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SECOND GUESSING DOUBLE JEOPARDY: THE STARE DECISIS FACTORS AS PROXY TOOLS FOR ORIGINAL CORRECTNESS

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ABSTRACT

In Gamble v. United States*, the Supreme Court reaffirmed the 170-year-old dual-sovereignty doctrine. That doctrine permits both the federal and state governments—as "separate sovereigns"—to each prosecute a defendant for the same offense. Justice Thomas concurred with the majority opinion in* Gamble*, but wrote separately to reject the traditional stare decisis formulation. In particular, the factors the majority used to evaluate stare decisis, in his view, amount to nothing more than marbles placed subjectively on either side of the stare decisis balancing scale. He would have preferred, instead, an inquiry into whether the precedent was demonstrably erroneous as an original matter, and he dismissed the stare decisis factors as irrelevant to that question. Justice Thomas may be right to criticize the subjectiveness of a multifactor balancing approach to stare decisis. Yet even if doubt about the factors is warranted, this Comment contends that certain factors may still be relevant to Justice Thomas's inquiry into precedent's correctness as an original matter. In making this case, the Comment divides the stare decisis factors into three groups: a priori factors—those factors that analyze a precedent for its original correctness—a posteriori factors—which explore the effects of precedent's real-world application, and hybrid factors—which may be employed in either an a priori or a posteriori*

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manner. When factors are used in an a priori fashion, this Comment contends that they remain useful as proxies to show whether precedent was right or wrong as an original matter. On that basis, some of the factors may help jurists decide whether precedent falls within "the realm of permissible interpretation," or, in the alternative, whether the precedent is "demonstrably erroneous." It follows, therefore, that even under Justice Thomas's stare decisis approach, in which all "demonstrably erroneous precedent" would be corrected "regardless of whether other factors support overruling the precedent," certain factors remain material to his ultimate question—whether the past precedent is within "the realm of permissible interpretation."

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INTRODUCTION

When the Supreme Court considers whether to overrule a precedent, the question the Court asks is "whether *stare decisis* counsels in favor of adhering to the decision."[1] Stare decisis, Latin for "let the decision stand,"[2] is a doctrine with ancient roots.[3] It was also a principle that readily spread to the judiciary of the new American republic. In the years shortly following the Constitution's ratification, the Court grappled with whether it should freely overrule precedents, ultimately deciding to embrace the doctrine of stare decisis.[4]

Now, as then, stare decisis represents the "idea that today's Court should stand by yesterday's decisions."[5] The doctrine thus encourages "courts to stand by the thing decided and not to disturb the calm."[6] Despite its status as an ancient maxim, "*[s]tare decisis* is not an inexorable command."[7] It is rather a "principle of policy and not a mechanical formula of adherence to the latest decision."[8] Precisely because stare decisis is part policy judgment rather than a mechanical formula, an examination of why the Court might invoke or reject stare decisis as a rationale for its decision is key to understanding how the Court approaches the question of whether to overrule precedent.

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1. Knick v. Township of Scott, 139 S. Ct. 2162, 2177 (2019).

2. Sol Wachtler, *Stare Decisis and a Changing New York Court of Appeals,* 59 ST. JOHN'S L. REV. 445, 445 n.2 (1985).

3. *See* SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45-46 (Charles M. Gray ed., 1971).

4. *See* Parisis G. Filippatos, Note, *The Doctrine of Stare Decisis and the Protection of Civil Rights and Liberties in the Rehnquist Court*, 11 B.C. THIRD WORLD L.J. 335, 337 (1991); *see also* NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 52 (2019) ("[T]he founders ... considered precedent as among the primary tools of the judicial trade.").

5. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015).

6. Filippatos, *supra* note 4, at 335; *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (Amy Gutmann ed., 1997) ("The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.").

7. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

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

By custom, the Court employs a number of factors to determine whether stare decisis applies.[9] As with any multifactor test, none of the factors are dispositive, and different Justices weigh the importance of each factor in their own way.[10] For that reason, any one of the factors may be invoked in support of the Court's application (or non-application) of stare decisis. In a recent decision, the Court set forth the following list of factors: "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[11] Yet that list is nonexhaustive. From time to time, the Court has added new factors, including the precedent's "antiquity" (i.e., how much time has passed since the precedent was first established),[12] the margin of the precedent's victory,[13] the merit of the prior decision,[14] how many times the precedent has been reaffirmed,[15] and the impact of the precedent on individual liberty.[16] Thus, as the law currently

9. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 923 (2007) (Breyer, J., dissenting) ("I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case.").

10. David L. Berland, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception*, 2011 U. ILL. L. REV. 695, 701.

11. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2478-79 (2018).

12. *See* Montejo v. Louisiana, 556 U.S. 778, 792-93 (2009); *see also* South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (noting that the antiquity factor is premised on the notion that "the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity").

13. Payne v. Tennessee, 501 U.S. 808, 829-30 (1991). In that case, Chief Justice Rehnquist relied upon the fact that the prior cases were decided "by the narrowest of margins, over spirited dissents" to challenge the basic underpinnings of a decision. *Id.* at 829.

14. William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey*,* Dickerson *and the Consequences of Pragmatic Adjudication*, 1 UTAH L. REV. 53, 80 (2002).

15. Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 135 (2015) ("[R]ecent decisions should be more amenable to reconsideration than are longstanding and entrenched lines of cases."); *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 152 (2010) ("[T]he more recently the earlier case was decided, the less forcefully the stare decisis anti-overruling principle should be applied."); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 4 (2008) ("Precedent-following is very obviously a backward-looking activity: when we decide on the basis of precedent, we treat as significant the fact that essentially the same decision has been made before.").

