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The Past and the Present: Stare Decisis in Wisconsin Law

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THE PAST AND THE PRESENT: STARE DECISIS IN WISCONSIN LAW

DANIEL R. SUHR & KEVIN LEROY*

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I. INTRODUCTION

*Thus this court, at last, made the circuit, and the stone which the builders rejected again became the head of the corner. By that change all its utterances inconsistent with the points so necessarily decided by the united court, November 17, 1855, became from thenceforth as mere dicta. But is it quite clear that the decision in M. & M. R. Co. v. Waukesha was contrary to sound reason, and to be sustained only upon the maxim stare decisis?*¹

Justice John B. Cassoday, 1881

When the Milwaukee Lawyers Chapter of the Federalist Society held its 25th Anniversary Panel and Dinner in 2017, the Chapter’s former presidents were asked what emerging issues Wisconsin law would confront in the next twenty-five years. Justice Rebecca Bradley, one of two former Chapter presidents now serving on the Wisconsin Supreme Court, identified the court’s

* This Article does not necessarily represent the positions of any of Suhr’s or LeRoy’s current or former employers. Any information about cases that either author participated in is drawn from court opinions or public filings only.

1. Wis. Cent. R.R. Co. v. Taylor County, 52 Wis. 37, 76–77, 8 N.W. 833, 846 (1881).

approach to precedent as a key issue. She suggested that once Wisconsin jurists began applying textualism and originalism to long-standing doctrines in Wisconsin law, they may discover substantial gaps between the law as written and the law as interpreted—necessarily raising the question of stare decisis. We agree with Justice Bradley that this question will be critical for the Wisconsin Supreme Court in the coming decades; nevertheless, as Justice Cassoday’s opinion quoted above shows, it is a version of a question almost as old as the state high court itself.²

Stare decisis, to stand by things decided, is an ancient legal principle that dates back to the earliest days of English common law.³ The U.S. Supreme Court has developed its own version of the doctrine, although most of the justices of that court carry their own idiosyncrasies on the matter.⁴ Similarly, the Wisconsin Supreme Court has a series of cases stretching back to its beginning defining the power of precedent⁵—and, like the U.S. Supreme Court, each of Wisconsin’s supreme court justices has his or her own unique, considered views on the topic.

We have both descriptive and normative goals for this Article. First, descriptively, we collect relevant stare decisis cases and synthesize the Wisconsin court’s modern-day test, which finds its foundation in 2003’s *Johnson Controls* decision (as a backdrop, we also detail the U.S. Supreme Court’s approach).⁶ We then use the Wisconsin Supreme Court’s approach to stare decisis to frame our discussion of the doctrine of precedent.⁷ Our concern is simple: the doctrine of stare decisis results in near-limitless judicial discretion that is individualized to each judge. Importantly, we think this undesirable result flows from the nature of the doctrine itself, not from judicial malfeasance or misfeasance.

For our normative goals, we offer two new ways to conceive of stare decisis, both of which reduce the doctrine’s undesirable unpredictability in a

2. In fact, even as early as 1859 the court would state, “[s]tare decisis is the motto of the courts of justice.” *Ableman v. Booth*, 11 Wis. 517, 541 (1859); *see also Lonstorf v. Lonstorf*, 118 Wis. 159, 163, 95 N.W. 961, 963 (1903).

3. Thomas Burns, *The Doctrine of Stare Decisis* (1893) (unpublished B.L. thesis, Cornell University) (on file with Cornell Law School, Historical Theses and Dissertations Collection).

4. *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412–413 (2010).

5. *See, e.g., Wis. Cent. R.R. Co. v. Taylor County*, 52 Wis. 37, 76–77, 8 N.W. 833, 846 (1881); *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257; *State v. Denny*, 2017 WI 17, 373 Wis. 2d 390, 891 N.W.2d 144.

6. *Johnson Controls*, 2003 WI 108, ¶¶ 94–100.

7. In April 2018, Judge Rebecca Dalett won election to the seat on the Wisconsin Supreme Court opened by Justice Michael Gableman’s retirement. Since Justice Dalett has not yet written on stare decisis as a member of the Wisconsin Supreme Court, this Article does not include her approach.

class of cases. First, we propose that stare decisis should operate differently in some respects in a judicial system with publicly elected judges, like Wisconsin's, as opposed to a system with appointed judges, like the federal system. Specifically, we argue that the weight of stare decisis ascribed to a particular decision should vary based on public opinion, as that opinion is expressed in watershed judicial elections. This does not mean that elected judges are absolutely justified in overturning what may be unpopular precedent. Rather, this theory means elected judges have more justification to *reconsider anew* such opinions when the voters have disclaimed them. If the unpopular judicial decision is correct on the merits—if the elected judge is independently persuaded that the opinion is a correct statement of law—then the judicial oath would require that judge to affirm the precedent.

Second, we offer a new way of thinking about originalist issues as questions of first impression, such that stare decisis does not apply to these arguments, even if there are previous decisions governing the same area of law. As we saw recently in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, where the Wisconsin Supreme Court declared its agency-deference doctrine unconstitutional, the court's majority is willing to abandon decades-old doctrines that conflict with originalist readings of the constitution.⁸ Justice Kelly's lead opinion very quickly dismissed the argument that its approach disrespected stare decisis by concluding that the question at issue ("Does agency deference comport with the original understanding of the constitution?") was actually one of "first impression."⁹ While countless decisions over the course of decades had defined and applied the agency-deference doctrine, none from the Wisconsin Supreme Court actually analyzed the constitutionality of that doctrine.¹⁰ Thus, Justice Kelly's opinion seemingly treated this precedent as having significantly less stare decisis effect, devoting only a few short paragraphs to justify the case's significant break from precedent. In this sense, Justice Kelly's lead opinion simply restated a legal truism: on questions of first impression there is no precedent to follow, and thus no stare decisis concerns.

We believe many Wisconsin Supreme Court doctrines and many clauses of the Wisconsin Constitution have never been analyzed through an originalist lens before. In our view, should the Wisconsin Supreme Court conduct an

8. 2018 WI 75, ¶ 42, 382 Wis. 2d 496, 914 N.W.2d 21 (2018).

9. *Id.* ¶ 42.

10. *E.g.*, *Racine Harley-Davidson, Inc. v. Wis. Div. of Hearing & Appeals*, 2006 WI 86, 292 Wis. 2d 549, 717 N.W.2d 184; *Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995); *Harrington v. Smith*, 28 Wis. 43 (1871).

originalist analysis on those questions of “first impression” and conclude that the court’s prior precedent on these topics is legally incorrect, the court is justified in overturning that precedent without any need to engage in traditional stare decisis analysis.

The Wisconsin legal landscape is in a period of change—a change that, at least at this stage, appears to be towards textualism and originalism.¹¹ This evolution is often precipitated by institutional litigants. The Wisconsin Department of Justice—and in particular through the former Office of the Solicitor General—has confronted numerous bedrock Wisconsin legal issues, from deference to agencies (already mentioned above), to the power of Wisconsin executive officers, to tort-reform.¹² Sometimes the Department of Justice calls for overturning precedent, even if longstanding.¹³ Additionally, the Wisconsin Institute for Law & Liberty is increasingly bringing cases that seek to overturn precedent or challenge historical interpretations of state constitutional doctrines like substantive due process.¹⁴ Other scholars and litigants are calling for the court to rethink the constitutional foundations of the Public Trust Doctrine.¹⁵ And the court itself is responsible for prompting some of this change: in *Tetra Tech*, the court—not the parties—first introduced the

11. See for example *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶ 2, 376 Wis. 2d 147, 897 N.W.2d 384, wherein the court took an originalist and textualist approach to the separation-of-powers doctrine in a decision that could perhaps be perceived as politically unpopular, ruling as it did against the Crime Victims Rights Board.

12. *Tetra Tech*, 2018 WI 75, ¶ 43; *Koschkee v. Evers*, 2018 WI 82, ¶¶ 1–2, 382 Wis. 2d 666, 913 N.W.2d 878; *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 1, 383 Wis. 2d 1, 914 N.W.2d 678.

13. See, e.g., *Tetra Tech*, 2018 WI 75, ¶ 3 (briefing by the Solicitor General’s Office calls for overturning long-standing doctrine of agency deference); *Mayo*, 2018 WI 78, ¶ 2; *State v. Denny*, 2017 WI 17, ¶¶ 122–29, 373 Wis. 2d 390, 891 N.W.2d 144; see also *State v. Lynch*, 2016 WI 66, ¶ 4, 371 Wis. 2d 1, 885 N.W.2d 89 (relaying that the Department of Justice, though not through the SG’s office, calls for overturning a 14-year-old precedent).

14. Amicus brief by WILL in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, straightforwardly asks the Court to overrule *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996). Amici Curiae Brief of the Honorable Jason Fields, Honorable Scott Jensen, and the Wis. Inst. for Law & Liberty, *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 (No. 11-CV-4573), https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2013AP000416&p%5bdocId%5d=100282&p%5beventSeqNo%5d=22&p%5bsectionNo%5d=1 [https://perma.cc/V2KE-AXZH]; see *Porter v. State*, 2018 WI 79, ¶¶ 12, 55, 382 Wis. 2d 697, 913 N.W.2d 842 (WILL advocates an expansive reading of the substantive due process clause to embrace a right to earn a living).

15. See, e.g., Andrew C. Cook, *New Limits on the Public Trust Doctrine*, Wis. L.J. (Nov. 29, 2013), <http://wislawjournal.com/2013/11/29/new-limits-on-the-public-trust-doctrine/> [https://perma.cc/23R7-LMFF].

question of whether Wisconsin's longstanding deference regime should be abandoned.¹⁶

Wisconsin's changing legal landscape correlates with broader national movements. Conservative intellectuals and lawyers, that is, those most likely to advocate for originalism and textualism, have moved away from unflinching deference to precedent¹⁷ and towards a rediscovery of original meaning, including for state constitutional provisions that lack a federal analogue—a sort of new-federalism for conservatives.¹⁸ Additionally, the U.S. Supreme Court's October Term 2017 had some high-profile stare decisis cases,¹⁹ and the October Term 2018 appears to have such cases as well.²⁰ Perhaps this is a sign of things to come in that court. Further, some have called for an abandonment of stare decisis altogether in constitutional cases,²¹ something even Justice Thomas has hinted at.²²

16. Philip C. Babler, *Will this Term of Wisconsin's Supreme Court Be the Last for Agency Deference in Wisconsin?*, FOLEY & LARDNER (Sept. 11, 2017), <https://www.wiappellatelaw.com/2017/09/11/will-this-term-of-wisconsins-supreme-court-be-the-last-for-agency-deference-in-wisconsin/> [<https://perma.cc/EVW8-7GFR>] (noting that it was the court's briefing order which brought forth the deference issue in *Tetra Tech*).

17. See Adam Liptak, *Thomas Is Getting a New Chance to Break Precedent (if Not Silence)*, N.Y. TIMES (Feb. 24, 2014), <https://www.nytimes.com/2014/02/25/us/another-test-of-precedent-not-thomass-silence.html> [<https://perma.cc/3SYH-QXK2>].

18. Compare Clint Bolick, *State Constitutions: Freedom's Frontier*, CATO SUP. CT. REV., 2016–2017, at 15, 15–17; JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 211 (2018) (both offering a new federalism for conservatives), with Shirley S. Abrahamson & Diane S. Gutmann, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88, 88 (1987) (describing a new federalism to achieve liberal goals such as expanded rights for criminal defendants).

19. E.g., *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096–97 (2018) (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)); *accord Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944)).

