
ESSAY
PERSONAL PRECEDENT AT THE SUPREME COURT

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PERSONAL PRECEDENT AT THE SUPREME COURT

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Personal precedent is a judge's presumptive adherence to her own previously expressed views of the law. This Essay shows that personal precedent both does and should play a central role in Supreme Court practice. For example, personal precedent simultaneously underlies and cabins institutional precedent — as vividly illustrated by Dobbs v. Jackson Women's Health Organization. Further, the Justices' use of personal precedent is largely inevitable, as well as beneficial in many cases. Still, the Justices should manage or reform their use of personal precedent, including by limiting its creation. Finally, and most fundamentally, personal precedent challenges conventional theories of legality. Though typically excluded from the law, personal precedent may actually be its building block.

INTRODUCTION

Many judges and commentators have argued that fidelity to precedent is essential to the judiciary's "impersonal" character.¹ Without stare decisis — that is, adherence to institutional precedent — courts would rule according to whatever their current membership happens to believe about the law. Changes in court personnel or attitudes could therefore yield immediate, sweeping changes in doctrine, and the rule of law would give way to arbitrariness or, even worse, to politics.² Judicial individualism is thus cast as the antithesis of precedent, if not of law itself. This thinking played an especially salient role in *Planned Parenthood of Southeastern Pennsylvania v. Casey*³ and still features in debates both on and off the U.S. Supreme Court. Take *Dobbs v. Jackson Women's Health Organization*,⁴ where defenders of abortion rights insisted that *Casey* itself not be overruled, lest the Court "be perceived as representing nothing more than the preferences of its current membership."⁵ The *Dobbs* dissent agreed, lamenting: "Today, the proclivities of

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¹ See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (noting "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments"); RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 41–42 (2017) (linking stare decisis with "impersonality" in that it "ensures that the law is not reduced to the preferences and personalities of a particular group of [J]ustices assembled at a particular moment in time").

² See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *69–70; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

³ 505 U.S. 833, 865–66 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁴ 142 S. Ct. 2228 (2022).

⁵ Brief for Respondents at 4, *Dobbs* (No. 19-1392).

individuals rule.”⁶ Conservative jurists, too, often distinguish between personality and the law.⁷ Clearly, judicial impersonality occupies a prominent place in legal culture.

Yet the choice between impersonal law and personal whimsy poses a false dichotomy. What that purported choice overlooks is the possibility of judicial decisionmaking that is both personal and law-like. Call it *personal precedent*, or judges’ presumptive adherence to their own previously expressed legal views, as contrasted with the institutional precedent issued by court majorities.⁸ Though it lacks any formal pedigree, personal precedent has secure foundations. Justices view their own past rulings as evidence of how they should rule today, and they also have strong incentives to remain personally consistent.⁹ The range of sources potentially giving rise to personal precedent is expansive, including not just a Justice’s separate opinions, but also lower court opinions and even law review articles.¹⁰

Rarely discussed as a category or afforded sustained attention, personal precedent is a pervasive feature of practice at the Court. At

⁶ *Dobbs*, 142 S. Ct. at 2320 (Breyer, Sotomayor & Kagan, JJ., dissenting); see also Transcript of Oral Argument at 14–15, *Dobbs* (No. 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4h25.pdf [<https://perma.cc/3ASJ-H32W>] (Justice Sotomayor asking whether the Court could “survive” if it rewarded states that defied precedent “because we have new [J]ustices on the Supreme Court,” *id.* at 15).

⁷ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–12 (2015) (Roberts, C.J., dissenting) (“[F]or those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening.”); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (“It is the proud boast of our democracy that we have ‘a government of laws and not of men.’” (quoting MASS CONST. OF 1780, pt. 1, art. XXX)).

⁸ See LAWRENCE BAUM, *THE SUPREME COURT* 134, 156 n.70 (14th ed. 2022) (quoting Richard M. Re, *Personal Precedent in Bay Mills, RE’S JUDICATA* (June 4, 2014, 11:00 AM), <https://richardresjudicata.wordpress.com/2014/06/04/personal-precedent-in-bay-mills> [<https://perma.cc/A4KN-XR3G>]; Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court’s Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1278 (2010) (critically discussing “personal precedents”). A similar idea sometimes travels under terms like “personal stare decisis,” particularly in quantitative work on judicial behavior. See SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992*, at 77–85 (1995) (empirically demonstrating that a Justice’s past votes help explain later ones); Reed C. Lawlor, *Personal Stare Decisis*, 41 S. CAL. L. REV. 73, 80–84 (1968). For an important qualitative study that critically evaluates “self stare decisis,” see Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 469 (2008). “Personal precedent” better captures the diverse, relatively informal, and often subtle ways that a Justice’s past opinions can matter.

⁹ See *infra* section I.B, pp. 829–33.

¹⁰ One might add still more types of past opinions, such as statements in litigation briefs. But additional sources generally pose a greater risk of overreading, in part because they may have depended on the speaker’s role at that time. A famous example arose in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where Justice Jackson disclaimed a view he had taken in his capacity as Attorney General. See William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-for-Bases Deal*, 52 AM. J. LEGAL HIST. 1, 130 (2012) (“[T]he government sought to use as precedent a statement by then-Attorney General Jackson that President Roosevelt had authority to seize plants.”). Justice Jackson remarked in part: “I should not bind present judicial judgment by earlier partisan advocacy.” *Youngstown*, 343 U.S. at 649 n.17. Here, I exclude opinions expressed as part of an advocacy role from the ambit of personal precedent.

various times, personal precedent helps to shore up, inflect, or defeat institutional precedent. So personal precedents are about as important as institutional ones — and that basic state of affairs is not only inevitable but desirable. On reflection, the rule of law faces greater threats than personal consistency.¹¹ Even if institutional precedent represents a salutary ideal, personal precedent can still offer a critical backstop on judicial hackery. A jurist's integrity, in other words, can work as an inoculant against arbitrariness and partisanship, even when institutional precedent does not.