16. Berland, *supra* note 10, at 706.

stands, the list contains at least eleven factors: (1) the quality of the precedent's reasoning, (2) the workability of the precedent, (3) the precedent's consistency with other related decisions, (4) developments since the decision was handed down, (5) reliance on the decision, (6) the precedent's original margin of victory, (7) the merit of the precedent, (8) the age of the precedent, (9) the number of times the precedent has been reaffirmed, (10) the impact of the precedent on individual liberty, and (11) substantial and ongoing criticism of the precedent.[17]

Though courts often invoke the factors *en masse*, this Comment argues that the above list actually consists of three distinct types of factors—a posteriori, hybrid, and a priori factors. Of the eleven factors, four can be categorized as purely a posteriori—meaning that the weight of those factors turns on the effects of the precedent's application in the real world.[18] The a posteriori factors look to the results of the precedent when actually applied.[19] This category includes (1) the workability of precedent, (2) developments since the decision was handed down, (3) reliance on the decision, and (4) the impact of the precedent on individual liberty. By contrast, two factors can be classified as purely a priori—meaning that they analyze precedent for its original, intrinsic legal reasoning, rather than its real-world application.[20] The a priori factors scrutinize the precedent itself, regardless of the precedent's applicable effects.[21] The (1) quality of the precedent's reasoning and (2) the merit of the precedent fall into the a priori category. Finally, the remaining five factors are hybrids. These five factors are inherently neither a priori nor a posteriori, but may be categorized as one or the other depending on how a particular Justice decides to use them. If the factor is employed to analyze precedent with regard to its practical

17. *See supra* notes 11-16 and accompanying text.

18. *See* J. Lyn Entrikin, *Global Judicial Transparency Norms: A Peek Behind the Robes in a Whole New World - A Look at Global "Democratizing" Trends in Judicial Opinion-Issuing Practices*, 18 WASH. U. GLOBAL STUD. L. REV. 55, 83 (2019).

19. A posteriori means "'[f]rom afterwards,' *i.e.*, from the effect to the cause." Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2038 (1985). Therefore, it is "[a] mode of reasoning in which one looks to results and reasons back to what might have been their cause." *Id.*

20. *See* Entrikin, *supra* note 18, at 83.

21. "In logic and law," a priori is "a term for a mode of thought or reasoning 'from before' or 'from prior principles.'" Leff, *supra* note 19, at 2048.

application, it is categorized as an a posteriori factor;[22] if used to examine a precedent's intrinsic logic without regard to its practical application, it is classified as an a priori factor.[23] This hybrid camp includes (1) the margin of victory, (2) the age of the precedent, (3) substantial and ongoing criticism, (4) the number of times the precedent has been reaffirmed, and (5) the precedent's consistency with other related decisions. By and large, these factors instruct the Court to overturn a decision only if the precedent was "*a priori* wrongly decided or *a posteriori* deleterious."[24] The following chart diagrams the three categories and their corresponding factors.

The A Priori Factors	(1) the quality of the precedent's reasoning and (2) the merit of the precedent.
The Hybrid Factors	(1) the margin of victory, (2) the age of the precedent, (3) substantial and ongoing criticism, (4) the number of times the precedent has been reaffirmed, and (5) the precedent's consistency with other related decisions.
The A Posteriori Factors	(1) the workability of the precedent, (2) developments since the decision was handed down, (3) reliance on the decision, and (4) the impact of the precedent on individual liberty.

The continuing relevance and application of these factors was placed into sharp relief when, this past term in *Gamble v. United States*, the Court confronted the question of "whether to overrule a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment" that permits successive federal and state prosecutions for the same conduct.[25] In answering that question,

22. *See supra* notes 18-19 and accompanying text.

23. *See supra* notes 20-21 and accompanying text.

24. Filippatos, *supra* note 4, at 375.

25. 139 S. Ct. 1960, 1963 (2019); *see also* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016) (discussing the history of the dual-sovereignty doctrine). The Double Jeopardy Clause of the Fifth Amendment provides that no "person [shall] be subject for the same

three of the opinions emphasized or downplayed the relevance of certain factors to advance their respective arguments. Justice Thomas's view that his colleagues failed to engage in a uniform analysis of the stare decisis factors led him to call for the end of the multifactor approach. In support of his criticism, Justice Thomas argued that when the Court "decide[s] whether the scales tip in favor of overruling precedent," the weight accorded each factor "ebb[s] and flow[s] with the Court's desire to achieve a particular end."[26] Accordingly, he denounced the Court's use of the factors as marbles, so to speak, to be placed on the stare decisis balancing scale in support of what he considered policy-oriented outcomes.[27]

In place of the balancing approach, Justice Thomas asserted that the Court should simply ask whether the precedent is "demonstrably erroneous" under "the original meaning of the text."[28] On the whole, Justice Thomas may be right to question the subjectiveness of a multifactor balancing approach to stare decisis. If anything, the weight of the various factors seems to "turn on the fundamentally competing perspectives of individual justices."[29] But even if Justice Thomas's misgivings about the multifactor balancing approach are warranted, this Comment argues that certain factors remain highly relevant to Justice Thomas's guiding inquiry—whether the precedent is correct or incorrect as an original matter.

Instead of simply casting aside all of the factors, this Comment advances the novel argument that both the a priori and hybrid factors—when used in the a priori sense—serve as useful proxy tools to decide whether precedent was rightly or wrongly decided on the merits.[30] In this regard, Justice Thomas prematurely dismissed the

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offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

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

27. *Id.*

28. *Id.* at 1989.

29. Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1030 (2018); *see also* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. (forthcoming 2020) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3517580 [https://perma.cc/6V6E-Z27Z] ("The Court's own cases do invoke reasons when they decide whether prior cases should be overruled. But there are competing sets of reasons, laid down in highly controversial cases, and they leave plenty of discretion in the hands of the Court, as evidenced from its recent disagreements.").

30. To be sure, academics have previously referred to stare decisis as a mere tool. *See* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2046 (1996) (noting that recent formulations of stare decisis

relevance of the factors writ large. To make this argument, the Comment is divided into five Parts. Part I briefly summarizes the facts of *Gamble v. United States* and discusses the ultimate outcome of the case. Part II contextualizes Justice Thomas's dismissal of the a priori and hybrid factors by summarizing his approach to stare decisis. Part III explores Justice Alito's use of both the a priori and hybrid factors as proxies to support the dual-sovereignty doctrine's correctness. It also highlights the majority's use of the a posteriori factors to show why they have no role under Justice Thomas's approach. Part IV reviews the role of the factors as proxies for original error in Justice Gorsuch's analysis of the dual-sovereignty doctrine. Likewise, the a posteriori factors are explored to accentuate their irrelevance to the demonstrably erroneous approach to stare decisis. Part V describes Justice Ginsburg's evaluation of the factors in her argument for the dual-sovereignty doctrine's wrongness. In conclusion, this Comment contends that Justice Thomas may be right to second guess the subjectiveness of the multifactor balancing approach to stare decisis. In the end, however, his labeling of the factors as wholly irrelevant overlooks some of the factors' value as tools to inquire whether precedent is, in his words, "demonstrably erroneous"—meaning "outside the realm of permissible interpretation."[31]