20. E.g., *Knick v. Township of Scott*, No. 17-647 (U.S. argued Oct. 2, 2018, reargued Jan. 16, 2019) (considering whether to overrule part of *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)); *Gamble v. United States*, No. 17-646 (U.S. argued Dec. 6, 2018) (considering whether to overrule precedents establishing the Double Jeopardy Clause's "separate sovereigns" exception).

21. E.g., Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 298 (2005) ("[S]tare decisis in constitutional law . . . is utterly unjustifiable.").

22. See Clarence Thomas & John Malcolm, *Joseph Story Distinguished Lecture: A Conversation with Clarence Thomas* (Nov. 22, 2017), HERITAGE FOUND.,

Our two approaches to stare decisis proposed here seek to guide the court through this changing landscape. The originalism revolution that transformed the federal courts in the past thirty years has now reached Wisconsin, bringing with it a new generation of originalist/textualists on the bench and in the bar. As these new judges and advocates confront constitutional clauses for the first time, they use the tools of originalist/textualist analysis that have not been applied to these questions in the past century. This is to say nothing of the court's continued role in addressing more work-a-day issues—insurance, torts, and the like—many of which will call for overruling prior cases in whole or in part. In short, we expect, like Justice Rebecca Bradley, that stare decisis will enjoy pride of place in many Wisconsin Supreme Court opinions in the next few years. The proposals we sketch here are two ways to better comprehend of this principle for classes of cases most likely to raise stare decisis problems in the court's coming terms.

II. THE GENERAL DOCTRINE OF STARE DECISIS, IN WISCONSIN AND ELSEWHERE

Stare decisis—“to stand by things decided”—is the bedrock legal doctrine that the judicial resolution of a present controversy must accord with the judicial resolution of identical controversies in the past.²³ The doctrine of stare decisis is often divided into two distinct sub-doctrines: vertical stare decisis and horizontal stare decisis.²⁴

Vertical stare decisis applies between higher and lower courts in a single system—for example, the Wisconsin Supreme Court and the Wisconsin courts of appeals and circuit courts,²⁵ or the U.S. Supreme Court, the U.S. Court of

<https://www.heritage.org/courts/report/joseph-story-distinguished-lecture-conversation-clarence-thomas> [<https://perma.cc/9K5J-Y3AA>] (“I think that the Constitution itself, the written document, is the ultimate stare decisis.”); *e.g.*, *Timbs v. Indiana*, No. 17-1091, 2019 WL 691578, at *8–9 (U.S. Feb. 20, 2019) (Thomas, J., concurring) (preferring incorporation through the Privileges or Immunities Clause rather than the Due Process Clause); *McDonald v. City of Chicago*, 561 U.S. 742, 855 (2010) (Thomas, J., concurring) (rejecting the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)).

23. *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014); *e.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (“[T]oday's Court should stand by yesterday's decisions. . .”).

24. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–25 (1994).

25. Interestingly, the Wisconsin Supreme Court grants (somewhat paradoxically) vertical stare decisis to unreversed decisions of the Wisconsin Court of Appeals. Thus, to disagree with the holding of the court of appeals, the Wisconsin Supreme Court must formally engage in stare decisis analysis. *State v. Grady*, 2007 WI 81, ¶ 20, 302 Wis. 2d 80, 734 N.W.2d 364; *State v. Douangmala*, 2002 WI 62, ¶ 42, 253 Wis. 2d 173, 646 N.W.2d 1 (“[s]tare decisis requires us to abide by precedent established by the court of appeals unless a compelling reason exists to overrule the precedent.”); *In re Marriage of Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246, 254 (1997) (reasoning that “[t]he statute provides that officially published opinions of the court of appeals shall have statewide precedential effect”). In

Appeals for the Seventh Circuit, and the Eastern and Western Districts of Wisconsin. The doctrine requires lower courts to faithfully apply the decisions of higher courts in their system—even if the lower courts believe those decisions erroneous²⁶—unless those higher courts have overturned them. This doctrine, that higher courts bind lower courts, is absolute²⁷ and near-universally accepted, although there is a good-faith debate on how a higher court’s holding should be defined²⁸ and how lower courts should treat higher-court dicta.²⁹

Horizontal stare decisis—the focus of this Article, and what we will now refer to without the leading adjective—operates within the same court, requiring it to adhere to its own prior decisions, even if incorrect, unless special circumstances are present.³⁰ The “even if incorrect” component is crucial: in order for horizontal stare decisis to have any influence, a court must *disagree*

practice, the Wisconsin Supreme Court likely grants less stare decisis effect to opinions of the Court of Appeals than of its own. *See, e.g., Milwaukee Police Ass’n. v. City of Milwaukee*, 2018 WI 86, ¶ 44, 383 Wis. 2d 247, 914 N.W.2d 597 (reversing the court of appeals with no indication that its decision had any stare decisis weight).

26. *United States v. Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) (Easterbrook, J.) (“An inferior court is not entitled to say that because the one is more persuasive than the eight, it will follow the one.”).

27. *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (“Vertical stare decisis is absolute . . .”). There are two notable “exceptions”: the U.S. Supreme Court has opened the door to say that its summary affirmances need not be followed if subsequent doctrinal developments undermine them. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *see, e.g., Baskin v. Bogan*, 766 F.3d 648, 659 (7th Cir. 2014). And the Wisconsin Supreme Court has held that the court of appeals may disregard one of its decisions if it is in direct conflict with a subsequent U.S. Supreme Court decision. *State v. Jennings*, 2002 WI 44, ¶ 43, 252 Wis. 2d 228, 647 N.W.2d 142. We use scare quotes because both of these “exceptions” were created by the relevant highest court, so a lower court utilizing them is still adhering to vertical stare decisis.

28. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 188 (2006) (discussing the “legislative holding” and “ratio decidendi” conception of precedent).

29. *Compare Planned Parenthood of Ind. & Ky., Inc. v. Ind. Dep’t of Health*, No. 17-3163, 2018 WL 3655854 at *3–4 (7th Cir. June 25, 2018) (Easterbrook, J., dissenting from denial of rehearing en banc) (“Judicial opinions are not statutes; they resolve only the situations presented for decision.”), *with Bloom*, 149 F.3d at 653 (Easterbrook, J.) (“The Supreme Court often articulates positions through language that an unsympathetic audience might dismiss as dictum . . . and it expects these formulations to be followed. . . . Appellate courts that dismiss these expressions and strike off on their own increase the disparity among tribunals . . . and frustrate the evenhanded administration of justice . . .”).

30. Interestingly, some intermediate appellate courts, including the Wisconsin Court of Appeals, do not have the authority to overturn their own cases, thus horizontal stare decisis is absolutely binding on these courts. *Marriage of Cook*, 208 Wis. 2d at 189.

with one of its own prior decisions and nevertheless adhere to that decision.³¹ So even after a court fully reconsiders a prior precedent—accepting full merits briefing from the parties, hearing oral argument, inviting amici to weigh in, etc.—it will adhere to the prior decision although it now believes it incorrectly decided.³² The U.S. Supreme Court frequently takes this approach,³³ as does the Wisconsin Supreme Court.³⁴ If, on the other hand, a court opens up its prior precedent to reconsideration and becomes independently persuaded to reach the same decision as the prior precedent, *stare decisis* has played no role.³⁵ (In this way, *stare decisis* is identical to deference doctrines.)³⁶

31. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (“Respecting *stare decisis* means sticking to some wrong decisions.”); *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (concluding that prior decision incorrectly sanctioned a violation of the First Amendment, then addressing question of “whether *stare decisis* nonetheless counsels against overruling” that prior decision); *see also* Transcript of Oral Argument at 53, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) (Chief Justice Roberts: “But the—the assumption, when you’re talking about *stare decisis*, is that the decision was wrong.”); *accord* *Buchmeier v. United States*, 581 F.3d 561, 573 (7th Cir. 2009) (en banc) (Sykes, J., dissenting) (“I take the force of *stare decisis* seriously. . . . I am convinced, however, that our [previous decision] is mistaken. Beyond that (and I accept that something more should be required to overrule circuit precedent) . . . [the court’s previous decision] produces such variable meanings [that it] has proven itself unworkable. I think it’s time to start over.”); *State v. Lindell*, 2001 WI 108, ¶¶ 145–48, 245 Wis. 2d 689, 629 N.W.2d 223 (A.W. Bradley, J., concurring) (arguing that the court should not overrule a decision out of respect for precedent even though she dissented in the original decision).

32. “Many a judge dissents in one case but later follows the majority decision on the basis of *stare decisis*.” *Bauer v. Shepard*, 620 F.3d 704, 714 (7th Cir. 2010) (Easterbrook, J.). “Under usual circumstances, I would consider myself bound by the doctrine of *stare decisis* and follow the holding in *Gaertner* despite my disagreement with it.” *United States v. Kimberlin*, 776 F.2d 1344, 1349 (7th Cir. 1985) (Ripple, J., dissenting). It takes more than argument that a decision is mistaken to justify overruling. *Tate v. Showboat Marina Casino P’ship*, 431 F.3d 580, 582–84 (7th Cir. 2005). See also Linda Greenhouse discussing Chief Justice Rehnquist’s early criticism of *Miranda* and his opinion upholding it in *Dickerson*. Linda Greenhouse, *The Supreme Court: The Precedent; Justices Reaffirm Miranda Rule, 7-2; A Part of ‘Culture’*, N.Y. TIMES (June 27, 2000), <https://www.nytimes.com/2000/06/27/us/supreme-court-precedent-justices-reaffirm-miranda-rule-7-2-part-culture.html> [<https://perma.cc/4BCM-KFXW>].

33. *E.g., Kimble*, 135 S. Ct. at 2406; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality op.); *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

34. *E.g., Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶¶ 1, 66, 281 Wis. 2d 300, 697 N.W.2d 417; *Jandre v. Wis. Injured Patients & Families Comp. Fund*, 2012 WI 39, ¶ 34, 340 Wis. 2d 31, 813 N.W.2d 627.

35. *Kimble*, 135 S. Ct. at 2409 (“Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.”).

36. *See Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶¶ 20, 78, 382 Wis. 2d 496, 914 N.W.2d 21; *E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2564 (2018) (Gorsuch, J., respecting the denial of certiorari) (“*Skidmore* deference only makes a difference when the court would not otherwise reach the same interpretation as the agency.”).

A. *The Rule of Law: Stare Decisis' Main End*

We describe the doctrine of stare decisis as a “bedrock” one because, without it, “[t]he alternative is bedlam.”³⁷ “To have a theory of precedent is to have a theory of the extent to which judges’ acts are law.”³⁸ As the Wisconsin Supreme Court explains, stare decisis is “fundamental to the rule of law,”³⁹ and it follows the doctrine “scrupulously” precisely because of its “abiding respect for the rule of law.”⁴⁰ If courts were free to disregard prior, non-distinguishable decisions, then resolution of disputes could appear to depend more on who the judge is than on a system of laws binding on all.⁴¹ Leaving existing law “open to revision in every case”—infinitely undecided—transforms “deciding cases” into “a mere exercise of judicial will, with arbitrary and unpredictable results.”⁴² That undermines both the “actual and perceived integrity of the judicial process.”⁴³ So, in short, stare decisis fulfills the foundational principle that “like cases should generally be treated alike.”⁴⁴

37. *United States v. Booker*, 375 F.3d 508, 516 (7th Cir. 2004) (Easterbrook, J., dissenting), *aff’d* 543 U.S. 220, 267 (2005).

38. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988) (“Precedent is the device by which a sequence of cases dealing with the same problem may be called law rather than will, rules rather than results.”).

