtered through previous cases. Courts read a statute through precedents that read the statute, and follow the precedents’ interpretations even if those interpretations are faulty. However, statutory law and the legislative process have majoritarian, democratic purposes.<sup>182</sup> The

178. For arguments against a system of precedent for constitutional cases, see Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL’Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2006).

179. See, e.g., Powell, *supra* note 39, at 287 (“The idea has long been advanced that stare decisis should operate with special vigor in statutory cases . . . .”); William N. Jr. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1362 (1988) (“Statutory precedents . . . often enjoy a super-strong presumption of correctness.”); Maltz, *supra* note 5, at 388 (“Typically, precedents relying on statutory interpretation are viewed as more sacrosanct than their common-law counterparts.”).

180. *Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008). See also, *Conway v. Town of Wilton*, 238 Conn. 653, 681, 680 A.2d 242, 257 (1996) (Peters, J., dissenting) (writing that, “[i]n assessing the force of stare decisis, our case law has emphasized that we should be especially cautious about overturning a case that concerns statutory construction”).

181. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (U.S. 1989). In *Patterson*, the Court proceeded as bound by *Runyon v. McCrary*, a case where the Court had interpreted 42 USC 1981 to apply to private contracts. The *Patterson* Court decided that, regardless of whether *Runyon* represents a correct interpretation of the statute, they would follow it out of allegiance to precedent.

182. As Daniel Farber puts it, when a court follows a precedent that represents fallacious statutory interpretation, “a court is declining to implement clear decisions by the democratic branches of government.” Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 293

outcome of a statutory case might better reflect the preferences that the statute represents if judges disregard previous judicial applications of the statute, at least in the event that previous applications are patently incorrect in hindsight.<sup>183</sup> If a court is genuinely at a loss as to what a statute means, then past cases might provide helpful guidance; however, if a court recognizes that a past case erred in its interpretation of a statute, adhering to the precedent nevertheless would seem to undermine the purpose of legislation as well as the judiciary's role in applying that legislation.<sup>184</sup>

Stare decisis requires judges to knowingly replicate previous mistakes, even in the context of horizontal precedent: as Larry Alexander puts it, "if incorrectness were a sufficient condition for overruling, there would be no precedential constraint in statutory and constitutional cases."<sup>185</sup> Does the judiciary have legitimate authority to knowingly misinterpret and misapply statutory law? Although courts claim that legislatures can and will clean up judicial errors, I doubt that legislatures generally do or could stay on top of judicial mistakes and correct them in a timely fashion.<sup>186</sup>

(1989).

183. As William Eskridge observes, "[i]t stands separation of powers on its head to argue that Congress should correct the Court's own mistake—especially when the mistake is so clear and the matter so much more within the arena of expertise practically left to the Supreme Court." *Supra*, note 179, at 1425.

184. Both Eskridge and Judge Frank Easterbrook challenge the idea that statutory cases should receive more precedential weight than other types of cases, but they do not go so far as to reject statutory stare decisis altogether. *Id.*; Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988). Alexander, *supra* note 59, at 57 notes that "precedential constraint in statutory and constitutional cases [fits] uneasily with a pure statutory/constitutional regime" but argues that stare decisis is nonetheless desirable in statutory and constitutional cases because it delivers legal determinateness and finality. Farber argues that, even though adherence to mistaken statutory cases "seems to be a violation of the [legislative] supremacy principle," "rational enacting legislators would probably prefer that courts give strong weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal"; accordingly, Farber believes that strong statutory stare decisis is ultimately justifiable. *Supra* note 182, at 314; 325, n.173. For an argument in favor of *absolute* stare decisis in the statutory context, see Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (arguing that a rule of absolute stare decisis in statutory cases would serve democratic values because it would incentivize the legislature to overrule precedents more often). Chief Justice Marshall wrote draft opinion in *Amorous v. United States*, a case interpreting the White Slave Traffic Act of June 25, 1910 (the Mann Act), based on the same argument he advanced in his law review article. His fellow Justices sharply opposed the view in draft concurring opinions, and Marshall dropped the argument in his final opinion. For a discussion of this history, see William N. Eskridge Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450 (1989).