I. THE FACTS AND THE DECISION THAT CAUSED MR. GAMBLE TO SEE DOUBLE

In 2008, an Alabama jury convicted Terance Martez Gamble of second-degree robbery, a felony offense.[32] Seven years later, Mr. Gamble was "pulled ... over for a faulty headlight."[33] The police

conceive the doctrine as a pragmatic "tool to accomplish certain specific goals"); *see also* Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 97 (2003) (stating that courts have "a variety of mechanisms" and "tools" under the traditional stare decisis doctrine to either evade or uphold precedent). Yet there is a conspicuous absence of scholarship dedicated to exploring the factors as proxies to adjudge the rightness or wrongness of precedent on the merits.

31. *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring); *see* DUXBURY, *supra* note 15, at 17 ("Precedents, therefore, are best described not as law but as evidence of how judges have interpreted the law.").

32. Petition for Writ of Certiorari at 3, *Gamble*, 139 S. Ct. 1960 (No. 17-646).

33. Brief for Petitioner at 2, *Gamble*, 139 S. Ct. 1960 (No. 17-646).

officer, upon approaching Mr. Gamble's vehicle, smelled marijuana emanating from the car.[34] The officer's subsequent search of the vehicle revealed the suspected marijuana along with a 9mm handgun.[35] The state of Alabama prosecuted Mr. Gamble for possessing marijuana.[36] In addition, Mr. Gamble was prosecuted for violating the state's felon-in-possession-of-a-firearm statute.[37] That law provides that no one convicted of "a crime of violence ... shall own a firearm or have one in his or her possession."[38] As a result of the Alabama prosecution, Mr. Gamble was convicted and "received a one-year sentence."[39]

While the state prosecution was pending, the federal government also prosecuted Mr. Gamble for violating its own felon-in-possession-of-a-firearm statute.[40] Sure enough, the federal charge was based on "the same incident of November 29, 2015 that gave rise to his state court conviction."[41] In his motion to dismiss the federal indictment, Mr. Gamble argued that the federal prosecution violated his "Fifth Amendment [right] against being placed twice in jeopardy for the same crime."[42] But, as the district court recognized, under the long-standing dual-sovereignty doctrine, a state may prosecute a defendant under state law even if the federal government has prosecuted him for the same conduct under a federal statute—and vice versa.[43] The court, although sympathetic to "concern[s] over the possible abuses of dual prosecutions," went on to state that "until the Supreme Court overturns" the binding

34. Petition for Writ of Certiorari, *supra* note 32, at 3.

35. *Id.*

36. *Id.*

37. *Id.*

38. ALA. CODE § 13A-11-72(a) (2015); *see also* § 13A-11-70(2) (defining "crime of violence" to include robbery). According to Alabama's Supreme Court, firearm is interpreted to include a "pistol." *See* Ex Parte Taylor, 636 So. 2d 1246, 1246 (Ala. 1993).

39. Petition for Writ of Certiorari, *supra* note 32, at 4.

40. The federal law forbids those convicted of "a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1), (9); *see also* Kayla Mullen, Gamble v. United States*: A Commentary*, 14 DUKE J. CONST. L. & PUB. POL'Y 207, 208-09 (2019) (discussing the facts and the criminal standards).

41. Petition for Writ of Certiorari, *supra* note 32, at 4.

42. *Id.*

43. United States v. Gamble, No. 16-00090-KD-B, 2016 WL 3460414, at *2 (S.D. Ala. June 21, 2016), *aff'd*, 2017 WL 3207127 (11th Cir. 2017), *aff'd*, 139 S. Ct. 1960 (2019).

precedent, Mr. Gamble's "double jeopardy claim must fail."[44] Seeing the writing on the courtroom wall, Mr. Gamble entered into a conditional guilty plea in the federal proceeding, reserving the right to challenge the constitutionality of the dual-sovereignty doctrine.[45]

Unfortunately for Mr. Gamble, his argument that the federal prosecution violated "his rights pursuant to the Double Jeopardy clause of the Fifth Amendment" suffered the same fate in the Eleventh Circuit Court of Appeals as it did in the district court.[46] The Eleventh Circuit dutifully applied binding Supreme Court precedent and concluded "that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns."[47] Accordingly, "until the Supreme Court overturns" its dual-sovereignty doctrine, the federal government could prosecute "[Mr.] Gamble for the same conduct for which he had been prosecuted and sentenced for by the State of Alabama."[48] Once again, Mr. Gamble had run into the obstacle of stare decisis.

With nowhere to go but up, Mr. Gamble petitioned the Supreme Court for review. His petition explicitly called for "[t]he separate-sovereigns exception to the Double Jeopardy Clause" to "be overruled."[49] After at least four Justices agreed to review his petition, Mr. Gamble's brief directly confronted stare decisis. He argued that "[*s*]*tare decisis* concerns should not keep the Court from overruling the separate-sovereigns exception."[50] In this respect, the brief contended that Mr. Gamble's "case exemplifies nearly all of the traditional justifications for overruling an erroneous precedent."[51] His brief invoked a number of the stare decisis factors—including at least one from each of the three categories. For instance, he invoked an a priori factor by arguing that the dual-sovereignty doctrine "developed without any thorough consideration of constitutional text

44. *Id.*

45. Petition for Writ of Certiorari, *supra* note 32, at 4.

46. *Id.* at 5 (citation omitted).

47. United States v. Gamble, No. 16-16760, 2017 WL 3207127 (11th Cir. July 28, 2017) (citing Abbate v. United States, 359 U.S. 187, 195 (1959)), *aff'd*, 139 S. Ct. 1960 (2019).