39. *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257.

40. *Id.*

41. Easterbrook, *supra* note 38, at 423.

42. *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266; *see Johnson Controls*, 2003 WI 108, ¶ 151 (Wilcox, J., dissenting) (“[R]efusing to adhere to stare decisis in this case sends a precarious message to litigants suffering adversely from our decisions. The solidity of the judiciary depends upon non-prevailing litigants accepting our decisions and adjusting their behavior accordingly. By overturning established precedent today, after repeatedly refusing to do so in the past, the court tells litigants with the means to do so that they are better served through constant expostulations and challenges to adverse decisions than by acknowledging the validity of the state’s law, even if reluctantly, and abiding by it.”).

43. *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018); *see Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, ¶ 188, 293 Wis. 2d 38, 717 N.W.2d 216 (Roggensack, J., concurring in part and dissenting in part) (“[S]tare decisis [is] one of the pillars that support the institutional integrity of the court.”).

44. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018); *see also Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 367 (7th Cir. 1987) (Easterbrook, J.); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (plurality op.) (“Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”); Dorf, *supra* note 24, at 1997.

B. *Other Related Ends of Stare Decisis*

Beyond its rule-of-law function, stare decisis supports other worthy ends⁴⁵: stability, or respect for the people’s reliance interests;⁴⁶ “decentraliz[ed] decisionmaking,” or “allow[ing] each judge to build on the wisdom of others”;⁴⁷ and efficiency of dispute resolution.⁴⁸ These ends are derivative of the rule-of-law principle: they are positive effects that flow from following the rule of law, of which stare decisis is a critical component.⁴⁹ A brief word about each:

On reliance, the doctrine of stare decisis tells the people that the case law of yesterday will (likely) be the case law of today and tomorrow. As Justices O’Connor, Kennedy, and Souter famously declared in *Casey*, “Liberty finds no refuge in a jurisprudence of doubt.”⁵⁰ Thus stare decisis says the people may make contracts, develop property, or form businesses with confidence in the legal rules governing such conduct.

As for decentralized decision-making, or “build[ing] on the wisdom”⁵¹ of judges, “[t]he stock of precedents” to which stare decisis requires a court’s assent “is produced by generations of judges wrestling with hard questions.”⁵² When viewed as a whole, the body of a single court’s precedent “may incorporate more wisdom than any single . . . judge possesses.”⁵³ Thus, adhering to this precedent “increases . . . the chance of the court’s being right.”⁵⁴

On efficiency, the doctrine of stare decisis “sav[es] parties and courts the expense of endless relitigation” because it “reduces incentives for challenging

45. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (“To overturn a decision settling one such matter simply because we might believe that decision is no longer ‘right’ would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.”).

46. *Janus*, 138 S. Ct. at 2478; *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015).

47. Easterbrook, *supra* note 38, at 423.

48. *Kimble*, 135 S. Ct. at 2409 (“[Stare decisis] reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.”); Easterbrook, *supra* note 38, at 423.

49. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (calling stare decisis’ “greatest purpose [as] serv[ing] a constitutional ideal—the rule of law”).

50. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (plurality op.).

51. Easterbrook, *supra* note 38, at 423.

52. *Id.* at 422.

53. *Id.* at 422–23.

54. *Id.* at 423; *cf. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932) (“The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”).

settled precedents,” since such a challenge immediately faces an uphill climb.⁵⁵ So even if the undoing of an incorrect precedent would win a litigant’s case—perhaps, for example, *Marbury v. Madison*⁵⁶ or the *Slaughter House Cases*⁵⁷—that litigant would be wise to make the best of existing case law and try to win under the cases as they are rather than as they wish them to be.

All of this adds up to the Wisconsin Supreme Court’s conclusion that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”⁵⁸ The court settling on a clear system of rules allows society to better enjoy liberty—even if some of those rules are legally erroneous—than the court considering all rules subject to revision at will.

C. *When Stare Decisis Gives Way*

All the same, “stare decisis is not an inexorable command.”⁵⁹ Rather, it must be balanced against “a second generally accepted principle”—that under some conditions, the law may need to “accommodate to changing circumstances.”⁶⁰ In other cases, the law may change because a prior decision was simply wrong; as Chief Justice Roberts powerfully reminds us, if stare decisis were absolute, then “segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal

55. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015); accord Ed Whelan, *Richard Hasen’s Jumble of Confusions—Part 1*, NAT’L REV. (Apr. 2, 2018), <https://www.nationalreview.com/bench-memos/richard-hasen-book-antonin-scalia-flawed/> [<https://perma.cc/JP6G-4MPR>] (“As Scalia wrote in *A Matter of Interpretation*, ‘Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of stare decisis; it cannot remake the world anew.’ There is plenty of room to argue, as Justice Thomas does, that Scalia is too accepting of mistaken precedent that is settled, or to contend that the whole question of whether precedent is “settled” is too indeterminate to be meaningful.”).

56. Transcript of Oral Argument at 30, *Dalmazzi v. United States*, 138 S. Ct. 53 (2018) (No. 16-961) (Justice Kennedy, asking counsel in jest, “Do you think *Marbury* versus *Madison* is right?”).

57. Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521) (Justice Scalia criticizing counsel for asking the Court to overrule the *Slaughter House Cases*: “[W]hat you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it’s wrong, I have—even I have acquiesced in it.”).

58. *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, ¶ 97, 264 Wis. 2d 60, 665 N.W.2d 257 (ultimately quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

59. *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (citation omitted); *State v. Denny*, 2017 WI 17, ¶ 71, 373 Wis. 2d 390, 891 N.W.2d 144.

60. See *State v. Stevens*, 181 Wis. 2d 410, 442, 511 N.W.2d 591, 602 (1994) (Abrahamson, J., concurring).

suspects without first obtaining warrants.”⁶¹ Those evocative examples support the Wisconsin Supreme Court’s statement that it “do[es] more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision.”⁶² In this way, the need to overturn precedent flows (almost paradoxically) from the same foundational principle as the need to follow it: the rule of law.

Not surprisingly, courts explain that they “will not . . . abandon[] [precedent] lightly”⁶³ or “casually.”⁶⁴ Rather, any departure demands “special,”⁶⁵ “sufficient,”⁶⁶ or “compelling”⁶⁷ justification. So, having recounted the basic rule of stare decisis (follow on-point precedent, both correct and incorrect) and its justifications (rule of law, reliance, decentralized decision-making, efficiency), we next address when stare decisis gives way. We will briefly explain the tests used by the U.S. Supreme Court and the Wisconsin Supreme Court when considering whether to overturn precedent and depart from stare decisis in a given case. Both, as we will see, deploy extensive, though not identical, multi-factor balancing tests.

1. U.S. Supreme Court

As the U.S. Supreme Court recently recounted in *Janus*—the landmark case overruling a forty-year-old precedent to hold that forcing public-sector employees to pay agency fees to a union violates the First Amendment—the Court looks to a multi-factor balancing test to determine whether it will depart from stare decisis.⁶⁸ This test comprises “a series of prudential and pragmatic considerations” and “gauge[s] the respective costs of reaffirming and

61. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Adkins v. Children’s Hospital of D.C.*, 261 U.S. 525 (1923), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967)).

62. *Johnson Controls*, 2003 WI 108, ¶ 100.

63. *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266; *accord Janus*, 138 S. Ct. at 2478 (“strong grounds”).

64. *Stevens*, 181 Wis. 2d at 442 (Abrahamson, J., concurring); *Denny*, 2017 WI 17, ¶ 143 (A.W. Bradley, J., dissenting); *accord Janus*, 138 S. Ct. at 2478 (“strong grounds”).

65. *Denny*, 2017 WI 17, ¶ 69; *Schultz*, 2002 WI 125, ¶ 37; *accord Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015).

66. *Stevens*, 181 Wis. 2d at 442 (Abrahamson, J., concurring); *accord Kimble*, 135 S. Ct. at 2409.

67. *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405; *accord Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 362 (2010) (“the most convincing of reasons”).

68. *Janus*, 138 S. Ct. at 2478–79.

overruling a prior case.”⁶⁹ It “must balance the importance of having [the legal] questions *decided* against the importance of having them *decided right*.”⁷⁰

Factors the Court considers include (1) “the quality of [the precedent’s] reasoning,”⁷¹ for example, the integrity of its treatment of historical sources⁷² or whether it “abandoned [important legal] principles;”⁷³ (2) “the workability of the rule it established”⁷⁴ or, in other words, its “real world implementation;”⁷⁵ (3) whether it is “consisten[t] with other related decisions”⁷⁶ or if its “foundations . . . have sustained serious erosion;”⁷⁷ (4) “developments since the decision was handed down,”⁷⁸ for example, “far-reaching systemic and structural changes in the economy,”⁷⁹ “[r]apid changes in technology,”⁸⁰ or the “emerging recognition” of new moral principles in society;⁸¹ and (5) the

69. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (plurality op.).

70. *Citizens United*, 558 U.S. at 378.

71. *Janus*, 138 S. Ct. at 2478.

72. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (“[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate.”).

73. *Citizens United*, 558 U.S. at 363.

74. *Janus*, 138 S. Ct. at 2478; *see also Casey*, 505 U.S. at 854 (“whether the rule has proven to be intolerable simply in defying practical workability”).

75. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

76. *Janus*, 138 S. Ct. at 2478; *see also Lawrence*, 539 U.S. at 577 (“*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.”); *Casey*, 505 U.S. at 855 (“whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine”); *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2411 (2015) (asking whether the previous decision is a “doctrinal dinosaur or legal last-man-standing”).

77. *Lawrence*, 539 U.S. at 576.

78. *Janus*, 138 S. Ct. at 2478–79; *see also Lawrence*, 539 U.S. at 577 (“*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.”); *Casey*, 505 U.S. at 855 (“whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”). And in *Citizens United* and *Janus*, the Court added another qualification: when the First Amendment is in play, stare decisis is even weaker. *Citizens United*, 558 U.S. at 363; *Janus*, 138 S. Ct. at 2478.

79. *Wayfair*, 138 S. Ct. at 2097.

80. *Citizens United*, 558 U.S. at 364.

81. *Lawrence*, 539 U.S. at 572.

“reliance on the decision,”⁸² or whether it “causes uncertainty.”⁸³ Of course, this list is not exhaustive.⁸⁴

The strength of the showing necessary to overturn the decision depends on still more inputs. When the decision interprets the Constitution, less showing is required, since the Court alone can correct course.⁸⁵ When it’s a statute, more showing is required, since Congress may always intervene.⁸⁶ When precedent “prohibit[s] the States from exercising their lawful sovereign powers,” less showing.⁸⁷ “When neither party defends the reasoning of a precedent,” less showing.⁸⁸ But for “cases involving property and contract rights,” then the Court needs more showing⁸⁹—unless the case deals with the Sherman Act, in which case, less showing will suffice.⁹⁰ And then there’s whatever showing it takes to overrule a “super-precedent,”⁹¹ and the question of whether precedents about methodology are precedential at all.⁹²

82. *Janus*, 138 S. Ct. at 2479; *see also Lawrence*, 539 U.S. at 560; *Casey*, 505 U.S. at 854 (“whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”).

83. *Lawrence*, 539 U.S. at 560.

84. *See Janus*, 138 S. Ct. at 2478; *e.g.*, *Citizens United*, 558 U.S. at 412 (“antiquity” of the precedent).

85. *Janus*, 138 S. Ct. at 2478.

86. *See id.* at 2478; *see also Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015).

87. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018).