The idea of personal precedent raises deep questions about the nature of law. Of course, everyone recognizes that different judges rule differently — and in ways that are often predictable.¹² That obvious fact is often viewed with embarrassment or concern, if not as a fundamental challenge to the idea of law itself.¹³ As Judge Posner once put it, “If changing judges changes law, it is not even clear what law is.”¹⁴ Personal precedent offers a distinctive answer. True, judicial personality can reflect political ideology, the inevitable friction in a complex human organization, or objectionable bias. But variations among judges can also represent differences of legal principle. When judges commit themselves to certain ways of deciding future cases, and then go on to do just that, the resulting practice is not just precedential but legal in nature. So we should be neither surprised nor concerned that changes in the Court's personnel yield changes in the law. To a great extent, the accumulated views of various judges is just what law *is*.

The argument proceeds in four parts that respectively focus on theory, practice, reforms, and jurisprudence.

I. THEORY

Begin with an account of what personal precedent is and why it matters to legal practice.

¹¹ *But see* David Cole, *Let the Decision Stand*, N.Y. REV. BOOKS (Nov. 4, 2021), <https://www.nybooks.com/articles/2021/11/04/abortion-let-roe-v-wade-stand> [<https://perma.cc/N9T5-NEEF>] (“The only thing that has changed [regarding *Casey*], in short, is who sits on the Court. And if we are to be ruled by law, not men (or women for that matter), that cannot be a sufficient ground for reversal.”).

¹² This point is sometimes denied through the assertion of a different claim — namely, that judges are nonpartisan. *See, e.g.*, Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, WASH. TIMES (Nov. 21, 2018), <https://www.washingtontimes.com/news/2018/nov/21/roberts-criticizes-trump-for-obama-judge-asylum-co> [<https://perma.cc/Q557-9TGF>] (quoting Chief Justice Roberts) (“We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”).

¹³ *See, e.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES, at xvii (2012) (“The Supreme Court frequently reverses itself on important constitutional law issues for no reason other than the composition of the Court changes . . . call[ing] into serious question the axiom that we are a government of laws not people . . .”); *see also* sources cited *infra* note 95.

¹⁴ RICHARD A. POSNER, HOW JUDGES THINK 1 (2008); *see also* SEGALL, *supra* note 13, at xvii (“[I]f changing judges changes law, then it is uncertain whether the law controls judges or the other way around.” (quoting POSNER, *supra*, at 1)).

A. *Defining the Concept*

The Court often asserts that majority opinions, not separate writings, are authoritative.¹⁵ Yet individual Justices sometimes commit themselves, and their future votes, to idiosyncratic views of the law.¹⁶ Those explicit commitments are only the most salient evidence of a larger practice that is distinct from institutional precedent. That parallel practice is *personal precedent*, or a judge's presumptive adherence to her own previously expressed legal views,¹⁷ as paradigmatically expressed in a separate opinion.¹⁸

So defined, personal precedent resembles some accounts of institutional precedent. That is, commentators have suggested that the defining feature of precedent, in any context, is that deviations from it require adequate justification.¹⁹ Consistent with that view, the Court often asserts that institutional precedent is binding absent a “special justification” for dispensing with it.²⁰ Personal precedent likewise supplies a presumptive answer to legal questions, and judges do or should feel some need to explain deviations from it.

What qualifies as an adequate or “special” justification is a matter of some controversy and so is itself often a subject of personal precedent. For example, a Justice might think that either institutional or personal precedent can be disregarded whenever it is clearly erroneous.²¹ Or a Justice might rank these two potentially conflicting forms of precedent, so that personal precedent is always defeated by contrary institutional precedent, or vice versa.²² Given this array of options, the precise strength and nature of personal precedent is itself personal — that is, variable across jurists.

¹⁵ See, e.g., *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1511 (2020); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

¹⁶ E.g., *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (2021) (Gorsuch, J., concurring) (“My vote in similar cases to come will, I hope, ‘be guided as nearly as [possible] by the principles set forth herein.’” (alteration in original) (quoting *Brown v. Allen*, 344 U.S. 443, 548 (1953) (Jackson, J., concurring in the result))).

¹⁷ This initial definition is neutral as between competing jurisprudential conceptions of “the law.” However, Part IV will argue that personal precedent underlies the law itself and so will adopt an adjusted definition: a particular judge’s public acceptance of a rule as binding on her official decisions.

¹⁸ On qualifying materials, see *supra* note 10.

¹⁹ See, e.g., Deborah Hellman, *An Epistemic Defense of Precedent*, in *PRECEDENT IN THE UNITED STATES SUPREME COURT* 63, 70 (Christopher J. Peters ed., 2013).

²⁰ E.g., *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). But see Frederick Schauer, *Stare Decisis — Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 143 (2019) (arguing that stare decisis is largely rhetorical).

²¹ As to institutional precedent, see *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 3 (2001).

²² As we will see, however, Justices should, and usually do, adopt a more nuanced approach. See *infra* section ILC, pp. 845–46.

B. *The Pull of Personal Precedent*

Justices and practitioners alike have strong reasons to attend to personal precedent, regardless of what formal legal rules dictate. And because these reasons are nonlegal, or prelegal,²³ they matter to virtually all judges, regardless of their substantive or methodological views of the law. The result is a practice of personal precedent that both supports and shapes institutional precedent.