48. *Id.*

49. Petition for Writ of Certiorari, *supra* note 32, at 5.

50. Brief for Petitioner, *supra* note 33, at 7.

51. *Id.* at 31.

and original meaning."[52] Likewise, he relied upon three a posteriori factors—that the doctrine is "the product of a bygone era.... It produces unfair and unworkable results. And it implicates no reliance interests."[53] Finally, one hybrid factor was mentioned—the doctrine "was built on a jurisprudential foundation that crumbled when the Double Jeopardy Clause was incorporated against the states."[54]

At first blush, it may seem ambitious to argue that five factors from each of the three categories called for overruling the dual-sovereignty doctrine. Yet Gamble's attempt to undermine the dual-sovereignty doctrine with an a priori factor, multiple a posteriori factors, and a hybrid factor wisely catered to different Justices' jurisprudential philosophies.[55] Indeed, the use of the factors in this way was likely a prudent decision, as it allows jurists with differing views of stare decisis to decide whether the precedent should be reaffirmed or overruled based on either practical or original correctness considerations. What is more, the brief took the seemingly ambitious argument a step further—stating that "[f]or *any* and *all* of these reasons, *stare decisis* should not prevent this Court from overruling the separate-sovereigns exception."[56] The suggestion that *any one* of the factors could tip the stare decisis scale in favor of scuttling the dual-sovereignty doctrine supports Justice Thomas's contention that different Justices will subjectively weigh different traditional factors to align with their own "desire to achieve a particular end."[57]

On the flip side, the brief focused on multiple factors to demonstrate that the dual-sovereignty doctrine was wrong as an original matter. The first factor it analyzed was the quality of the precedent's reasoning.[58] As that factor falls within the a priori category, it is no surprise that its invocation was tethered to an argument that the dual-sovereignty doctrine was wrong on the merits from the

52. *Id.*
53. *Id.* at 31-32.
54. *Id.* at 31.
55. *See infra* Parts II-V.
56. Brief for Petitioner, *supra* note 33, at 32 (emphasis added).
57. Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).
58. Brief for Petitioner, *supra* note 33, at 32.

very beginning.[59] The brief also marshaled the hybrid doctrinal changes factor—that incorporation of the Fifth Amendment undermined the original doctrinal underpinnings of the dual-sovereignty doctrine.[60] Put differently, incorporation undercut the original rationale for the dual-sovereignty rule, because the Double Jeopardy Clause now applied to both state and federal governments. Use of the hybrid factor in this way placed it on the a priori rather than the a posteriori side of the divide, as the factor indicated defects in legal reasoning.

Gamble's brief went on to cite additional hybrid factors to emphasize how erroneous the dual-sovereignty doctrine was from the outset.[61] Those factors included the narrow margin of victory and the dual-sovereignty doctrine's substantial and ongoing criticism.[62] In this situation, both hybrid factors were used to challenge the original correctness of the dual-sovereignty doctrine. The margin of victory factor was utilized to call attention to "ill-considered dicta" upon which the doctrine was constructed.[63] Likewise, the ongoing criticism factor was invoked to emphasize that the doctrine was "solidified through a series of decisions that ... ignored prior precedents, and never meaningfully engaged with the text or original meaning of the Double Jeopardy Clause."[64]

Despite Mr. Gamble's persuasive brief, seven Justices voted to affirm the dual-sovereignty doctrine.[65] In doing so, Justice Alito's majority opinion and Justices Ginsburg's and Gorsuch's dissents relied on the stare decisis factors both to assess the precedent's real-world effects and to decide whether the precedent was rightly or wrongly decided as an original matter.[66] As a result, this Comment contends that some of the stare decisis factors may serve a valuable purpose even under Justice Thomas's approach. If the a priori and hybrid factors are used as proxies to show that the precedent was right or wrong as an original matter, they are relevant to the

59. *See id.*
60. *Id.* at 31-32.
61. *See Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring).
62. *See* Brief for Petitioner, *supra* note 33, at 33-35.
63. *Id.* at 32-33.
64. *Id.*
65. *See Gamble*, 139 S. Ct. at 1963.
66. *See id.* at 1969, 1993, 2005-06.

question of whether a decision is "demonstrably erroneous." To understand why Justice Thomas dismissed all of the factors in the first place, however, a thorough understanding of his approach to stare decisis is a prerequisite.

II. JUSTICE THOMAS'S CONCURRENCE AND "DEMONSTRABLY ERRONEOUS" PRECEDENT

In *Gamble*, Justice Thomas concurred with the majority but wrote "separately to address the proper role of the doctrine of *stare decisis*."[67] Justice Thomas argued that the "typical formulation" of stare decisis failed to "comport with [the Court's] judicial duty under Article III."[68] The judiciary, in his view, is beholden to "the text of the Constitution and other duly enacted federal law."[69] Prudential considerations (represented by the a posteriori factors) thus should not stand in the way of correcting an erroneous decision. Instead, for Justice Thomas, the Court must always "adhere[ ] to the correct, original meaning of the laws."[70] To carry out the judicial duty properly conceived, Justices must be willing to "'repudiate[ ]' constitutional doctrine inconsistent with the Constitution."[71] In other words, there must be no hesitation to correct a precedent's reasoning, if, as an original matter, it is "demonstrably erroneous."[72]

In Justice Thomas's view, a precedent is demonstrably erroneous when it is "outside the realm of permissible interpretation."[73] Under

67. *Id.* at 1981 (Thomas, J., concurring).

68. *Id.*; *see also* Baude, *supra* note 29, at 8 ("Justice Thomas argued that judges have an obligation—not just a *power*, but a *duty*—to disregard and overrule any precedent that is 'demonstrably erroneous.'").

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

70. *Id.*

71. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1929 n.35 (2017).

72. *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring); *see* DUXBURY, *supra* note 15, at 27-28 ("[C]ourts ought to be able to overrule precedents, their own precedents included, in order to correct earlierprecedents which misrepresent the range of legitimate judicial discretion on particular points of law."); *see also* Baude, *supra* note 29, at 9 (summarizing Justice Thomas's approach by stating: "[T]o the extent that a precedent reaches the demonstrably wrong answer about a statute or constitutional provision, it is contrary to the law, and judges should follow the law rather than the precedent").

73. *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring); *see also* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 N.W. U. L. REV. 803, 843 (2009) ("When the original meaning is uncertain, there is a far stronger argument for

Justice Thomas's approach, then, the "traditional tools of legal interpretation" (such as the canons of construction) are used to determine whether an earlier decision is within the realm of permissibility.[74] As long as the prior decision is "within that range of permissible interpretations," then the "precedent is relevant" because "reasonable people" can "arrive at different conclusions."[75] Put another way, "when a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law."[76] Justice Thomas thus endorsed a simple rule: "When faced with a demonstrably erroneous precedent ... [w]e should not follow it."[77] With his view of the proper formulation of stare decisis on the table, Justice Thomas next explained the pitfalls inherent to the multifactor balancing approach to stare decisis.