88. *Citizens United*, 558 U.S. at 363.

89. *Kimble*, 135 S. Ct. at 2410 (2015) (citation omitted).

90. *Id.* at 2412.

91. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006); *see also Planned Parenthood of Ind. & Ky., Inc. v. Ind. Dep’t of Health*, 888 F.3d 300, 311–13 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part); *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376–77 (4th Cir. 2000) (Luttig, J., concurring):

I understand the Supreme Court to have intended its decision in *Planned Parenthood v. Casey* to be a decision of super-stare decisis with respect to a woman’s fundamental right to choose whether or not to proceed with a pregnancy. And I believe this understanding to have been not merely confirmed, but reinforced, by the Court’s recent decision in *Stenberg v. Carhart*.

(citations omitted.)

92. *See Chad M. Oldfather, Methodological Stare Decisis and Constitutional Interpretation, in PRECEDENT IN THE UNITED STATES SUPREME COURT 135, 137* (Christopher J. Peters ed., 2013). *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010).

We believe in methodological consensus because we believe particular approaches to the judicial job to be right. We are especially emphatic about vertical methodological stare decisis because of the respect we believe lower courts owe to higher courts that have definitively achieved and maintained that consensus. *See Daniel R. Suhr, Interpreting Wisconsin Statutes*, 100 MARQ. L. REV. 969 (2017). We need not repeat here the broader arguments around the deference owed methodological precedents

2. Wisconsin Supreme Court

The Wisconsin Supreme Court most definitively explained its stare decisis approach in *Johnson Controls* in 2003. There, and in a few subsequent cases, the court identified seven factors: (1) changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law (when the cases in a particular area are a doctrinal mess, lacking any consistency, the court may repudiate some or all to bring clarity⁹³); (4) the prior decision is unsound in principle⁹⁴ (when two cases “cannot be reconciled without generating . . . arbitrary and illogical distinctions,” one must be overruled⁹⁵); (5) the prior decision is unworkable in practice⁹⁶ (when a precedent simply doesn’t work in practice, such that later cases prompt courts to “engraft exceptions upon it” constantly to avoid its import, it is ready for reversal⁹⁷); (6) “whether reliance interests are implicated”; and (7) “whether it has produced a settled body of law”⁹⁸ (when an error undermines an entire statutory scheme and cannot be contained to a particular situation, stare decisis

(i.e., lessened reliance interests, etc.), methodological discussions as dicta, etc., because those arguments are fully made elsewhere. *See, e.g.*, Oldfather, *supra*; Evan J. Criddle & Glen Staszewski, Essay, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1574–76 (2014).

93. *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, ¶ 106, 264 Wis. 2d 60, 665 N.W.2d 257 (citing *City of Milwaukee v. Firemen’s Relief Ass’n*, 42 Wis. 2d 23, 37–38, 165 N.W.2d 384, 392 (1969)).

94. *State v. Popenhagen*, 2008 WI 55, ¶ 70, 309 Wis. 2d 601, 749 N.W.2d 611 (“Mistaken statements of the law should not constitute precedent that binds this court. . . . We do more damage to the rule of law by refusing to admit error than by correcting an erroneous proposition of law.”); *State v. Lynch*, 2016 WI 66, ¶ 39 n.17, 371 Wis. 2d 1, 885 N.W.2d 89 (criticizing when “courts have continued to blindly adhere to poorly reasoned cases solely because they have felt compelled to do so. . . . We cannot continue to pass the buck. We must roll up our sleeves and dig into the law. Interpreting the Constitution is, after all, the ultimate responsibility of this court.”).

95. *Johnson Controls*, 2003 WI 108, ¶ 105.

96. *Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216. Sometimes the “unsound in principle” factor is instead phrased as “objectively wrong.” *See, e.g.*, *State v. Douangmala*, 2002 WI 62, ¶ 42, 253 Wis. 2d 173, 646 N.W.2d 1.

97. *Johnson Controls*, 2003 WI 108, ¶ 108 (quoting *Wilcox v. Wilcox*, 26 Wis. 2d 617, 624–25, 133 N.W.2d 408, 412 (1965)).

98. *Johnson Controls*, 2003 WI 108, ¶¶ 99–100. Earlier the Court suggested that it would follow the stare decisis analysis of *Planned Parenthood v. Casey*, but that articulation of the doctrine was supplanted by the factors listed in *Johnson Controls*. *See State v. Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶¶ 29–31, 244 Wis. 2d 613, 628 N.W.2d 376.

gives way⁹⁹). And not every factor is necessary in every case—for example, in *Denny* the court overturned a prior decision with no analysis of reliance interests.¹⁰⁰

The Wisconsin Supreme Court has also identified factors that it will *not* consider. It is not sufficient that “a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions.”¹⁰¹ This often makes sense, since the Wisconsin Supreme Court is interpreting *Wisconsin* law, which often addresses the same substantive problem as other jurisdictions with different particular texts. The court also frequently reiterates that a mere change in the membership of the court, the presence of a new judge, is not sufficient for stare decisis to give way.¹⁰² After all, “[t]his court is more than simply the sum of its current members. It is an institution that endures long after any one individual justice leaves the bench,” and its decisions are more than “collection[s] of several law review articles by members of th[e] court.”¹⁰³

As in the U.S. Supreme Court, the strength of Wisconsin’s stare decisis test is calibrated by other inputs. For instance, “considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.”¹⁰⁴ In other cases, “[c]onsiderations of stare decisis are stronger where the legislative prerogative to overturn [court] decisions is involved.”¹⁰⁵ In a case of statutory interpretation, if the court errs, the legislature may amend the statute to clarify its desired outcome. That is not nearly so easy if the court botches a case of constitutional interpretation, which suggests the court must exercise greater scrutiny of its precedents in constitutional cases.¹⁰⁶ Some members of the court have argued that permitting

99. *State v. Denny*, 2017 WI 17, ¶ 70, 373 Wis. 2d 390, 891 N.W.2d 144.

100. *Id.* ¶¶ 69–71.

101. *Johnson Controls*, 2003 WI 108, ¶ 100.

102. *State v. Lynch*, 2016 WI 66, ¶ 102, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & A.W. Bradley, JJ., dissenting); *Johnson Controls*, 2003 WI 108, ¶ 135 (Wilcox, J., dissenting); *Welch v. State Farm Mut. Auto. Ins. Co.*, 122 Wis. 2d 172, 182, 361 N.W.2d 680, 685 (1985) (Steinmetz, J. dissenting). *But see* Part IV, *infra*, arguing that membership changes accompanied by watershed elections do affect stare decisis.

103. *Lynch*, 2016 WI 66, ¶ 231 (Ziegler, J., dissenting).

104. *Johnson Controls*, 2003 WI 108, ¶ 141 (Wilcox, J., dissenting) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)); *id.* ¶ 143 (“[S]tare decisis concerns are particularly strong where substantial reliance in the affected business community occurs.”); *Denny*, 2017 WI 17, ¶ 158 (A.W. Bradley, J., dissenting).

105. *Johnson Controls*, 2003 WI 108, ¶ 140 (Wilcox, J., dissenting); *see State v. Douangmala*, 2002 WI 62, ¶ 42, 253 Wis. 2d 173, 646 N.W.2d 1.

106. *Lynch*, 2016 WI 66, ¶ 39 n.18.

an error in statutory interpretation to persist undermines the legislature and its policy choices, a view which reduces the deference owed to precedent.¹⁰⁷ And some members suggest that doctrines that have been around awhile have greater stare decisis protection,¹⁰⁸ while others would say that older precedents are less likely to be connected to the realities of the modern world and thus less entitled to stare decisis.¹⁰⁹

III. DISCUSSION OF THE DOCTRINE

We have now recounted the Wisconsin Supreme Court's stare decisis doctrine, which is roughly parallel to that of the U.S. Supreme Court: the court must follow on-point precedent, unless—after applying a multi-factor balancing test, calibrated in strength by myriad additional considerations—it concludes that a sufficient justification exists to overrule the precedent. We now turn to our discussion of these approaches, before suggesting two alternative approaches applicable in some classes of cases.

Our concern is simple: the current stare decisis doctrine, comprising factors upon factors, nuanced by various additional considerations, inevitably results in near-limitless, individualized judicial discretion.¹¹⁰ That is, multi-factor balancing tests generally lead to judicial discretion, and very complex ones, like the stare decisis doctrine, allow that near-limitless discretion to be exercised by each judge in a unique way. Importantly, this near-limitless, individualized discretion flows directly from the nature of the doctrine, not from a misapplication of it.¹¹¹ Thus, our criticism is not of the integrity or competency of the judges applying the doctrine, but of the doctrine itself. Even judges

107. *Denny*, 2017 WI 17, ¶ 70 n.16.

108. See *Lynch*, 2016 WI 66, ¶ 98 (Abrahamson & A.W. Bradley, JJ., dissenting); *State v. Stevens*, 181 Wis. 2d 410, 442, 511 N.W.2d 591, 602 (1994) (Abrahamson, J., concurring).

109. *State v. Michels Pipeline Const., Inc.*, 63 Wis. 2d 278, 295, 217 N.W.2d 339, 347 (1974) (citing *State v. Esser*, 16 Wis. 2d 567, 582, 115 N.W.2d 505, 513 (1962)).

110. Judge Easterbrook pointedly put his similar criticism this way: a “multi-factor balancing test with two tiers, three prongs per tier, and four tines per prong” is a “bad rule[],” “[t]oo many forks in doctrine produce forks in tongues.” Easterbrook, *supra* note 38, at 424.

111. *Accord DeGuelle v. Camilli*, 724 F.3d 933, 937 (7th Cir. 2013) (criticizing Wisconsin's collateral estoppel test similarly); *United States v. Rosales*, 716 F.3d 996, 997–99 (7th Cir. 2013) (criticizing a test found within the U.S. Sentencing Guidelines similarly). As Minnesota Supreme Court Justice Barry Anderson has said: “a 26-factor domicile test is no test at all.” *Mauer v. Comm'r of Revenue*, 829 N.W.2d 59, 78 (Minn. 2013) (Anderson, J., dissenting). See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

applying the doctrine in good faith will end with a result marked by discretion and individual views.¹¹²

Because of this near-limitless, individualized discretion, whether a court will adhere to stare decisis in a given case is unpredictable. The courts describe the doctrine explicitly as a “principle of policy”;¹¹³ it represents a judicial policy judgment that stability is more important than correctness in law.¹¹⁴ So, under the current approach, courts are overtly guided by “principle[s] of policy,” not the “inexorable command[s]” of the law.¹¹⁵ This inevitably—that is, by design—leads to courts making policy decisions, weighing arguments about reliance interests or workability, rather than assuming the age-old task of declaring what the law is.¹¹⁶ So since policy—not strict law—is at play, “[e]ach suggestion that [a] case[] must be overturned must be scrutinized *individually*,”¹¹⁷ meaning the decision to overturn precedent in one case is unlikely to meaningfully assist in deciding whether to overturn precedent in a different case. After all, no two proper evaluations of all of the factors and considerations could possibly be the same. In other words, the “grand balancing test[s]” used by Wisconsin Supreme Court and the U.S. Supreme Court have “neither a maximand nor weights to produce a decision when the criteria conflict, as they always do.”¹¹⁸ Each factor is apparently equally important, and thus arguably equally unimportant in a given case. Thus, no rules govern conflicts between the factors. For example, there is no defined way to decide when, if ever, the quality of a decision’s reasoning is so poor that

112. See, e.g., Craig S. Lerner, *Justice Scalia’s Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL’Y 91, 160 (2019) (discussing Justice Scalia’s seesawing between stare-decisis and originalism in the Eighth Amendment context); accord Thomas & Malcolm, *supra* note 22 (“Justice [Arthur] Goldberg’s theory [of stare decisis] was basically ‘It’s a ratchet.’ As you improve civil liberties, those strict rules of stare decisis apply when you win those cases. But when they need to overrule cases in order to do what he thinks is the right thing, then a loose set of rules of stare decisis apply.” (alterations in original.)).