The first reason for a Justice to care about personal precedent is epistemic: it offers uniquely valuable evidence of how that judge in particular ought to rule. When a jurist has already carefully studied an issue and expressed an opinion, she — and her clerks — will be inclined to pick up where she left off, rather than trying to reinvent the wheel. And the Justice's own previous views presumably give strong indication of how she, given her distinctive methodological and other commitments, would answer the same question today. In that respect, personal precedent has an advantage over institutional precedent: the current judge might not view her predecessors' opinions as good proxies for her own.²⁴ In fact, the judges of one era often understand that their ancient forebearers were prejudiced, ignorant, or methodologically confused — and that, as a result, their legal conclusions are unreliable.²⁵ A judge may be especially likely to credit her own past views when her personal precedent addresses a still-open question and has not been superseded by subsequent legal changes, such as intervening Court rulings. Yet personal precedent will still have luster even if it contradicts institutional precedent. *Stare decisis* is sometimes overcome, after all. And personal precedent can provide a personalized reason to overrule.²⁶

There is a second and even more fundamental reason for judges to find personal precedent attractive. Outside of courts and the law, people generally want to appear, both to themselves and others, as consistent.²⁷ And people who lack consistency are often criticized as convictionless

²³ By “nonlegal,” I mean that the reason exists or is motivating independent of any legal rule. And by “prelegal,” I mean that the reason can be the foundation of a legal rule with similar or identical content.

²⁴ See, e.g., William Baude & Ryan D. Doerfler, Essay, *Arguing with Friends*, 117 MICH. L. REV. 319, 321 (2018); Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2012); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 19 (2007) (“[E]ven the smartest person may not be a reliable guide if he or she is using the wrong method.”).

²⁵ Even *Planned Parenthood of Southeastern Pennsylvania v. Casey* asserted that past Justices “had not been able to perceive” the reality of either race discrimination or economic exploitation. 505 U.S. 833, 863 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). One wonders how credible any of the earlier Court’s decisions can be, once those failures of perception are candidly acknowledged.

²⁶ See, e.g., *Direct Mktg. Ass’n v. Brohl*, 575 U.S. 1, 18–19 (2015) (Kennedy, J., concurring) (anticipating *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)); *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (similar).

²⁷ See ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 53 (4th ed. 2001); LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1 (1957).

or “flip-flop­pers.”²⁸ The widespread and deeply ingrained psychological predisposition in favor of consistency (or against inconsistency) is rooted in individual people, not institutions. As a result, each Justice will desire to be, or seem, consistent with her own past legal statements.²⁹ Moreover, this desire for consistency is content independent, in that it pushes each Justice toward her own past views independent of what those views are or whether they are correct. And because it is a psychological feature of people generally, the pull of personal consistency will be felt by virtually all Justices, regardless of their legal philosophies or methods.

Jurists self-consciously recognize as much. Most recently, Justice Breyer has noted “the importance of personal consistency” and described its effects: “[A] judge who has previously expressed a view, even on a fairly minor technical matter, may hesitate to join fully a majority opinion expressing a contrary view on the minor matter, lest the legal public think that the judge is being inconsistent”³⁰ This statement by a then-sitting Justice emphasizes that personal consistency can have significant effects “even on a fairly minor technical matter.” The implication is that personal consistency has an even greater effect in major, salient matters linked to the jurist’s professional reputation and legacy.

Yet even that claim underrates the importance of personal consistency, at least at the Court. Today, the Justices are second-tier celebrities,³¹ sometimes complete with cult followings³² and multimillion-dollar book

²⁸ This general impression is combatted, but also thereby acknowledged, in judicial opinions that bravely admit that their authors are eating crow. See *McGrath v. Kristensen*, 340 U.S. 162, 177 (1950) (Jackson, J., concurring) (“Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion”); *Henslee v. Union Planters Nat’l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting); cf. RALPH WALDO EMERSON, *SELF-RELIANCE* (1841), reprinted in *THE MAJOR PROSE* 127, 133 (Ronald A. Bosco & Joel Myerson eds., 2015) (“A foolish consistency is the hobgoblin of little minds”).

²⁹ This worry is part of the motivation behind recusal rules and related prohibitions on extra-judicial statements of opinion: a jurist who comments on legal issues prematurely might be reluctant to change course later on. See generally CODE OF CONDUCT FOR UNITED STATES JUDGES, in 2 GUIDE TO JUDICIARY POLICY pt. A., ch. 2, at 1 (Admin. Off. of the U.S. Cts. 2019).

³⁰ STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 83 (2021); see also Larsen, *supra* note 8, at 469 (suggesting that “the Justices do not want to appear intellectually inconsistent”); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 953 (2005) (“Justices might resist overturning cases they joined in deciding . . . [because of] reluctance to admit they have made mistakes. Such admissions might make the Justices appear to be indecisive or incompetent.”).

³¹ See Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157, 158 (2016); Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 300–01 (2013).

³² The exemplar is Justice Ginsburg. See IRIN CARMON & SHANA KNIZHNIK, *NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG* 6–9 (2015). In recent years, Justice Scalia probably enjoyed the runner-up following. See *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT’S WITTIEST, MOST OUTSPOKEN JUSTICE* (Kevin A. Ring ed., 2004).

deals.³³ Celebrity Justices have extra reason to cultivate a brand and market a recognizable personality.³⁴ Creating and then adhering to personal precedent helps a Justice stand out, increasing the odds of both fandom and a long-term jurisprudential legacy.³⁵ If a Justice is known to stand by her own distinctive opinions, then those opinions will have to be read and studied. By contrast, a Justice who readily abandons personal precedent will seem unprincipled or wishy-washy.³⁶ And a Justice who ignores her own personal precedent diminishes the need for anyone else to remember or remark on her views.³⁷

Moreover, each Justice likely cares much more about personal consistency than institutional consistency. To adapt a cliché, the Court is a “they,” not an “it.”³⁸ For the reasons already discussed, any given Justice is almost certain to care intensely about her own personal consistency, whereas it is far less clear that she will identify with the institution to such a degree as to have similar concern for its consistency. In fact, some Justices make their personal reputations in part by lampooning institutional precedents.³⁹ And while every Justice proudly recognizes

³³ See, e.g., Joseph Choi, *Amy Coney Barrett Receives \$2 Million Advance for Book Deal: Report*, THE HILL (Apr. 19, 2021, 3:57 PM), <https://thehill.com/homenews/media/549062-amy-coney-barrett-received-2-million-advance-for-book-deal-report> [<https://perma.cc/6Y74-KNBE>]; see also NEIL GORSUCH WITH JANE NITZE & DAVID FEDER, *A REPUBLIC, IF YOU CAN KEEP IT* (2019); SONIA SOTOMAYOR, *MY BELOVED WORLD* (2013); CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007).