At the outset, Justice Thomas argued that the factorial approach to stare decisis is a "principle of policy."[78] The weight accorded to the factors "ebb[s] and flow[s] with the Court's desire to achieve a particular end."[79] Justice Thomas would do away with all "demonstrably erroneous" precedent, "regardless of whether other factors support overruling the precedent."[80] Adherence to "demonstrably erroneous decisions" simply because more factors weigh on one side of the stare decisis scale, in his view, cloaks "incorrect precedents" in a "veneer of respectability."[81] Indeed, Justice Thomas's foremost

following precedent-provided that it is within the range of uncertainty regarding the original meaning.").

74. *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring).

75. *Id.* at 1986 (citing Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 11 (2001)). It is worth mentioning that originalism is in no way incompatible with precedent. In fact, originalism "places a premium on precedent," especially when there is historical doubt about whether overruling the precedent would deviate from "historically-settled meaning." Barrett, *supra* note 71, at 1923.

76. Caleb Nelson, *supra* note 75, at 8.

77. *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring); *see also* Baude, *supra* note 29, at 2 (criticizing Justice Thomas's approach because his proposal "is neither a regime of adherence to precedent, nor a regime without precedent, but rather a regime in which individual Justices have substantial discretion whether to adhere to precedent or not").

78. *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring) (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 363 (2010)).

79. *Id.*

80. *Id.* at 1984.

81. *Id.* at 1981.

critique of the factorial approach is that it privileges precedent over the original meaning of the text. For Justice Thomas, then, the Court should always correct demonstrably erroneous precedent regardless of what the factors suggest.[82] The duty to correct demonstrably erroneous decisions flows "directly from the Constitution's supremacy over other sources of law."[83] In this respect, Justice Thomas claimed that under his stare decisis formulation, no factor is ever required to depart from demonstrably erroneous precedent.[84] Instead, "upholding the law's original meaning is reason enough to correct course."[85]

When expounding his theory of stare decisis, Justice Thomas did not explain why, exactly, certain factors that explore the original correctness of the precedent could not serve as useful proxy tools. As this Comment contends, there is no apparent reason why both the a priori and hybrid factors cannot be used as proxy tools to channel whether precedent is, in his words, "demonstrably erroneous."[86] In fact, a close analysis of the three other opinions in *Gamble* shows that Justices Alito, Gorsuch, and Ginsburg used some of the factors as proxy tools for original correctness rather than as prudential marbles to be placed on the stare decisis balancing scale. This analysis will also demonstrate why—according to Justice Thomas's approach—the a posteriori factors are irrelevant to the question of whether to overrule demonstrably erroneous precedent. This Comment thus turns to Justice Alito's use of the a priori and hybrid factors as proxy tools for the correctness of the dual-sovereignty doctrine on the merits. It also will touch on Justice Alito's use of the

82. *See id.*

83. *Id.* at 1984.

84. *See id.* at 1981-84. To be clear, just because Justice Thomas claims that the factors are irrelevant, does not mean that stare decisis more generally is meaningless under his approach. Of course, stare decisis would be pointless "if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter." Nelson, *supra* note 75, at 8; *see also* Herr v. U.S. Forest Serv., 803 F.3d 809, 817 (6th Cir. 2015) (Sutton, J.) ("A critical feature of stare decisis—perhaps the salient feature of it—is that it requires courts to preserve error."); DUXBURY, *supra* note 15, at 23 ("*[I]f* precedents had absolutely no capacity to constrain, there would be no point to the doctrine of *stare decisis*."); McGinnis & Rappaport, *supra* note 73, at 829 ("[P]recedent is authorized by the original meaning of the Constitution.").

85. *Gamble*, 139 S. Ct. at 1986 (Thomas, J., concurring).

86. *Id.* at 1981.

a posteriori factors to emphasize their irrelevance to Thomas's approach.

III. THE MAJORITY'S USE OF THE FACTORS AS PROXIES FOR ORIGINAL CORRECTNESS

Justice Alito's majority opinion recognized right away that the case was not simply one about criminal procedure, but that it also implicated stare decisis. In the first sentence of his opinion, he framed *Gamble* as concerning "whether to overrule a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment."[87] After surveying the text and history of the Double Jeopardy Clause, the majority concluded that "a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate."[88] On this analysis, the majority was probably convinced that the doctrine was correct as an original matter. Later in the opinion, however, Justice Alito returned to the issue of stare decisis, arguing that it presented yet "another obstacle" in the way of overturning the dual-sovereignty doctrine.[89]

Justice Alito began his stare decisis analysis by positing that adherence to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[90] This statement, of course, reinforces Justice Thomas's criticism of the factors as mere prudential marbles used to justify policy-oriented results. In the next sentence of the opinion, however, Justice Alito refocused his analysis on the merits of the dual-sovereignty doctrine—stating that "[o]f course, it is also important to be right."[91] The majority then invoked several a priori and hybrid factors in support of the dual-sovereignty doctrine's original correctness.

First among these hybrid factors was the "antiquity" of the precedent.[92] In this situation, this hybrid factor should be categorized as a priori, given that the majority used continued adherence to a

87. *Id.* at 1963 (majority opinion).
88. *Id.* at 1967.
89. *Id.* at 1969.
90. *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).
91. *Id.*
92. *Id.* (quoting Montejo v. Louisiana, 556 U.S. 778, 792 (2009)).

dated precedent as evidence of the decision's original correctness.[93] The majority assumed that an erroneous decision would have been corrected at some point during the precedent's protracted existence.[94] In other words, jurists year after year would not have continued to both apply and rely upon foolhardy precedent if it were demonstrably erroneous as an original matter. Justice Alito adopted that understanding of the hybrid factor as he contended that the strength of precedent grows stronger with age.[95]

The majority also referred to how many times the dual-sovereignty doctrine had been reaffirmed.[96] Reaffirmation is a hybrid factor, as it can be used to highlight either prudential or merit-based considerations. In *Gamble*, the majority used the factor to support the original correctness of the precedent.[97] In Justice Alito's words, any argument that a precedent is erroneous must be "better than middling" to provide "enough force to break a chain of precedent linking dozens of cases over 170 years."[98] Applying that rationale, the majority determined that contrary evidence did not "come close to settling the historical question with enough force to meet Gamble's particular burden under *stare decisis*."[99] The Court's use of these hybrid factors to inspect precedent's original correctness is unsurprising. A uniform series of decisions is "particularly strong evidence of the correctness of a particular rule *precisely because* the judges in the series would have overruled decisions that they deemed demonstrably erroneous."[100] The precedent's continued reaffirmation, then, served as a proxy for whether that precedent was correctly decided on the merits and not merely to show that the precedent had grown unworkable in the present day.