113. *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, ¶ 97, 264 Wis. 2d 60, 665 N.W.2d 257.

114. In that way, stare decisis is a judicially created doctrine not unlike the presumption of constitutionality or the preference for constitutional avoidance. Both of those doctrines are policy choices, made by the judiciary, for the benefit of the legislature.

115. *Denny*, 2017 WI 17, ¶ 71 (ultimately quoting *Payne v. Tennessee*, 501 U.S. 808 (1991)).

116. *Compare* *State v. Lynch*, 2016 WI 66, ¶ 39 n.17, 371 Wis. 2d 1, 885 N.W.2d 89 (Gableman, J., lead op.) (“[C]ourts have continued to blindly adhere to poorly reasoned cases solely because they have felt compelled to do so. . . . We cannot continue to pass the buck. We must roll up our sleeves and dig into the law. Interpreting the Constitution is, after all, the ultimate responsibility of this court.”), *with id.* ¶¶ 208–09 (Ziegler, J., dissenting). Supporting Justice Gableman’s view, see generally *Koschkee v. Evers*, 2018 WI 82, ¶ 46, 382 Wis. 2d 666, 913 N.W.2d 878.

117. *Denny*, 2017 WI 17, ¶ 71.

118. *Easterbrook*, *supra* note 38, at 422.

all reliance interests must give way, or when a decision's workability is so high that no erosion of its theoretical foundations will topple it.

Further, it is not evident why *appellate* judges should be making the policy determinations called for in *stare decisis* doctrine. The explicitly policy-oriented approach puts judges in the uncomfortable situation of making predictions from current business practices to trends in social mores, and the reliance interests at stake in each—and then declaring that these policy judgments outweigh the correct conclusion as to the law. Moreover, given that *stare decisis* is a question of law reserved for appellate courts, not of fact for trial courts, judges may have to make these policy judgments in the dark. For example, an appellate court may be called upon to determine the business community's reliance on a particular precedent without the benefit of expert testimony, competing economic studies, or the like.¹¹⁹

So, ironically, the *stare decisis* doctrine's primary goal is to protect the rule of law, yet, because every judge enjoys such great latitude in applying it, the doctrine results in the rule of men.¹²⁰ Its aim is to promote stability, predictability, and reliance, yet it is itself unpredictable.¹²¹ And even the benefits of decentralized decision-making and efficiency fall short: with so much discretion, the lessons of history will be only partially heeded (a weakened decentralized decision-making), and litigants are still advised to challenge unfavorable precedent in the chance that their case happens to contain the mix of factors persuasive to the court (inefficiency).

The foregoing discussion about the variability of the doctrine can be demonstrated by reviewing the records of any set of appellate judges, any cross-section of which will show the diversity of dedication to precedent and the difficulty of applying the myriad factors in individual cases. Looking to the records of the justices of the Wisconsin Supreme Court, they each find

119. *E.g.*, *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2484–86 (analyzing the reliance of public-sector unions on a decision favorable to their interests with the only record evidence noted being a single contract between the parties).

120. THE FEDERALIST No. 78, at 490, 493 (Alexander Hamilton); Scalia, *supra* note 111.

121. *See Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 151, 264 Wis. 2d 60, 665 N.W.2d 257 (Wilcox, J., dissenting) (“[R]efusing to adhere to *stare decisis* in this case sends a precarious message to litigants suffering adversely from our decisions. The solidity of the judiciary depends upon non-prevailing litigants accepting our decisions and adjusting their behavior accordingly. By overturning established precedent today, after repeatedly refusing to do so in the past, the court tells litigants with the means to do so that they are better served through constant expostulations and challenges to adverse decisions than by acknowledging the validity of the state's law, even if reluctantly, and abiding by it.”).

themselves in the awkward juxtaposition of holding that the court must respect stare decisis and defer to precedent, except when they think the court should overrule a prior case and not follow precedent—all based solely on their own weighing of the relevant factors and considerations.¹²² Again, we believe that this troubling result is the product of the *faithful* application of stare decisis doctrine as currently conceived, not of a deliberate overstepping by the judiciary. In other words, the doctrine is so indeterminate, so sensitive to an individual judge’s views, that the judiciary’s “judgment” on whether to follow stare decisis inevitably looks no different than an exercise of “force” or “will.”¹²³

122. Thus, for example, Chief Justice Roggensack would follow stare decisis in *Bartholomew v. Wisconsin Patients Compensation Fund*, 2006 WI 91, ¶¶ 185–93, 293 Wis. 2d 38, 717 N.W.2d 216 (Roggensack, J., concurring in part and dissenting in part), but not in *State v. Lynch*, 2016 WI 66 n.1, 371 Wis. 2d 1, 885 N.W.2d 89.

Justice Abrahamson would follow precedent in *Coyne v. Walker*, 2016 WI 38, ¶ 82, 368 Wis. 2d 444, 879 N.W.2d 606 (Abrahamson, J., concurring), *St. Croix County Department of Health & Human Services v. Michael D.*, 2016 WI 35, ¶¶ 85–86, 368 Wis. 2d 170, 880 N.W.2d 107 (Abrahamson, J., and A.W. Bradley, J., dissenting), *State v. Houghton*, 2015 WI 79, ¶ 83, 364 Wis. 2d 234, 868 N.W. 2d 143 (Abrahamson, J., dissenting), *Jandre v. Wisconsin Injured Patients & Families Compensation Fund*, 2012 WI 39, ¶ 34, 340 Wis. 2d 31, 813 N.W.2d 627, *Schultz v. Natwick*, 2002 WI 125, ¶¶ 37–38, 257 Wis. 2d 19, 653 N.W.2d 266, *State v. Lindell*, 2001 WI 108, ¶¶ 150–53, 245 Wis. 2d 689, 629 N.W.2d 223, *State v. Stevens*, 181 Wis. 2d 410, 442–43, 511 N.W.2d 591, 602 (1994) (Abrahamson, J., concurring), *State v. Fuerte*, 2017 WI 104, ¶ 43, 378 Wis. 2d 504, 904 N.W.2d 773 (Abrahamson, J., dissenting), and *State v. Outagamie County Board of Adjustment*, 2001 WI 78, ¶¶ 132–35, 244 Wis. 2d 613, 628 N.W.2d 376 (Abrahamson, C.J., dissenting), but not in *State v. Luedtke*, 2015 WI 42, ¶ 92–99, 362 Wis. 2d 1, 863 N.W.2d 592 (Abrahamson, J., concurring), *Bartholomew*, 2006 WI 91, ¶¶ 31–51, *State v. Douangmala*, 2002 WI 62, ¶ 42, 253 Wis. 2d 173, 646 N.W.2d 1, or *State v. City of Oak Creek*, 2000 WI 9, ¶ 85, 232 Wis. 2d 612, 605 N.W.2d 526 (Abrahamson, C.J., dissenting). *Fuerte* illustrates the fraught nature of these cases: the court’s majority there (over Abrahamson’s dissent) overruled *Douangmala* (where she was in the majority), which itself overruled four precedents set by the Court of Appeals.

Justice A.W. Bradley would follow stare decisis in *St. Croix County Department of Health*, 2016 WI, ¶¶ 85–86 (Abrahamson and A.W. Bradley, JJ., dissenting), *Lindell*, 2001 WI 108, ¶¶ 145–48 (A.W. Bradley, J., concurring); *Denny*, 2017 WI 17, ¶¶ 134–37 (A.W. Bradley, J., dissenting), but not in *State v. Ferron*, 219 Wis. 2d 481, 514, 579 N.W.2d 654, 668 (1998) (A.W. Bradley, J., dissenting).

Justice Ziegler would follow precedent in *Lynch*, 2016 WI 66, ¶¶ 204–16 (Ziegler, J., dissenting), but not in *Denny*, 2017 WI 17, ¶ 69; *accord Coyne*, 2016 WI 38, ¶ 249 n.2 (urging reexamination of a precedent).

Justice R.W. Bradley would follow precedent in *State v. Suriano*, 2017 WI 42, ¶ 29, 374 Wis. 2d 683, 893 N.W.2d 543, but not in *State v. Friedlander*, 2019 WI 22, ¶ 24, 923 N.W.2d 849.

Likewise, Justice Kelly would follow precedent in *Suriano*, 2017 WI 42, ¶ 29, but not in *Friedlander*, 2019 WI 22, ¶ 24.

123. THE FEDERALIST No. 78 (Alexander Hamilton); *accord Solum*, *supra* note 28, at 156 (“In the Warren Court era, the political, judicial, and academic left seemed to view constitutional stare decisis as the enemy of progressive (living constitution) constitutionalism. In the Roberts Court era,

While our criticism is relatively simple, we unfortunately offer no correspondingly simple solution. We cannot offer here a universal theory to answer when a court should adhere to stare decisis in a given case. Further, we do not argue that the Wisconsin Supreme Court (or the U.S. Supreme Court) should jettison the doctrine altogether. We recognize that stare decisis came about for good reasons: reliance interests are real, prior generations of judges did their job with wisdom, and efficiency in dispute resolution is important. Litigants and the public at large need to know courts function as neutral decisionmakers, delivering equal justice under law.

Instead, what we offer are two different theories that each justify the Wisconsin Supreme Court side-stepping this quagmire to review anew the merits of precedent in some classes of cases. In other words, our two approaches allow the court, in some classes of cases, to directly overrule precedent without the need to consider whether stare decisis commands a different result. Thus, by avoiding the need to navigate the twists and turns of the doctrine in these classes of cases, these two proposals would on balance create a more predictable judicial system.¹²⁴

stare decisis may be the last defense of Warren Court precedents against conservative (originalist constitutionalism on the ascendancy.”).

124. We keep the focus of our two theories on Wisconsin specifically, content otherwise to refer readers to the broad body of scholarship that exists on the overall jurisprudential merit of stare decisis, especially for those who claim the mantle of originalism. In fact, this is a topic as old as this journal. W. F. Kuzenski, *Stare Decisis*, 6 MARQ. L. REV. 65, 69 (1922). For discussions of a more recent vintage, see, for example, Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1685–86 (1991); Kozel, *supra* note 4, at 414; Nelson Lund, *Stare Decisis and Originalism*, 19 GEO. MASON L. REV. 1029, 1029 (2012); John F. Manning, *Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 747–48 (2017); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 803 (2009); Tom Goldstein, *Justice Thomas and Constitutional “Stare Indecisis”*, SCOTUSBLOG (Oct. 8, 2007, 4:42 PM), <https://www.scotusblog.com/2007/10/justice-thomas-and-constitutional-stare-indecisis/> [<https://perma.cc/U4DD-TQ9X>]; David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137, 137 (2011); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 272–73 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23 (1994); Paulsen, *supra* note 21, at 289; Stephen Markman, *Originalism and Stare Decisis*, 34 HARV. J.L. & PUB. POL'Y 111, 111 (2011).