³⁴ See Lerner & Lund, *supra* note 8, at 1278 (“Justices write separately in opinion after opinion, striving to preserve consistency with their own stock of personal precedents.”).

³⁵ For books collecting judicial opinions and other writings by judicial celebrities like Justices Scalia and Ginsburg, see, for example, SCALIA DISSENTS, *supra* note 32; and IN DEFENSE OF JUSTICE: THE GREATEST DISSENTS OF RUTH BADER GINSBURG (Sarah Wainwright & Abigail Neff eds., 2019).

³⁶ See Gerhardt, *supra* note 30, at 953.

³⁷ Notably, Justices Stevens and Kennedy were, in relative terms, both willing to revisit their own past views and removed from the Court’s celebrity culture. See Justin Driver, *Essay, Judicial Inconsistency as Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1265–70 (2011); Mark Sherman, *Justice: Changing Course on the Bench Is Not Weakness*, AP NEWS (Sept. 23, 2016), <https://apnews.com/article/93476b06b78c409393f38df4d5d507b7> [<https://perma.cc/S8RU-YEN6>]. In addition, Justice Kennedy and other median Justices know that their opinions will be read simply because they are controlling, independent of their consistency. See Jeffrey Rosen, *Supreme Leader: On the Arrogance of Anthony Kennedy*, NEW REPUBLIC (June 16, 2007), <https://newrepublic.com/article/60925/supreme-leader-the-arrogance-anthony-kennedy> [<https://perma.cc/M4R3-JM4V>].

³⁸ See, e.g., RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE*, at xii (2d ed. 2013) (“[T]he Supreme Court is a ‘they,’ not an ‘it.’ . . . [W]e need to attend closely to the frequently varied thinking of each of the nine individuals who make up the Court.”); cf. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 550 (2005). Because the Court as an institution lacks personality, it cannot be embarrassed. So when a new majority declares that it is redeeming the institution by cleaning up an old majority’s mistakes, only the remaining members of the old majority are likely to feel slighted. And they are by definition a minority of the Court — if any remain on the Court at all.

³⁹ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (triumphantly noting the end of an “ancien régime” at the Court).

the institutional “anticanon,”⁴⁰ few Justices broadcast their own greatest blunders.

Further, as then-Professor Frank Easterbrook has shown, institutional precedent is necessarily incoherent.⁴¹ In many situations, a majoritarian voting procedure simply cannot aggregate the Justices’ divergent preferences in a logically consistent way. The upshot is striking: *personal precedent is the only kind of precedent that can possibly be internally consistent.*⁴² And Court precedent’s inevitable internal inconsistency is a double strike against it. Epistemically, the Justices might reasonably conclude that self-contradictory institutional precedent simply cannot be correct. And, reputationally, a confused doctrine is an embarrassment to be avoided. Thus, both epistemic and self-interested reasons intersect in ways that render them mutually supportive.

These intersecting factors help not only to explain but also to justify individual Justices’ heroic (or quixotic) efforts to stand athwart institutional precedent and campaign for its overruling. This behavior can be viewed as self-indulgent, even self-serving.⁴³ But it also yields important benefits — not just because existing legal doctrine might be wrong, but also because even generally good doctrines are likely to be incoherent, and perhaps increasingly so over time. So the campaigning dissenter, whose arguments are rooted in consistent personal precedent, often has a unique ability to offer a coherent, comprehensive alternative to the doctrinal status quo.⁴⁴

Personal precedent also has appeal for other actors in the legal system, apart from the Justices themselves. As we will see, sophisticated advocates make no bones about identifying likely swing votes and then designing their briefs with an eye to those Justices’ past writings.⁴⁵ But the benefits of personal precedent are far greater than simply helping advocates tailor their arguments to key Justices. Personal precedent also helps the public at large anticipate the likely results of possible litigation. That improved predictive ability facilitates settlement and streamlines litigation efforts. In these respects, personal precedent advances interests often associated with conventional stare decisis.

⁴⁰ See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

⁴¹ See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815–17 (1982) (describing “cycling,” among other scenarios in which preference aggregation fails to generate logically consistent results).

⁴² See *id.* at 832 (“There is no reason why we cannot ask each Justice to develop a principled jurisprudence and to adhere to it consistently.”).

⁴³ Consider Judge Wald’s suggestion that even, or especially, a judge engaged in concurrence (as contrasted with dissent) “may be thought to be self-indulgent, single-minded, even childish in her insistence that everything be done her way.” Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1413 (1995).

⁴⁴ Cf. RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 130 (2018) (calling for judges to exhibit good faith consistency in their interpretive approach).

⁴⁵ See *infra* section II.C, pp. 845–46.

But if advocates make use of personal precedent because they recognize its inherent importance to judicial decisionmaking, their repeated use of it is also compounding. Appeals to personal precedent have an ingratiating aspect. Partly because the jurist's past views are not formally precedential, they are ostensibly invoked on account of their wisdom and sagacity. A jurist who gets used to being flattered in this way might then be more likely to care about her own views for their own sake. But another aspect of the strategy is admonitory. By rendering salient a jurist's past words, advocates carefully wield not just a carrot but also a stick. Even a powerful Justice might not like to feel, or seem to others, self-contradictory. And briefing based on personal precedent keeps that unpleasant result in view.