The Court next considered the "developments since the decision was handed down" factor. This hybrid factor may be used either to inspect the original correctness of precedent or to call attention to

93. *See id.*
94. *See id.*
95. *See id.*
96. *Id.*
97. *See id.*
98. *Id.*; *see also* Mullen, *supra* note 40, at 209-13 (surveying the precedential history behind the current dual-sovereignty doctrine).
99. *Gamble*, 139 S. Ct. at 1974.
100. Nelson, *supra* note 75, at 36.

precedent's real-world effects in light of surrounding doctrinal change. Gamble's brief had used this factor in the a priori sense, arguing that incorporation of the Fifth Amendment to the states[101] "washed away any theoretical foundation for the dual-sovereignty rule."[102] The majority responded to this argument, however, by pointing out that "the premises of the dual-sovereignty doctrine have survived incorporation intact."[103] In the majority's view, "there is no logical reason" to depart from an originally correct doctrine that has withstood the test of doctrinal change.[104] In short, Gamble's "incorporation-changes-everything argument trades on a false analogy."[105]

When the majority finally turned to Gamble's a posteriori factorial arguments, it swept them aside as being outranked by the dual-sovereignty doctrine's a priori correctness. For instance, Mr. Gamble argued that the "far-reaching systemic and structural changes"[106] resulting from the "proliferation of federal criminal law"[107] should strip the dual-sovereignty doctrine of its stare decisis protection.[108] Though the changed circumstances argument was naturally a posteriori—as the described changes in federal law came decades after the Court first recognized the doctrine—the majority rejected the argument's force.[109] The "argument obviously assume[d] that the dual-sovereignty doctrine was legal error from the start,"[110] making any a posteriori considerations "only as strong as Gamble's argument about the original understanding of double jeopardy rights"—"an argument that [the Court] ... found wanting."[111] Justice Alito's summary dismissal of Gamble's a posteriori argument exhibits his preference for a priori considerations of correctness. But even if the majority *had* considered the practical effects engendered

101. In *Benton v. Maryland*, the Supreme Court incorporated the Double Jeopardy Clause to the states. 395 U.S. 784, 794 (1969).
102. *Gamble*, 139 S. Ct. at 1979.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1980 (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018)).
107. *Id.* at 1979.
108. *Id.* at 1979-80.
109. *See id.*
110. *Id.* at 1980.
111. *Id.*

by changed circumstances, this sort of a posteriori inquiry is untethered from correctness as an original matter, and thus is not the sort of factor relevant to Justice Thomas's analysis of stare decisis.

In sum, the majority opinion invoked some of the factors to evaluate the original correctness of the dual-sovereignty doctrine. Surprisingly, however, the majority did not entertain many of the a posteriori factors—including reliance, workability, margin of victory, or impact on individual liberty. If the factors were truly mere marbles to be placed on the prudential scale, one might have expected all the applicable factors from each of the three categories to play a role in the equation. But as Justice Alito himself stated, what matters most is whether the dual-sovereignty doctrine was correct—according to its "original understanding."[112] In his view, then, it appears the a priori factors sit atop the factorial hierarchy, along with the hybrid factors when used to explore the original correctness of a precedent. The majority's treatment of the factors as proxy tools for original correctness rather than balancing marbles thus calls into question Justice Thomas's dismissal of their relevance. Put another way, the a priori and the hybrid factors bolstered the majority's conclusion that the dual-sovereignty doctrine fell within the range of permissibility and was far from demonstrably erroneous.

IV. JUSTICE GORSUCH'S DISSENT: THE FACTORS AS ORIGINAL CORRECTNESS PROXY TOOLS

In his dissent, Justice Gorsuch condemned the dual-sovereignty doctrine by arguing that the exception "to the bar against double jeopardy finds no meaningful support in the text of the Constitution, its original public meaning, structure, or history."[113] After dismissing the majority's countervailing arguments, Justice Gorsuch opined that "the government is left to suggest that we should retain the separate sovereigns exception under the doctrine of *stare decisis*."[114] To be sure, Justice Gorsuch noted that the government's stare

112. *Id.*
113. *Id.* at 1996 (Gorsuch, J., dissenting).
114. *Id.* at 2005.

decisis defense was not meritless, conceding that "[s]tare decisis has many virtues."[115] He argued, however, that "judges swear to protect and defend the Constitution," not erroneous precedent.[116] Because "the Constitution as originally adopted and understood did *not* allow successive state and federal prosecutions for the same offense," Justice Gorsuch concluded that he need not blindly adhere to the dual-sovereignty doctrine.[117]

Nothing stopped the Justice from ending his analysis there. If he were so inclined, he simply could have adopted Justice Thomas's view that "demonstrably erroneous precedent" should be corrected "regardless of whether other factors support overruling the precedent."[118] Justice Gorsuch, nevertheless, went on to analyze several of the stare decisis factors—considering them probative in his inquiry into the dual-sovereignty doctrine's original correctness.[119]

He began his analysis with the a priori "quality of [the] reasoning" factor.[120] In doing so, Justice Gorsuch pointed out that the Court had previously relied on dicta from nineteenth-century opinions to reaffirm the dual-sovereignty doctrine.[121] He argued that the Court "normally" does not "give precedential effect to such stray commentary,"[122] given that the Court often fails to consult the "original meaning" and "the relevant historical sources before offering its dictum."[123] The Court's reliance on this dubious authority over the years thus undermined the quality of the reasoning behind the precedent. It follows that Justice Gorsuch's use of this a priori factor was as a proxy tool to evaluate the dual-sovereignty doctrine's original error.