IV. THE WATERSHED JUDICIAL ELECTION: A NEW CONSIDERATION FOR STARE DECISIS

Like most states, and unlike the federal system, Wisconsin places the power to select judges with the people directly.¹²⁵ Different states approach the project of judicial election differently: some choose retention elections, while others, like Wisconsin, prefer candidate-versus-candidate contests.¹²⁶ Within the latter category, some states allow judicial candidates to run with a partisan label on the ballot,¹²⁷ while others, like Wisconsin, keep the election formally nonpartisan.¹²⁸ No matter the particulars, judicial elections often place before the community the record of a judge, either as an incumbent or on a lower court, and ask the people to pass on that judge's record. Thus, in a system with elected judges, it is ultimately the people who choose which lawyers will take the judicial oath and discharge the duties of the judicial branch. That is, judicial elections ultimately allow the people to judge who should judge them.¹²⁹ In our view, this also means that the truism “elections have consequences”—almost absolutely true for the political branches—is true as well, in a qualified way, for the judiciary.

A. *The Theory of the Watershed Judicial Election*

We believe that the constitutional choice of Wisconsin to select judges by direct elections should influence how the Wisconsin Supreme Court conceives of the legal doctrine of stare decisis. Specifically, we propose that the weight of stare decisis ascribed to a particular decision could depend on public opinion as expressed in watershed judicial elections. That is, we believe it is appropriate for the court to take the people's judgment, as expressed in a watershed judicial election, into account when ascribing precedential value to pre-watershed cases.

125. WIS. CONST. art. VII, §§ 4–5, 7; *Williams–Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015) (noting that thirty-nine states elect judges).

126. Visit <http://www.statecourtsguide.com/> [<https://perma.cc/FT6J-TFLW>] for an interactive guide and additional resources for state judicial selection. For Wisconsin, see Michael Koehler, *Baseball, Apple Pie and Judicial Elections: An Analysis of the 1967 Wisconsin Supreme Court Race*, 85 MARQ. L. REV. 223, 224 (2001).

127. For example, Texas, Illinois, and Pennsylvania. JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009* (Charles Hall ed. 2010), <http://www.brennancenter.org/sites/default/files/legacy/New%20Politics%20PDF.pdf> [<https://perma.cc/Q8Z6-QGNG>].

128. Koehler, *supra* note 126, at 225.

129. *Accord Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 53 n.20, 376 Wis. 2d 147, 897 N.W.2d 384 (“Wisconsin judges are . . . elected to exercise [a] portion of the sovereign power” of the government.).

So, when Wisconsin experiences a watershed judicial election to seat a justice on the Wisconsin Supreme Court, the pre-watershed decisions of the court should no longer receive stare decisis effect when occasion arises for the court to reconsider those decisions. Thus, in our view, stare decisis would operate differently some of the time in a judicial system with publicly elected judges, like Wisconsin's, as opposed to a system with appointed judges, like the federal system.¹³⁰

Importantly, the watershed-judicial-election theory does not mean that elected justices are always justified, full-stop, in overturning pre-watershed precedent—even unpopular pre-watershed precedent. All justices in Wisconsin must “take and subscribe [the] oath . . . to support the constitution of the United States and the constitution of the state of Wisconsin and faithfully discharge the duties of [the judicial branch].”¹³¹ Those duties, of course, are to faithfully “say what the law is”¹³² without being “swayed by partisan interests, public clamor or fear of criticism.”¹³³ Rather, under our theory, the justices have more justification to reconsider anew pre-watershed opinions. If the unpopular judicial decision is correct on the merits—not simply left undisturbed because of stare decisis—then the judicial oath would require the elected judges to affirm the opinion. For the same reason, the watershed-judicial-election theory does not justify justices or judicial candidates engaging in inappropriate political activity,¹³⁴ bending their attitudes towards cases or broad legal issues to the whims of the electorate,¹³⁵ or making promises as to the resolution of particular cases that could come before them.¹³⁶ Each of those vices would also

130. Since federal judges do not face election, they do not have to evaluate questions of precedent in relation to the sovereignty of voters in the same way.

131. *E.g.*, WIS. CONST. art. IV, § 28.

132. *Gabler*, 2017 WI 67, ¶ 37 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

133. WIS. SUP. CT. R. 60.04(b).

134. *See id.* 60.06(2).

135. *Williams–Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015). Thus, our theory does not undermine the principle that “judges, particularly elected judges, must always guard against allowing popular pressures to influence their judgment.” *Gabler*, 2017 WI 67, ¶ 54. A solemn expression of the people’s views through a watershed judicial election, however, is quite different than “popular pressures.” Neither should influence a judge to change his views on the legal merits of a case. Yet the former may justify the Wisconsin Supreme Court ignoring stare decisis to *reconsider* the legal merits of a prior case.

136. WIS. SUP. CT. R. 60.06(3)(b) cmt. (“A judge or candidate for judicial office may not, while a proceeding is pending or impending in the court to which selection is sought, make any public comment that may reasonably be viewed as committing the judge, judge-elect or candidate to a particular case outcome.”); *see* Vikram David Amar, *Why Did Justice Scalia Decline to Participate in*

interfere with the judicial duty to “say what the law is,” whether a watershed judicial election has occurred or not.

While we believe the theory that watershed judicial elections in Wisconsin should influence stare decisis is unique, the broader point that judicial elections should have some formal influence on the law is not. This position has been advanced in an individual writing by Chief Justice Roggensack, by the Wisconsin Supreme Court’s lead opinion in *Tetra Tech* and, in a way, by Justice Scalia.

Chief Justice Roggensack. Over a decade ago, and in the pages of this journal, then-Justice Patience Roggensack powerfully criticized the great-weight deference doctrine for agencies, which had required the Wisconsin Supreme Court to affirm “an agency’s conclusion of law . . . even if the court [had] decide[d] that an alternate conclusion [was] more reasonable.”¹³⁷ In support of her criticism, then-Justice Roggensack “suggest[ed] that because the Wisconsin Supreme Court’s members were *elected to decide what the law is*,” the court’s use of decision-avoidance doctrines like great-weight deference—which shift the court’s law-declaring function to unelected agency bureaucrats—should be “re-examined.”¹³⁸ The people elect the justices of the Wisconsin Supreme Court “to review the decisions of other tribunals and to determine whether a fair decision under the applicable rule of law was made,” using and “applying [their own] collective knowledge.”¹³⁹ But if the court instead *defers* in its law-declaring power to unelected officials, then “it avoids the real work of appellate decision making: explaining to the public why the application of the law to the facts of the case resulted in the court’s decision and why that result is fair under the law.”¹⁴⁰ In short, the fact that Wisconsin justices are elected should influence the court’s decision to retain a particular legal doctrine.

the “One Nation Under God” Case? Recusal Decisions and When they Should, and Should Not, Be Required, FINDLAW (Oct. 31, 2003), <https://supreme.findlaw.com/legal-commentary/why-did-justice-scalia-decline-to-participate-in-the-one-nation-under-god-case.html> [<https://perma.cc/WRH4-QA5R>]; Kermit Roosevelt, *Ways a Judge Should, and Should Not, Be Impartial*, N.Y. TIMES: ROOM FOR DEBATE (May 17, 2016, 9:43 PM), <https://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/ways-a-judge-should-and-should-not-be-impartial> [<https://perma.cc/S94N-J9ZL>] (stating that the canon that judges should not make commitments on cases likely to come before them must be contextualized with the reality that we want intelligent, thoughtful judges with informed views about the law).

137. Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in this Court of Last Resort?*, 89 MARQ. L. REV. 541, 547 (2006).

138. *Id.* at 542.

139. *Id.* at 560.

140. *Id.*

The Tetra Tech Lead Opinion. In *Tetra Tech*, the Wisconsin Supreme Court vindicated then-Justice Roggensack’s theory and expressly relied on her article, *Elected to Decide*, described immediately above, to strike down the great-weight deference doctrine.¹⁴¹ The lead opinion, tracking then-Justice Roggensack, stated that great-weight deference is erroneous because “it privileges unelected executive-branch employees over those *the people of Wisconsin elected to resolve questions of law.*”¹⁴² So, because the justices are elected, this provides justification for them to reconsider, and ultimately overrule, some legal doctrine.

Justice Scalia. In a 1994 address to the Supreme Court Historical Society on dissenting opinions, Justice Scalia concluded that the U.S. Supreme Court’s practice of writing separate opinions led to the highly controversial judicial-nomination process commonly seen today.¹⁴³ Now, “the appointment of [a] new justice becomes something of a plebiscite upon the meaning of the Constitution in general . . . in effect giving the majority the power to prescribe the meaning of an instrument designed to restrain the majority.”¹⁴⁴ Yet Justice Scalia “confess[ed] not to be quite as aghast at this consequence” as others may be; rather, it seemed to him “a tolerable, and indeed perhaps a necessary, check upon the power of the Court. . . .”¹⁴⁵ Because of the difficulty of enacting a constitutional amendment, Justice Scalia noted, “*the people . . . achiev[ing]* correction of what they deem to be erroneous constitutional decisions through the appointment process” is “not inappropriate.”¹⁴⁶

These three views—then-Justice Roggensack’s, the Wisconsin Supreme Court’s, and Justice Scalia’s—provide the theoretical foundation for our theory of the watershed judicial election. The people elect the justices of the Wisconsin Supreme Court to “say what the law is.”¹⁴⁷ When that court defers

141. *Tetra Tech EC, Inc., v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶ 18, 382 Wis. 2d 496, 914 N.W.2d 21 (praising then-Justice Roggensack for doing “yeoman’s work in tracing the development and effect of this doctrine”).

142. *Tetra Tech*, 2018 WI 75, ¶ 57 (citing Roggensack, *supra* note 137) (emphasis added).

143. ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 280 (Christopher J. Scalia & Edward Whelan eds., 2017), first published as Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33.

144. *Id.* at 280–81.

145. *Id.* at 281.

146. *Id.* (emphasis added) (although ultimately concluding that this “corrective [measure] has been overused in recent years”).

147. *Accord Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

via stare decisis to the incorrect decisions of its past, the court deprives the people in some way of their chosen arbiters.¹⁴⁸ While that deprivation may perhaps be countenanced under normal circumstances, since the justices of the past were chosen by the public of the past, a watershed election is different: it leaves no doubt that the people desire a “correction of what they deem to be erroneous . . . decisions.”¹⁴⁹

Further, so long as stare decisis is ultimately a “principle of policy” for the benefit of the public,¹⁵⁰ it is fitting for elected justices to consider a formal expression of the public’s views—a watershed judicial election—when deciding stare decisis questions. Stated differently, in a system with elected judges, stare decisis may be viewed as a public right: the right to a reliable, stable system of judicial precedent, and the right for decisions to be left undisturbed by the judiciary absent special circumstances. This right, like almost all rights, may be alienated by the bearer at will. Thus, if the public were to disclaim its reliance interests in a particular decision, then there would be little reason for a justice to adhere to that decision. A watershed judicial election is, in our view, the public making such a disclaimer.

Finally, we think the watershed-judicial-election theory successfully avoids the same indeterminacy pitfalls that plague traditional stare decisis. While defining what a watershed judicial election is in the abstract may be difficult—and we hesitate to attempt to provide a comprehensive definition here—it should not be too difficult to identify watershed elections in reality. Further, once a court decides that a previous election is indeed watershed, that determination suffices to negate the stare decisis effect of *all* cases which the public passed on during the watershed election. So, even looking at the simple number of necessary applications alone, the watershed-judicial-election theory improves upon the predictability of stare decisis.