Finally, institutional characteristics enhance the appeal of personal precedent. In lower courts, ambitious judges jockey for promotion by developing attention-getting personal precedents.⁴⁶ But those judges' individuality is often checked by the presence of many colleagues, the unpredictability of panel assignments, and appellate review. By comparison, the Supreme Court is an en banc apex court whose membership, on average, changes slowly.⁴⁷ Each Justice thus has time to accumulate personal precedent that, for her, will have epistemic value in helping her decide cases correctly. The Justices likewise enjoy a special degree of public and professional salience that lends itself to personal branding and fandom. And, with only nine backstories to study in any given case, sophisticated litigants have little trouble identifying each Justice's past statements on a given issue. For these reasons, personal precedent is far more consequential at the Supreme Court than in the lower courts.

C. *Distinguishing Personal from Institutional*

Personal precedent has what seems like a severe limitation: it is disconnected from the institutional life of the Court. At first blush, then, personal precedent is grossly inadequate in terms of the range of decisions it can govern. A new Justice simply cannot have enough personal precedent to help her decide most of the cases that come before her. And even veteran Justices often encounter issues that are old to the Court but novel to themselves. Yet all those issues cannot be, and in fact are not, treated as posing purely open questions. Thus, the argument

⁴⁶ See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 632 (2000); Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 112 (2021) (discussing lower court judges' promotion incentives). An Associate Justice of the Supreme Court might jockey for promotion to Chief Justice.

⁴⁷ On average, a new Justice has been confirmed roughly every two years. See *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/GM3V-C843>] (showing that roughly thirty Justices have joined the Court in the past seventy-five years).

concludes, personal precedent is generally peripheral; institutional precedent must occupy the central role.

Yet personal precedent alone comes surprisingly close to matching the usefulness of its institutional counterpart. We can see this by imagining a Court that has no norm of institutional precedent whatsoever. Even in such a regime, we have seen, personal precedent would matter to its creators for non- or prelegal reasons. So whenever the Court issued a majority opinion,⁴⁸ observers would understand that most Justices had personally committed themselves to a legal position.⁴⁹ And that controlling block of Justices would together possess the legal power to reverse contrary lower court rulings.⁵⁰ What's more, the great majority of the Court's opinions have supermajority support, and "median" Justices often abide for a decade or more. For all these reasons, litigants and lower courts would have ample reason to regard majority opinions as authoritative, along a medium-term time horizon, based on personal precedent alone. Personal precedent alone thus gives rise to institutional practices that closely resemble formal Court precedent.

That said, a regime of personal precedent alone would not be quite the same as the formal norm of stare decisis that we are familiar with. Three potential differences are especially significant. On a Court without Court precedent: (i) Justices who dissent from a particular ruling could lawfully ignore that ruling; (ii) all Justices could lawfully ignore old majority decisions, that is, decisions predating their own tenure; and (iii) a new median Justice could lawfully repudiate any closely decided ruling. But these differences are not actually so great — particularly after accounting for how precedent actually operates, as opposed to its official nature.

Start with dissenting Justices. In our imagined world without institutional precedent, the dissenters' situation would be complex. On one hand, their decision to dissent would have created personal precedent at odds with the views of most Justices. So for the reasons already discussed, the dissenters would have reason to keep dissenting in similar cases. But on the other hand, the dissenters would worry about being outvoted again in future cases of the same type. The dissenters accordingly have good reason to assimilate the majority's views, so as to appeal

⁴⁸ Majority agreement may sometimes be discernible across the judgment — that is, adding some members of the majority to the dissenters — and so carry force, even if informally. Cf. Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 306–12 (2019) (arguing that dissenting opinions can be critical to a case's precedential effect).

⁴⁹ See Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 42 (1994) ("Even if they do not personally write the majority or the dissent, [a joining Justice's] name will be subscribed to the one view or the other.").

⁵⁰ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 832, 873 (1994).

to that group and thereby influence the results of future cases.⁵¹ Given these competing incentives, a dissenter might adopt the following principle:

If I can pull members of the majority toward my preferred results by adopting their reasoning, am uncertain of my own view, or don't care much about the issue, then I will abandon my personal precedent. But if I cannot use the majority's reasoning to pull it toward my preferred outcomes, am sure that I am correct, *and* care enough about the issue to keep dissenting, then I will adhere to my personal precedent.

That relatively nuanced approach roughly approximates actual practice. Though officially bound by institutional precedent, the Justices sometimes engage in "perpetual dissent," seemingly in the circumstances just described.⁵²

Next, consider old precedents. Without institutional *stare decisis*, one might think that the Justices would simply disregard judicial decisions from decades or centuries ago. After all, personal precedents from that era would have expired with the individual Justices who created them. Again, however, the situation is more complex. Because the Court's membership turns over gradually, most Justices will, at all times, have quite a bit of personal precedent stemming from majority rulings. And Court majorities often go out of their way to recount doctrinal patterns and practices that span long periods of time, essentially telling doctrinal stories — or constructing mythologies — that obtain new majority support.⁵³ So in a regime of personal precedent, old or ancient precedents would retain their vitality *to the extent that they have garnered recent support*. And, again, that more nuanced view is a better statement of actual practice than the official story that precedents are valid unless and until overruled. Old cases are almost never cited today — except for the small number that have entered canonical status or otherwise enjoyed more recent vindication.⁵⁴ And it would be perilous, even a fatal acknowledgement of weakness, for a litigant to rely on

⁵¹ See Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1100 (2002) ("[A]bsent intervening personnel changes on the Court, it would largely be pointless for the dissenting Justices to vote in Case Two to overrule Case One."). Some commentators suggest that bowing to institutional precedent "advances the rule of law when judges subordinate — and are seen as subordinating — their individual views for the sake of keeping faith with their court's institutional history." KOZEL, *supra* note 1, at 131; see also Larsen, *supra* note 8, at 474–75 (arguing that adherence to precedent can prevent the Court "from being perceived as a political institution," *id.* at 474).