For Justice Gorsuch, the hybrid margin of victory factor mattered too. He used the factor as a proxy to reveal the precedent's original wrongheadedness rather than to highlight real-world effects stemming from the doctrine. In particular, he noted that the prior cases

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 1984 (Thomas, J., concurring).
119. *See id.* at 2006-09 (Gorsuch, J., dissenting).
120. *Id.* at 2006 (quoting Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2479 (2018)).
121. *See id.*
122. *Id.*
123. *Id.* at 2007.

affirming the dual-sovereignty doctrine "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."[124] Those dissenting opinions, in short, highlighted the shaky ground upon which the precedent was built.[125] Likewise, he invoked the "traditional developments in the law" hybrid factor as a proxy to undercut the dual-sovereignty doctrine's doctrinal underpinnings. According to Justice Gorsuch, after incorporation, the "premise" that the Double Jeopardy Clause only applied to the federal government "fell away."[126] For that reason, then, the dual-sovereignty doctrine's underlying rationale, although questionable from the beginning, was certainly wrong after incorporation.[127]

Justice Gorsuch also examined a posteriori factors to challenge the dual-sovereignty doctrine. The first of the two he marshaled was the "far-reaching systemic and structural changes" factor.[128] In his mind, the proliferation of federal criminal statutes meant that today, virtually every American could be "indicted for some federal crime."[129] Other things being equal, then, structural and doctrinal change supported overturning the dual-sovereignty doctrine because the world today is a different place.[130] Justice Gorsuch also analyzed the "reliance" factor.[131] For him, the a posteriori reliance factor could not justify continued adherence to the dual-sovereignty doctrine, as prosecutors are "the only people who have relied on the separate sovereigns exception."[132] He concluded that stare decisis should present no obstacle because the "Court has long rejected the idea that 'law enforcement reliance interests outweig[h] the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.'"[133] Put another way, Justice Gorsuch used the fact that only prosecutors rely on the doctrine to support his

124. *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 828-29 (1991)).
125. *See id.*
126. *Id.* at 2008.
127. *See id.*
128. *Id.* (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018)).
129. *Id.* (quoting William N. Clark & Artem M. Joukov, *The Criminalization of America*, 76 ALA. LAW. 225, 225 (2015)).
130. *See id.*
131. *Id.*
132. *Id.*
133. *Id.* at 2008-09 (quoting Arizona v. Gant, 556 U.S. 332, 350 (2009)).

view that "[i]t is not for this Court to reassess" the Constitution and the Bill of Rights "to make the prosecutor's job easier."[134]

In sum, Justice Gorsuch analyzed a priori, hybrid, and a posteriori factors to call for the overruling of the dual-sovereignty doctrine. More to the point, he used both the a priori and hybrid factors to support his conclusion that the dual-sovereignty doctrine "was wrong when it was invented, and it remains wrong today."[135] While his analysis of the a posteriori factors clearly would not appeal to Justice Thomas,[136] his use of other factors as original correctness proxy tools calls into question Justice Thomas's dismissal of the remaining factors as wholly irrelevant. As Justice Gorsuch's opinion makes clear, some factors are valuable for their ability to probe a decision's rightness or wrongness as an original matter.

V. JUSTICE GINSBURG'S DISSENT AND THE IRRELEVANCE OF THE A POSTERIORI FACTORS

Rather than adhere to the "misguided [dual-sovereignty] doctrine," Justice Ginsburg would have held that "the Double Jeopardy Clause bars 'successive prosecutions [for the same offense] by parts of the whole USA.'"[137] She explicitly questioned the dual-sovereignty doctrine's "premise,"[138] disputing that the federal and state governments "must be allowed to vindicate—a distinct interest in enforcing [their] own criminal laws."[139] Rather, in her view, "when Federal and State Governments prosecute in tandem, [it] is the same as it is when either prosecutes twice."[140] Despite casting doubt upon the correctness of the dual-sovereignty doctrine, Justice Ginsburg still conceded that the "doctrine ... has been embraced repeatedly by the Court."[141] Nevertheless, she "would not cling to" the "ill-advised

134. *Id.* at 2009.
135. *Id.*
136. *See supra* notes 68-72 and accompanying text.
137. *Gamble*, 139 S. Ct. at 1989 (Ginsburg, J., dissenting) (quoting Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (2016)).
138. *Id.* at 1991.
139. *Id.*
140. *Id.*
141. *Id.* at 1993.

decisions"[142] that reaffirmed the dual-sovereignty doctrine, as "'*[s]tare decisis* is not an inexorable command.'"[143]

Given her view that the factors cut against the dual-sovereignty doctrine, Justice Ginsburg treated stare decisis as no command at all. Even still, like Justice Alito, Justice Ginsburg was conspicuously selective about which factors to deploy. She first invoked the a priori quality of the reasoning factor, calling attention to the doctrine's ill-founded basis by pointing out that "the Court relied on dicta from 19th-century opinions" to adopt and reaffirm the dual-sovereignty doctrine.[144] In this respect, Justice Ginsburg argued that because the Court relied on dicta, by default, "the Court gave short shrift to contrary authority" that supported overruling the doctrine.[145] Thus, the a priori quality of the reasoning factor, in her view, served as a proxy for the doctrine's original error.

Justice Ginsburg next considered the hybrid doctrinal change factor. In her assessment, the incorporation of the Fifth Amendment to the states left the dual-sovereignty doctrine a sort of "legal last-man-standing for which we sometimes depart from *stare decisis*."[146] Unlike Justice Gorsuch, Justice Ginsburg appeared to use the hybrid factor less to explore the original correctness of the doctrine, but more to highlight how the doctrine has applied in a changing world. She noted that the doctrine originally "restrained only federal, not state, action."[147] After incorporation, both the state and the federal governments were restrained by the Double Jeopardy Clause, yet criminal prosecution by both sovereignties has only escalated for the same crime.[148] For Justice Ginsburg, the hybrid doctrinal change factor served to highlight real-world change more so than original incorrectness. Under Justice Thomas's approach, then, the hybrid factor used in this way would be irrelevant to his ultimate inquiry.