B. Defining a “Watershed Judicial Election,” Primarily by Way of a Recent Judicial Election in Wisconsin

To better conceptualize the watershed-judicial-election theory, we will recount a recent judicial election from Wisconsin that we believe should qualify

148. *Accord* State v. Lynch, 2016 WI 66, ¶ 39 n.17, 371 Wis. 2d 1, 885 N.W.2d 89 (Gableman, J., lead op.) (“[C]ourts have continued to blindly adhere to poorly reasoned cases solely because they have felt compelled to do so. . . . We cannot continue to pass the buck. We must roll up our sleeves and dig into the law. Interpreting the Constitution is, after all, the ultimate responsibility of this court.”).

149. SCALIA, *supra* note 143, at 281.

150. *See* Johnson Controls, Inc. v. Emp’rs Ins. of Wausau, 2003 WI 108, ¶ 97, 264 Wis. 2d 60, 665 N.W.2d 257.

as “watershed.” Historically, Wisconsin judicial elections attracted little fanfare. One pundit rehearsed an old joke that supreme court races were like “playing a game of checkers by mail.”¹⁵¹ Until recently, an incumbent had not lost reelection in over four decades.¹⁵² Yet, the spring 2008 election to the Wisconsin Supreme Court was not the typical sleepy judicial race.¹⁵³

Leading up to the 2008 election, the public was fully engaged on the issues concerning the court. An open seat the previous year had prompted a race that was unusually expensive and negative,¹⁵⁴ reflecting the fact that the entire state was in conversation around the court’s new direction that had begun in its 2004 term. Justice Louis Butler had been appointed in 2004 by Democratic Governor Jim Doyle to a vacant seat on the court created by the elevation of Justice Diane S. Sykes to the U.S. Court of Appeals for the Seventh Circuit.¹⁵⁵ Justice Butler’s appointment, along with the jurisprudential shift of previously conservative-leaning Justice N. Patrick Crooks, led to a 4–3 non-originalist/purposivist majority on the court.¹⁵⁶ This new majority then began rendering sweeping, transformative decisions¹⁵⁷—often quite detached from originalist/textualist principles—which prompted significant debate across

151. Katelyn Ferral, *As Wisconsin’s Supreme Court Reaches New Levels of Discord, Voters Navigate Another Heated Election*, CAP. TIMES (Mar. 30, 2016), https://madison.com/ct/news/local/govt-and-politics/as-wisconsin-s-supreme-court-reaches-new-levels-of-discord/article_5f2f4d79-29d6-5603-9587-8e1518dd9d38.html [<https://perma.cc/ZDU3-B58Z>].

152. Dee J. Hall, *Gableman Wins Supreme Court Race*, CHIPPEWA HERALD (Apr. 2, 2008), https://chippewa.com/news/gableman-wins-supreme-court-race/article_572804b4-4352-53c4-a15b-627dc9608ce5.html [<https://perma.cc/UX8D-29VN>].

153. See Shawn Johnson, *For Contentious Supreme Court Race, Stage Was Set a Decade Ago*, WIS. PUB. RADIO (Apr. 2, 2018, 9:04 AM), <https://www.wpr.org/contentious-supreme-court-race-stage-was-set-decade-ago> [<https://perma.cc/3DDX-S8BJ>].

154. See *id.*

155. *Supreme Shift*, ISTHMUS (Dec. 8, 2005), <https://isthmus.com/archive/from-the-archives/state-highest-court-is-evolving-in-ways-that-hearten-convicts-and-give-fits-to-business-groups/> [<https://perma.cc/ZP4G-KQGC>].

156. *Id.*

157. See *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440; *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523; *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582; *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.

Wisconsin. Newspapers,¹⁵⁸ law reviews,¹⁵⁹ think tanks,¹⁶⁰ stakeholder groups¹⁶¹—all featured in-depth reporting and commentary on the court’s new direction, far beyond the attention normally paid to the third branch. Moreover, this public discussion had a distinctly jurisprudential cast. People were actually talking about cases—as the sub-head in one newsmagazine put it, “Supreme shift: The state’s highest court is evolving in ways that hearten convicts and give fits to business groups.”¹⁶²

After some years, this Wisconsin conversation transitioned from a general discussion about the court’s direction to the specific Wisconsin Supreme Court contest between Justice Butler and his challenger, Michael Gableman, a little-known northern Wisconsin trial-court judge from a small county.¹⁶³ Advertising spending in the race set a new record,¹⁶⁴ and a national advocacy group concluded it was “the most expensive and hardest fought race” nationally of its type.¹⁶⁵ Most importantly for our purposes, the election put the questions around judicial philosophy squarely before the voters; as one newspaper reported:

Michael Gableman [characterized] his campaign against

158. Michael B. Brennan, *Are Courts Becoming Too Activist?*, MILWAUKEE J. SENTINEL, Oct. 2, 2005, at 1J; David Ziemer, *Crooks Emerges as Court’s Key Swing Vote*, WIS. L.J. (Aug. 24, 2005), <https://wislawjournal.com/2005/08/24/crooks-emerges-as-courtsquos-key-swing-vote/> [<https://perma.cc/9LYX-RKY8>]; *Alabama North*, WALL STREET J. (Aug. 9, 2005), <https://www.wsj.com/articles/SB112354398666108112> [<https://perma.cc/YEK4-E2W9>].

159. Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court’s Critics*, 91 MARQ. L. REV. 425, 425 (2007); Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 725–26 (2006); Donald G. Gifford, *The Death of Causation: Mass Products Torts’ Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 985 (2006).

160. RICK ESENBERG, *A COURT UNBOUND? THE RECENT JURISPRUDENCE OF THE WISCONSIN SUPREME COURT* (2007), <https://fedsoc.org/commentary/publications/a-court-unbound-the-recent-jurisprudence-of-the-wisconsin-supreme-court> [<https://perma.cc/79A7-KNXM>]; Rick Esenberg, *Activist vs. Restraint: Where is Wisconsin’s Court Headed?*, WIS. INT., Fall 2007, at 15, 15; Diane S. Sykes, *A New Direction for the Wisconsin Supreme Court*, WIS. INT., Fall 2007, at 11, 11.

161. Jim Hough, *Liability Reform Summary 2005–2006*, WIS. DEF. COUNS., Spring 2006, <https://www.wdc-online.org/wdc-journal/archived-editions/liability-reform-summary-2005-2006> [<https://perma.cc/ZLR8-QC9J>]; Tom Still, *Business Liability Law Complaints Grow with State Supreme Court Decisions*, WIS. TECH. COUNCIL (Aug. 18, 2005), <https://wisconsintechcouncil.com/business-liability-law-complaints-grow-with-state-supreme-court-decisions/> [<https://perma.cc/8KFK-XUMF>].

162. *Supreme Shift*, *supra* note 155.

163. *See* Hall, *supra* note 152.

164. *Nasty Supreme Court Race Costs Record \$6 Million*, WIS. DEMOCRACY CAMPAIGN (July 22, 2008), <http://www.wisdc.org/pr072208.php> [<https://perma.cc/Q4PT-7UEE>].

165. SAMPLE, SKAGGS, BLITZER & CASEY, *supra* note 127, at 32.

Wisconsin Supreme Court Justice Louis Butler as one of very sharp contrasts in their backgrounds and judicial philosophies. The Burnett County Circuit Court judge describes himself as a judicial conservative and Butler as a judicial activist. Gableman also says he was a longtime prosecutor, while Butler was a longtime defense attorney. Butler says what Gableman really means was that he disagrees with the opinions of the state's high court.¹⁶⁶

In the end, for the first time in decades, the voters selected a challenger over an incumbent, and Judge Michael Gableman became the newest justice with a seat on the state's high court.¹⁶⁷ That type of an election seems to us to be a watershed.¹⁶⁸

C. The Takeaway

A number of the issues from the Justice Butler era have returned to the Wisconsin Supreme Court in the decade since the Justice Gableman election, and certain high-profile issues have been overturned by the new, originalist/textualist majority.¹⁶⁹ Professor Alan Ball of Marquette University has noted that the Gableman-for-Butler change led to a marked dedication to

166. *Gableman Describes Supreme Court Race as One of Stark Contrasts*, TWIN CITIES PIONEER PRESS (Mar. 12, 2008, 1:50 PM, updated Nov. 13, 2015, 6:54 PM), <https://www.twincities.com/2008/03/12/gableman-describes-supreme-court-race-as-one-of-stark-contrasts/> [<https://perma.cc/NYK7-TCJP>].

167. Hall, *supra* note 152.

168. We note in passing two other potential watershed elections: In 1986, the people of California chose not to retain three justices of the California Supreme Court, led by Chief Justice Rose Bird, over their views on the death penalty. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–33 (2001) (discussing the non-retention of Chief Justice Rose Bird and her colleagues). And in 2010 the people of Iowa chose not to retain three justices of the Iowa Supreme Court who had taken broad views of the judicial power to create rights under the state constitution. A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <https://www.nytimes.com/2010/11/04/us/politics/04judges.html> [<https://perma.cc/6XJZ-K7JB>]. These sorts of elections, where the judicial issues are put squarely before the people, seem to us to qualify as watershed moments.

169. See, e.g., *State v. Denny*, 2017 WI 17, ¶ 69, 373 Wis. 2d 390, 891 N.W.2d 144 (overturning *State v. Moran*, 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884); *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 2, 383 Wis. 2d 1, 914 N.W.2d 678 (overturning *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440).

precedent by the court's purposivists/non-originalists and a less deferential attitude toward precedent by the court's originalist/textualists.¹⁷⁰

If the Justice Gableman election was a watershed judicial election—as we argue—then the originalist/textualist justices' approach is entirely appropriate, even if their application of *stare decisis* is wanting under a traditional view, precisely because Wisconsin judges are elected. When the voters forthrightly choose to reject an incumbent justice based on his philosophy, we find it entirely reasonable to vacate the precedential value of the decisions that stemmed from that philosophy.¹⁷¹ Of course, as we noted above, in all cases, the judicial oath requires the justices to “say what the law is,” so if an unpopular pre-watershed decision is nevertheless legally correct, it must be affirmed.¹⁷² Thus, the originalist/textualist justices' approach identified by Professor Ball is only justified to the extent they believe in good faith that the prior decisions were wrong on the merits.

V. ADDRESSING QUESTIONS OF “FIRST IMPRESSION” IN OLD DOCTRINES

Our watershed-judicial-election theory is one justification for the Wisconsin Supreme Court to reconsider precedent free from the constraints of *stare decisis*. Our second, perhaps more conventional theory justifying the court avoiding *stare decisis* might be called the “question of first impression exception” to *stare decisis*.

Courts are often called upon in a particular case to address a legal question from a single perspective—for example, from the view of assuming the correctness of prior settled doctrine.¹⁷³ Yet, the ultimate correctness of a court's answer to such a question depends upon multiple perspectives: doctrinal, statutory, and constitutional. But depending on how litigants frame the

170. Alan Ball, *Is Stare Decisis Dead?*, SCOWSTATS (Mar. 28, 2017), <http://www.scowstats.com/2017/03/28/is-stare-decisis-dead/> [<https://perma.cc/N4VY-XRX2>].

171. Legal academics might find in this proposition an echo of Professor Bruce Ackerman's “constitutional moments” theory. We disclaim his theory though we understand the similarity.

172. Before the Butler–Gableman contest, the last time an incumbent justice lost reelection to the Wisconsin Supreme Court was Chief Justice George Currie in 1967. Chief Justice Currie had voted to allow the Milwaukee Braves to move to Atlanta. He then lost in an election characterized as a referendum on that decision. That referendum does not mean Chief Justice Currie's original decision was legally incorrect or that under our suggested analysis the court should have automatically overruled its previous holding. Sometimes judges must do unpopular things to vindicate the rights of the minority against the majority, or to uphold the contracts of corporations. That the people may throw a judge out of office for reaching the legally correct, but politically unpopular decision may be, to put it bluntly, just the way the world works. *See* Koehler, *supra* note 126, at 223–24.