⁵² Larsen, *supra* note 8, at 477. By contrast, Larsen proposes that a Justice "reserve [perpetual dissent] for the extraordinary times when he feels the need to act as a political figure." *Id.*

⁵³ Past cases, like other histories, can of course be remembered creatively. See generally ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993).

⁵⁴ See Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 614 (2017) (showing that, in general, precedents are cited less frequently as they grow older).

an obscure ruling from a prior generation. When truly forgotten cases do come up, the Justices typically bat them aside.⁵⁵

Last are changes in the median Justice. Absent institutional precedent, one might worry that a new median Justice would generate instantaneous tumult, as old case law is thrown out as irrelevant. But, once again, the truth is more complex. The bulk of existing case law was decided by a supermajority.⁵⁶ So any single-Justice change would bear on, at most, 5–4 rulings. And even then, the new Justice will often have personal precedent that is consistent with her predecessor’s. If the new Justice lacks personal precedent on point, then observers would understand that the law has become unsettled — not that it has been reversed. Only when the new median Justice has personal precedent squarely at odds with past Court decisions would lower courts, litigants, and others confidently revise their view of the law. And that, in fact, is just the narrow but important set of cases in which a change in personnel *is* often treated as consequential.⁵⁷

The bottom line is that personal precedent operates just under the surface of the regime of institutional stare decisis that, officially, is now the law. In many instances, personal precedent reinforces Court precedent. In other instances, however, personal precedent is indifferent to Court precedent, or even contrary to it. And, in that last set of cases, Court precedent often, and predictably, ends up being asterisked — or simply disregarded.

D. *Reconciling the Personal and the Institutional*

The discussion so far has evaluated personal precedent as an alternative to institutional precedent. But there is no need for an either/or choice. A Justice who responds to personal precedent can, and almost certainly will, see considerable virtue in Court precedent. Of course, there is a formal norm of stare decisis that might influence judicial behavior simply by virtue of its legal pedigree.⁵⁸ But some reasons for stare decisis do not depend on formal principles. For example, old Court decisions can be epistemically useful when a historically minded jurist

⁵⁵ See, e.g., *Bond v. United States*, 564 U.S. 211, 220 (2011) (dispatching *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118 (1939)).

⁵⁶ Sarah Turberville & Anthony Marcum, *Those 5-to-4 Decisions on the Supreme Court? 9 to 0 Is Far More Common.*, WASH. POST (June 28, 2018, 6:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common> [<https://perma.cc/9Y6V-89HG>] (noting that, from 2000 to 2016, 5–4 decisions made up just under one-fifth of all Court decisions).

⁵⁷ The starkest examples are anticipatory overrulings, e.g., *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 252–53 (S.D. W. Va. 1942), *aff’d*, 319 U.S. 624 (1943), which the Court has sometimes discouraged, see, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). *But see* *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O’Connor, J., dissenting) (criticizing the majority for not enforcing *Rodriguez de Quijas*).

⁵⁸ See *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015) (“Overruling precedent is never a small matter.”).

believes that her predecessors have better knowledge of relevant historical facts.⁵⁹ Further, past Justices may supply reliable evidence of the law when their legal methods align with those of a current Justice.⁶⁰ Old rulings can also generate reliance that might be relevant to current jurists on pragmatic grounds.⁶¹ These points are contingent and so not nearly as automatic, widely applicable, or powerful as the non- or pre-legal reasons underlying personal precedent — but they can still add heft to the formal principle in favor of institutional precedent.

The question, then, is how a judge would, or should, integrate personal precedent with a partially overlapping, but sometimes conflicting, commitment to Court precedent? The best answer is that Justices construct distinct roles for themselves, depending on the situation. When deciding how to vote, the Justices consider both personal and institutional precedent. When forming opinions for the Court, the Justices suppress personal precedent in favor of finding common ground and reinforcing the formal principle of institutional precedent. And when Justices write separately after failing to join a majority, they feel freer to rely on, and to develop, personal precedent. This division of labor helps explain how personal precedent can be so important and yet so easily overlooked. The official story of institutional precedent coexists with, and to some extent depends on, the informal story of personal precedent. Moreover, the two types of precedent in effect give rise to corresponding genres: an institutional opinion and a personal one.

Begin with the decision of how to vote. In general, the Justices try to coalesce around a majority opinion that is acceptable to each joiner. When institutional and personal precedent are both relevant and nonoverlapping, Justices usually attempt to accommodate both to the greatest extent possible. For instance, a Justice might ask that the majority adopt aspects of her personal precedent or reach an outcome closer to what her personal precedent recommends. Sometimes, however, accommodation is infeasible, and a Justice must abandon one type of precedent or the other.⁶² We have already seen a plausible strategy or rule for addressing that stark scenario: “If I cannot use the majority’s reasoning to pull it toward my preferred outcomes, am sure that I am correct, *and* care enough about the issue to keep dissenting, then I will adhere to my personal precedent.”⁶³ Alternatively, the Justice might

⁵⁹ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (arguing that a precedent had “a much closer vantage point” to a historical event).

⁶⁰ Institutional precedent is often defended on epistemic grounds. See, e.g., Hellman, *supra* note 19, at 65–69; John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 845 (2009). But as we have seen, judges do not always view their predecessors as reliable. See *supra* p. 829.

⁶¹ See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 7–9, 13–14 (1989).

⁶² Cf. Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-member Court*, 100 CALIF. L. REV. 1445, 1461–63 (2012).

⁶³ See *supra* section I.C, pp. 833–36.

adopt a stare decisis analysis that incorporates or defers to personal precedent. For instance, courts often ask whether institutional precedent is poorly reasoned, and personal precedent can provide the answer.