In Justice Ginsburg's view, the a posteriori factor concerning changed practical circumstances also called for overruling the dual-

142. *Id.* at 1990.
143. *Id.* at 1993 (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).
144. *Id.* at 1991.
145. *Id.* at 1991-92.
146. *Id.* at 1993 (quoting Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2411 (2015)).
147. *Id.*
148. *See id.*

sovereignty doctrine. As "federal criminal law ha[d] been extended pervasively into areas once left to the States,"[149] federal and state prosecutors gained the ability to "join together to take a second bite at the apple."[150] Making matters worse, the exponential growth of federal criminal statutes resulted in the prosecution of "run-of-the-mill felon-in-possession charges," the likes of which Mr. Gamble encountered.[151] Thus, changed practical circumstances—in this case, the proliferation of federal criminal law—"exacerbated ... problems created by the separate-sovereigns doctrine."[152] The use of the a posteriori factor to stress non-merit-based considerations, of course, places it outside Justice Thomas's stare decisis approach.

Equally important, Justice Ginsburg argued that casting aside the dual-sovereignty doctrine would not implicate the a posteriori reliance factor.[153] She emphasized that the dual-sovereignty doctrine affects only a small number of cases, noting that the Department of Justice pursues "only 'about a hundred'" dual prosecutions per year.[154] The only reliance interest substantially affected by overruling the doctrine, therefore, would be the "Federal and State Governments[']" ability to continue with "ongoing prosecutions."[155] In other words, private parties' reliance interests would be unaffected if the dual-sovereignty doctrine were overruled. As a general matter, Justice Ginsburg stressed that, because of minimal reliance interests, "eliminating the separate-sovereigns doctrine would spark no large disruption in practice."[156]

In her closing paragraph, Justice Ginsburg also invoked another a posteriori factor to reinforce her conclusion that the dual-sovereignty doctrine should be overruled.[157] Referencing the impact on individual liberty factor, she argued that continued adherence to the doctrine diminished "individual rights shielded by the Double

149. *Id.* at 1994.
150. *Id.* (quoting United States v. G.P.S. Auto. Corp., 66 F.3d 483, 498 (2d Cir. 1995) (Calabresi, J., concurring)).
151. *Id.*
152. *Id.*
153. *Id.* at 1995.
154. *Id.* (citation omitted).
155. *Id.*
156. *Id.*
157. *See id.* at 1995-96 (invoking the individual liberty a posteriori factor).

Jeopardy Clause,"[158] perverting the Clause's liberty-based rationale. Justice Ginsburg's exploration of the impact on liberty factor thus centered on the dual-sovereignty doctrine's effects in the real world.[159]

In her final analysis, Justice Ginsburg would have laid "the 'separate-sovereigns' [exception] to rest," given not only her conviction that its legal basis is incorrect, but also her view that it produces deleterious results in the real world.[160] Although Justice Ginsburg could not garner a majority in support of her views, her analysis is enlightening in the context of stare decisis. She reached across the a priori/a posteriori divide, marshaling both types of factors to support her criticism of the dual-sovereignty doctrine.[161] Her approach in this regard mirrored that of her more conservative colleague, Justice Gorsuch, who, though a textualist and originalist, considered not only the precedent's original correctness but also its practical effects.[162] On the one hand, that jurists with differing philosophies argued in similar ways is a testament to the factors' flexibility. But, on the other hand, the factors' malleability bolsters Justice Thomas's critique—that the factors are indeed *so* broad that they may be used to legitimate any outcome. Justice Thomas's criticisms in this respect may have force, but his preference to discard the current stare decisis paradigm wholesale misses the significant utility that at least some of the factors have in informing whether a precedent is correct as an original matter.

CONCLUSION

Justice Thomas's critique of his colleagues' approach to stare decisis—that the factors amount to prudential marbles placed on the balancing scale—overlooks the hybrid and a priori factors' relevance to precedent's rightness or wrongness on the merits.[163]

158. *Id.*

159. *Cf. id.* (transitioning from analyzing the practical impact of the separate-sovereigns doctrine to emphasizing the deleterious effects of the separate-sovereigns doctrine on individual liberty).

160. *Id.* at 1993.

161. *See id.* at 1989-96.

162. *See supra* Part IV.

163. To be sure, Justice Thomas may prefer a different methodological lens—be it

When the hybrid and a priori factors are used as proxy tools to examine a precedent's underlying rationale, they remain relevant to the question of whether past precedent is within "the realm of permissible interpretation."[164] It follows that as a practical matter, the hybrid and a priori factors may help jurists, including Justice Thomas, decide whether precedent falls within the range of permissibility, or, in the alternative, whether precedent is "demonstrably erroneous."[165] A "thoughtful and comprehensive" evaluation of certain stare decisis factors may indicate not just a precedent's effects, but also whether "the decision is correct."[166]

In addition, applying the a priori, hybrid, and a posteriori categorization to the stare decisis factors may assist litigants in framing their arguments to overrule precedent. The hybrid factors in particular can be used to argue that the precedent is wrong because of both the effects of the precedent's application in the real world and the precedent's original wrongness. The dual function of the hybrid factors thus allows litigants to appeal to jurists who embrace divergent approaches to stare decisis.[167]

Given these considerations, Justice Thomas may be right to criticize the multifactor approach to stare decisis, given the subjectivity of an unweighted, multifactor analysis. But when the hybrid and a priori factors are used to explore the original correctness of precedent, even Justice Thomas could rely on them to decide

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textualism or originalism—to analyze the merits of precedent. That said, a Justice wedded to a different jurisprudential philosophy can still theoretically arrive at a conclusion within a range of a permissible interpretation that Justice Thomas is willing to accept. *See* McGinnis & Rappaport, *supra* note 73, at 811 ("While the resolution selected by a prior decision may not be the next judge's preferred method, it still may not fairly be characterized as contrary to reason."); *see also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 265 (2005) ("[J]udicial constructions of the Constitution that are not inconsistent with original meaning may well be subject to the doctrine of precedent." (emphasis omitted)).

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

165. *Id.*

166. Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 518 (2003).

167. Indeed, some originalists posit that the Constitution should be understood, under some circumstances, "as authorizing that precedent be followed rather than the original meaning, because it sometimes confers greater weight on other values, such as predictability, clarity, and stability." McGinnis & Rappaport, *supra* note 73, at 829. Thus, the a posteriori factors maintain relevance even to some originalists.

whether precedent is "demonstrably erroneous."[168] In *Gamble*, then, although Justice Thomas second-guessed the dual-sovereignty doctrine, he should also think twice before dismissing the factors as irrelevant to his stare decisis framework.

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