173. *See* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 377 (2010); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

particular legal questions coming before a court, the court may consider and reconsider an issue in several different cases without ever answering a dispositive doctrinal, statutory, or constitutional question.¹⁷⁴

When a court does confront a legal issue it has addressed previously from a different perspective, traditional stare decisis doctrine requires the court to still give stare decisis effect to that precedent, even though the specific question at is one of first impression. So, for example, the Wisconsin Supreme Court engaged in a stare decisis analysis before overruling the agency-deference doctrine under a separation-of-powers rationale, although none of the court's prior agency-deference decisions had considered that specific question before.¹⁷⁵ It was, in the court's words, a question of "first impression."¹⁷⁶ Yet for a court to defer, or at least to consider whether to defer, to a previous decision on a question of first impression is in a way paradoxical. And when this paradoxical stare decisis effect is given in a case with a *constitutional* question of first impression, it arguably makes judicial precedent more fundamental than the Constitution.

To avoid that troubling result, we propose a "question of first impression" exception to stare decisis. Under this "exception," the Wisconsin Supreme Court would be justified in reconsidering precedent, without regard to stare decisis, if (1) the precedent may violate a more fundamental principle of law—say, for example, the original meaning of a provision of the Wisconsin Constitution—and (2) the potential violation is one of "first impression." Thus, under this "exception," the court would be justified in overturning prior precedent, based upon constitutional arguments of first impression, without first engaging in stare decisis analysis.

Granting stare decisis effect on questions of first impression found within settled doctrine does not meaningfully further the purposes of stare decisis, at least when those questions are constitutional questions. The rule of law—stare decisis' main end—is not advanced: the constitution is foundational law, thus deferring to incorrect judicial precedent on a novel question subverts that order. Stability and reliance are not well-advanced for a similar reason. If the proper application of the constitution may be perverted simply by accident of parties' litigation strategies, then the people's trust in the constitution as the bedrock charter of the state will be eroded. The benefits of decentralized-decision

174. This may especially be true when the court employs doctrines like constitutional avoidance, which intentionally pushes off deciding constitutional questions whenever possible.

175. *Tetra Tech EC, Inc., v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 42, 382 Wis. 2d 496, 914 N.W.2d 21.

176. *Id.*

making are also absent, given that, by definition, jurists of the past have not weighed in on questions of first impression. As for efficiency, we will concede the question-of-first-impression exception cuts against it, but submit that this end by itself could never justify stare decisis.

As with our watershed-judicial-election theory, the question-of-first-impression exception is not unknown in the law. Arguably, as-applied constitutional challenges are a rough form of the doctrine. Such challenges break down a larger question, facial constitutionality, into multiple smaller questions, constitutionality as applied to a specific subset. In this way, a court may declare a law unconstitutional as applied to one subset in case one, yet constitutional as applied to another subset in case two, without granting stare decisis effect to case one. In other words, as-applied constitutional challenges create questions of first impression within a larger body of precedent without bringing in stare decisis. So, for example, the U.S. Supreme Court held that the federal Religious Freedom Restoration Act was unconstitutional as applied to the states in *City of Boerne v. Flores*.¹⁷⁷ Yet the Court held it constitutional as applied to the federal government in both *Burwell v. Hobby Lobby Stores, Inc.*,¹⁷⁸ and *Gonzales v. O Centro*,¹⁷⁹ with of course no mention of the need to grant stare decisis effect to *City of Boerne*.

The jurisprudence of Justice Thomas provides a more direct comparison. In *Gonzalez v. Carhart*, which upheld the federal partial-birth abortion ban against a constitutional right-to-privacy challenge, Justice Thomas concurred.¹⁸⁰ He wrote separately, however, noting, “whether the Partial-Birth Abortion Ban Act of 2013 constitutes a permissible exercise of Congress’ power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.”¹⁸¹ This strongly implies that, if the Court were to look at the statute through a Commerce Clause lens, rather than a right-to-privacy lens, Justice Thomas would not feel bound to uphold against the Act, simply because of the purported stare decisis effect of *Carhart*. That is, because the question before the Court would be different and would require a different analysis, *Gonzalez* would be entitled to no stare decisis deference. A decision

177. 521 U.S. 507, 535 (1997) (concluding that the statute exceeded Congress’s Fourteenth Amendment, Section Five power).

178. 134 S. Ct. 2751, 2761 (2014).

179. 546 U.S. 418, 424 (2006).

180. 550 U.S. 124, 168–69 (2007).

181. *Id.* at 169 (Thomas, J., concurring).

on one question does not bind the Court as to future different questions about the same underlying topic.¹⁸²

Finally, the *Tetra Tech* lead opinion's approach to precedent supports the "question of first impression exception" (although it tackles a body of doctrine rather than an individual holding). There, Justice Kelly states that, although the courts have upheld and applied deference to administrative agencies for many years as a matter of common law, it was a question of "first impression" whether that deference comported with the constitutional separation-of-powers principle.¹⁸³ It then resolved the question of stare decisis in a few paragraphs, a perhaps surprising approach if the court had conceived of the doctrine in the traditional way. Yet, the court, Justice Kelly said, owed no obeisance to precedence because the previous cases did not consider the separation-of-powers question now before the court—same underlying issue, but different question. Thus, the court could take a practice that it had upheld in one context and strike down the practice when considered in a different context, just as Justice Thomas could uphold the partial-birth abortion statute in the Fourteenth Amendment context, but hold open the possibility of striking the same statute down in the Commerce Clause context if presented with the question in a future case.

We anticipate the distinction will become more prevalent and more apparent in future cases because of the trends we discussed in Part II, above. As advocates apply textualist and originalist methodologies for the first time to decades-old doctrines, there will be more "questions of first impression" about issues or provisions previously considered. Though administrative deference cases had percolated through the courts of Wisconsin for decades, *Tetra Tech* was genuinely the first case when the separation-of-powers question was squarely before the court.¹⁸⁴ We expect that the originalism-focused litigants

182. Justice Thomas also took this approach in *Troxel v. Granville*, which considered the constitutionality, under the substantive-due-process doctrine, of statutes authorizing grandparents to obtain visitation rights to their grandchildren. 530 U.S. 57, 65–66 (2000). Justice Thomas concurred in the judgment that such a statute was unconstitutional and wrote separately to note that "neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision." *Id.* at 80 (Thomas, J., concurring in the judgment). So, he would "leave the resolution of that issue for another day." *Id.*

183. *Tetra Tech EC, Inc., v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 42, 382 Wis. 2d 496, 914 N.W.2d 21.

184. It had been touched on elsewhere in separate opinions: *Operton v. Labor & Indus. Review Comm'n*, 2017 WI 46, ¶¶ 73–80, 375 Wis. 2d 1, 894 N.W.2d 426 (R.G. Bradley, J., concurring);

will bring cases that ask these sorts of “first principles” questions of long-standing doctrines for the first time.¹⁸⁵

VI. CONCLUSION

Thus we come to the question that Professor Alan Ball of Marquette University asked in a provocative post for his SCOWStat blog: “Is Stare Decisis Dead?”¹⁸⁶ Writing in March 2017, he uses the court’s then-recent decision in *State v. Denny* as a launching point to analyze forty-nine decisions from the past twenty terms wherein at least one justice substantively invoked the doctrine in his or her opinion. He suggests that there has been a “liberal–conservative role reversal on stare decisis,” that the purposivists/non-originalist justices have become defenders of judicial restraint, while the originalist/textualist justices have essentially become judicial activists “nullify[ing] or alter[ing] previous decisions as [they] saw fit.”¹⁸⁷ While we have argued that stare decisis allows for near-limitless, individualized judicial discretion, we believe that Professor Ball’s conclusion that the originalist/textualist justices are just acting “at will” is overly simplified, failing to give appropriate credence to these justices’ thoughtful attempts to apply the doctrine. Further, given that our two theories described above cannot completely displace stare decisis, we cannot say that stare decisis is dead. And while we have identified important downsides of the doctrine—that it leaves judges with near-limitless discretion—we do recognize that some conception of stare decisis is foundational to the rule of law.

DaimlerChrysler v. Labor & Indus. Review Comm’n, 2007 WI 15, ¶ 45, 299 Wis. 2d 1, 727 N.W.2d 311 (Roggensack, J., dissenting); Racine Harley–Davidson, Inc. v. Wis. Div. of Hearing & Appeals, 2006 WI 86, ¶¶ 104–113, 292 Wis. 2d 549, 717 N.W.2d 184 (Roggensack, J., concurring); Hilton v. Dep’t of Nat. Res., 2006 WI 84, ¶¶ 53–67, 293 Wis. 2d 1, 717 N.W.2d 166 (Prosser, J., concurring).

185. A broader reading of the “new questions of old doctrines” theory treads closer to questions of methodology: what happens when a court faces a case concerning a constitutional or statutory provision that has long been interpreted a certain way, but the tools of a particular modern judicial methodology (i.e., textualism or originalism) have never been applied to that clause. This eventually becomes simply the question, “What’s an originalist to do with non-originalist precedent?,” a topic explored at length elsewhere, such as Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 420 (2006), and beyond our scope.

We note only that Wisconsin courts have achieved methodological consensus for an originalist reading of non-constitutional texts, see Suhr, *supra* note 92, at 969–70, 994–95, and at least some justices are open to revisiting the court’s method for constitutional texts to establish an expectation of textualism there as well. See Coyne v. Walker, 2016 WI 38, ¶ 249 n.2, 368 Wis. 2d 444, 879 N.W.2d 606 (Ziegler, J., dissenting) (expressing “willing[ness] to reexamine the methodology this court currently employs when interpreting constitutional text.”).

186. Ball, *supra* note 170.

187. *Id.*

That said, our two theories do eliminate stare decisis' near-limitless discretion in some classes of cases, with the upshot that the justices may avoid Professor Ball's line of criticism, even as they reconsider more decisions. Indeed, looking generally at the jurisprudence of the justices, these proposals add substantial explanatory power: Chief Justice Roggensack and Justice Ziegler generally adopt an institutionalist position, willing to overturn precedent, yet also deferential to traditional notions of stare decisis.¹⁸⁸ Our proposed theory of watershed-judicial elections, defending the reversal of the Justice Butler-era cases, seems especially helpful in explaining these justices' jurisprudence. Justices Rebecca Bradley and Kelly are generally more open to reconsidering long-established doctrines in the new light of originalist or textualist analysis.¹⁸⁹ Our proposed theory addressing questions of first impression seems to explain these justices' views. We hope that, by developing these two theories here, we may assist the justices in more effectively skirting the imbroglio of stare decisis in these two types of cases.

188. *See id.*

189. *See, e.g.*, *Porter v. State*, 2018 WI 79, ¶ 74, 382 Wis. 2d 697, 913 N.W.2d 842 (R.G. Bradley & Kelly, JJ., dissenting) (questioning traditional understandings of substantive due process); *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶¶ 68–70, 73–91, 383 Wis. 2d 1, 914 N.W.2d 678 (R.G. Bradley, J., concurring) (questioning whether beyond a reasonable doubt is an appropriate burden to impose on a person challenging the constitutionality of a statute); *Operton v. Labor & Indus. Review Comm'n*, 2017 WI 46, ¶¶ 73–80, 375 Wis. 2d 1, 894 N.W.2d 426 (R.G. Bradley, J., concurring) (questioning traditional understandings of agency deference).