Once a majority coalition has formed, institutional precedent will dominate the resulting opinion for the Court. For one thing, any particular Justice's idiosyncratic views are likely to be divisive and distracting. Focusing on institutional precedent is thus the easiest path to majoritarian agreement in most cases. Further, the majority has an incentive to safeguard the formal authority of Court precedent, in part because the majority is trying to wield it. And that incentive cuts *against* reliance on personal precedent. Court opinions that trade on personal precedent blur the boundaries of formal authority and undermine their own prestige. A majority opinion that seeks guidance in separate opinions, which lack formal precedential force, will seem shaky and lacking its own authority. So when members of the majority have concerns related to personal precedent, the opinion for the Court is likely to sidestep or accommodate those points, rather than absorb or bow to them. In this and other ways, personal precedent influences the development of case law even without being cited. Still, in unusual cases, opinions for the Court do reference or even incorporate personal precedent, usually because doing so is the only way to form an important institutional precedent.⁶⁴

The situation is different when a Justice writes separately, in either a concurrence or a dissent. True, a Justice writing separately will still care about Court precedent, for reasons already canvassed.⁶⁵ Yet that Justice will also feel freer both to rely on and to develop her own personal precedent. Because they have few or no joiners, separate writings have less need to appeal to widely shared premises. And separate writers also do not have to worry so much about degrading the formal norm of Court precedent. After all, a separate writing is not itself formally precedential.⁶⁶ Further, separate writings, especially solo opinions, let ambitious Justices develop their distinctive brand. Majority opinions, by contrast, yield only shared glory. The result is striking: even Justices who discuss stare decisis at length when writing for the Court author separate writings that promise to ignore institutional precedent, without mentioning stare decisis.⁶⁷

The genre differences between majority and separate writings also point out an asymmetry in the negative or critical use of personal

⁶⁴ See, e.g., *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (citing *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)).

⁶⁵ See *supra* pp. 836–37.

⁶⁶ See cases cited *supra* note 15.

⁶⁷ Compare, for example, Justice Gorsuch's lengthy engagement with stare decisis in his opinion in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402–04 (2020) (opinion of Gorsuch, J.), with his almost complete disinterest in stare decisis when concurring in *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring).

precedent. Majority-opinion authors usually avoid elevating a dissenter's personal precedent by relying on it to indict the dissenter. By comparison, dissenters feel freer to wield personal precedent as a cudgel — and doing so fosters legal stability. In particular, a dissenter might turn the majority Justices' personal precedents against them by showing a contradiction between what the Court is doing now and what some of its members proclaimed in prior opinions.⁶⁸ The feeling of being personally inconsistent is bad enough, but being called out for it is worse. The threat of such a critique encourages Justices to remain faithful to their personal precedents — including to institutional precedents that the relevant Justices have joined.

II. PRACTICE

Personal precedent is visible in almost every aspect of practice at the Supreme Court. And, when not speaking in an institutional voice, the Justices have recognized as much.

A. *Rejecting Institutional Precedent*

Justices often reject institutional precedent in favor of attending to their own personalized jurisprudence. This practice is richer than generally recognized, encompassing not just the decision to dissent based on personal precedent, but also the decision to amend or abandon one's own personal precedent.

When it comes to personal precedent trumping *stare decisis*, the most well-known examples involve what Professor Allison Orr Larsen has insightfully discussed under the heading of “perpetual dissents.”⁶⁹ For example, Justices Brennan and Marshall adopted a policy of dissenting from every Court ruling on capital punishment by referencing their own settled views.⁷⁰ More recent examples include Justices Stevens, Ginsburg, and Breyer's longtime rejection of sovereign-immunity decisions like *Seminole Tribe of Florida v. Florida*.⁷¹ As Justice Stevens once put it: “Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.”⁷² Conservative jurists

⁶⁸ *E.g.*, *Jones v. Mississippi*, 141 S. Ct. 1307, 1336–37 (2021) (Sotomayor, J., dissenting); *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting); *Boumediene v. Bush*, 553 U.S. 723, 830–31 (2008) (Scalia, J., dissenting); *infra* p. 844.

⁶⁹ Larsen, *supra* note 8, at 450–51; *see also* Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 395–97 (2007) (“persistent dissent”); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 248 (1986) (“repetitious dissent”).

⁷⁰ *See* Larsen, *supra* note 8, at 450–51.

⁷¹ 517 U.S. 44 (1996); *see, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699–701 (1999) (Breyer, J., dissenting); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 787–88 (2002) (Breyer, J., dissenting).

⁷² *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., concurring in part and dissenting in part).

often make similar statements. Citing his own separate opinions, for instance, Justice Thomas long made clear that he “remain[ed] fundamentally opposed to the Court’s abortion jurisprudence.”⁷³ Scholars have adduced many other examples, ranging from punitive damages to free speech to trial rights.⁷⁴ It seems that virtually all Justices eventually pick topics for perpetual dissent, *stare decisis* notwithstanding.

Even more interesting, and less remarked on, is that the Justices sometimes invoke their personal precedents to explain why they have decided to *stop* engaging in persistent dissent. Take Justice Breyer’s treatment of the *Apprendi*⁷⁵ line of cases, which generally require that juries find all facts necessary for the imposition of a criminal sentence.⁷⁶ The Court recognized an exception to this principle when it came to factfinding necessary to impose mandatory minimum sentences.⁷⁷ Justice Breyer provided the critical fifth vote for that exception, in express defiance of *Apprendi*’s logic.⁷⁸ More than a decade later, however, Justice Breyer decided to accommodate *Apprendi* and so once again supplied the fifth vote for the Court — this time, to overrule the very exception for mandatory minimums that he himself had created in the earlier case.⁷⁹ Justice Breyer wrote separately to explain this about-face. While “continu[ing] to disagree with *Apprendi*,” he had come to recognize both the permanence of that institutional precedent and the increasingly objectionable “anomaly” that he had created.⁸⁰ This example illustrates how personal precedent lies between, and mediates, institutional precedent and a Justice’s views of the merits. Justice Breyer’s changing willingness to engage in persistent dissent brought about both a doctrinal exception’s rise and its demise.