185. Alexander, *supra* note 59, at 59.

186. See, e.g., Eskridge, *supra* note 179, at 1401 (noting that, "[i]n most instances, Congress is either not aware of the Court's statutory interpretations or faces no formal opportunity to examine those interpretations"); Farber, *supra* note 182, at 427 (explaining that, "[t]he structural features of government make legislation hard," and [i]t takes less political support to block a law than to get one passed"); Maltz, *supra* note 5, at 389 (arguing that we cannot rely on Congress to intervene in the event of mistaken statutory interpretations). Moreover, others point out that we should not expect Congress to override judicial errors in statutory interpretation when the statutes were enacted by a former Congress. See *id.* at 389; Easterbrook, *supra* note 184, at 426.

Even if we set democratic concerns aside, and consider just the stare decisis values, it is not clear to me that we would be better off with a system of precedent in the domain of statutory interpretation. When a court overturns a statutory precedent, both equality and predictability stand to suffer. However, equality suffers also when the legislative branch overturns precedent; I do not see why we should think that the equality cost associated with a court overruling a precedent is greater than that associated with a legislature overruling a precedent.

While reliance interests might be thwarted if a court overrules its own precedent, I am not sure that we should expect people to rely more on judicial decisions than they do on statutes.<sup>187</sup> Assuming a court misconstrued a statute in some past case, why think that individuals will be more inclined to rely on that decision than the statute itself? In any event, even supposing people do rely on precedents over statutes (indeed the current doctrine of stare decisis encourages them to do so), predictability would not necessarily be harmed by a no stare decisis regime in the realm of statutory cases, since people could presumably form predictions based on the statutes themselves. If courts interpreted these statutes directly rather than through past cases, I see no reason to think that predictions would be less reliable than they are in the current regime. They might well be more reliable in the no statutory stare decisis world.

Finally, a no statutory stare decisis regime might make for a more defensible distribution of power. A regime of statutory precedent allows erroneous judicial interpretations to prevail—even when decision makers know that the interpretations are erroneous; accordingly, statutory stare decisis requires courts to prioritize deference to other courts over deference to the legislature. We might have more reason to be bothered by this in the context of a court following its own precedents (the horizontal context) than a court following a higher court's precedents (the vertical context). Even if a lower court believes that a higher court erred in interpreting a statute, perhaps we should not trust the lower court to be correct in that judgment. Accordingly, we accept vertical statutory stare decisis if only because we think it will minimize error in statutory interpretation. However, in the horizontal context, it might be more appropriate for a court to defer to a statute directly rather than the court's previous interpretations of the statute. In the horizontal context, I do not know that a court has the power, let alone the obligation, to perpetuate

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187. Grover Rees argues that stare decisis is better justified in common law than statutory cases, because people form predictions based on statutes themselves, rather than judicial interpretations of statutes. Grover Rees *Cathedrals Without Walls: A View from the Outside*, 61 TEX. L. REV. 347, 374 (1982) (reviewing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)).

previous errors in statutory interpretation.

### CONCLUSION

Most basically, this paper has been about common law reasoning—about the practice of following past judicial decisions in the adjudication of present disputes. I examined commonly cited justifications for that practice and evaluated alternative methods of the practice based on how well they align with those justifications. I found that none of the methods aligns with the justifications as well as we might like. Nevertheless, some methods do better than others overall, and certainly some do better than others with respect to certain values.

I have suggested that our best bet is to embrace a variable approach to precedent—one that is sensitive to the contextual factors that make one method preferable to another. Moreover, if judges are open to options for following precedent, we might see more experimentation around methods of interpreting and applying precedent as well as increased judicial debate over the optimal method. I believe this would be an improvement over the *status quo*, where judicial disagreements about following precedent tend to rehash old debates about the sanctity of *stare decisis* and are often framed in the black and white terms of whether to respect or overrule some past decision. Judges have the power to follow the doctrine of precedent or not. They also have the power, and I think the duty, to develop methods for following the doctrine that successfully realize well-recognized values behind *stare decisis*.

Finally, my analysis suggests, I think, that we should be open to considering a no *stare decisis* regime. At least in some areas of law, adherence to precedent comes with considerable costs and only tenuous benefits.