Relatedly, Justices sometimes write separately to clarify, revise, or overrule their own personal precedents, even when doing so puts them at odds with institutional precedent. Justice Sotomayor offers a fascinating example. In *Sorrell v. IMS Health Inc.*,⁸¹ Justice Sotomayor joined the conservative Justices to create a 6–3 majority opinion upholding a First Amendment claim.⁸² But in later First Amendment cases

⁷³ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) (citing two of his own past separate opinions).

⁷⁴ See sources cited *supra* note 69; see also Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1721 n.70 (2013).

⁷⁵ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁷⁶ See *id.* at 483–84.

⁷⁷ See *Harris v. United States*, 536 U.S. 545, 569–70 (2002) (Breyer, J., concurring in part and concurring in the judgment).

⁷⁸ See *id.* at 569 (“I cannot easily distinguish *Apprendi v. New Jersey*, 530 U.S. 466 (2000), from this case in terms of logic.”).

⁷⁹ *Alleyne v. United States*, 570 U.S. 99, 122 (2013) (Breyer, J., concurring in part and concurring in the judgment).

⁸⁰ See *id.*

⁸¹ 564 U.S. 552 (2011).

⁸² *Id.* at 555.

that relied in part on *IMS Health*, Justice Sotomayor increasingly found herself in dissent.⁸³ The liberal Justices who had dissented from all these cases, including *IMS Health*, usually went out of their way to condemn the entire bunch.⁸⁴ The liberal dissenters were effectively constructing a First Amendment doctrine in exile.⁸⁵ And, given her vote in *IMS Health*, Justice Sotomayor seemed to straddle this conservative-liberal divide. Then, in a new dissent, Justice Sotomayor noted that while she had “joined the majority in . . . *IMS Health*,” she “disagree[d] with the way that this Court has since interpreted and applied that opinion.”⁸⁶ Justice Sotomayor had thus come to “agree fully with” her liberal colleagues.⁸⁷ The only purpose of Justice Sotomayor’s new dissent was to resolve a tension within her own personal precedent. Justice Sotomayor was able to resolve that tension in favor of full-throated support for the liberal wing of the Court — but only by confining her own vote in *IMS Health* to its facts. In essence, Justice Sotomayor rejected one of her own personal precedents, thereby making a new one. And that project led her to repudiate an institutional precedent.

Finally, Justices sometimes offer personal regret for their own past rulings and even try to make amends. Some examples are largely rhetorical, such as Justice Kagan’s literal “*mea culpa*” disavowing loose language in a prior majority opinion that she herself had authored.⁸⁸ Other examples suggest a deeper form of accountability, such as when Justice Sotomayor effectively apologized for creating a 4–1–4 split in a sentencing case.⁸⁹ As she put it: “Regrettably . . . my concurrence in particular” and “my individual views . . . have contributed to ongoing discord among the lower courts [and] sown confusion among litigants.”⁹⁰ Having learned from her error, Justice Sotomayor abandoned her prior stance and helped form a new majority opinion. Another example appears in a solo dissent by Justice Scalia in a statutory case.⁹¹ After noting that the lead dissent had persuasively explained why Justice Scalia had been wrong to join an earlier ruling, Justice Scalia concluded: “Rather than insist that Congress clean up a mess that I helped make, I

⁸³ See, e.g., *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Breyer, J., dissenting).

⁸⁴ See *id.* at 2382 (criticizing *IMS Health*); see also *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting) (same).

⁸⁵ Personal precedent can give rise to *group precedent* distinct from institutional precedent, yielding a “jurisprudence in exile.” Richard M. Re, *The New Supreme Court and the Jurisprudence in Exile*, PRAWFSBLOG (Feb. 17, 2016, 8:15 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2016/02/the-new-supreme-court-and-the-jurisprudence-in-exile.html> [<https://perma.cc/E3ZG-6TZN>].

⁸⁶ *Janus*, 138 S. Ct. at 2487 (Sotomayor, J., dissenting).

⁸⁷ See *id.*

⁸⁸ *Borden v. United States*, 141 S. Ct. 1817, 1833 n.9 (2021) (plurality opinion) (discussing *Voisine v. United States*, 136 S. Ct. 2272 (2016)).

⁸⁹ See *Hughes v. United States*, 138 S. Ct. 1765, 1779 (2018) (Sotomayor, J., concurring).

⁹⁰ *Id.*

⁹¹ *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 814 (2014) (Scalia, J., dissenting).

would overrule” the earlier decision.⁹² In this remarkable passage, Justice Scalia’s sense of personal responsibility, even guilt,⁹³ overrides the normally “super-strong” rule of statutory stare decisis.⁹⁴

B. *Preserving Institutional Precedent*

Personal precedent also plays a surprisingly critical role in maintaining institutional precedent. To some extent, personal precedent’s power is visible in the basic fact that, as Justice Scalia once put it, “[o]verrulings of precedent rarely occur without a change in the Court’s personnel.”⁹⁵ This pattern is easily explained as a product of personal precedent. When supported by the past votes of most Justices, institutional precedent is generally secure.⁹⁶ But when new Justices arrive, institutional precedent rests only on its own authority — and is consequently far more vulnerable. That basic point finds support not just in overall jurisprudential patterns but also in explicit judicial reasoning. To show as much, this section explores *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁹⁷ While it remains the Court’s most famous decision to rely on institutional precedent, *Casey* actually had at least as much to do with personal precedent — and that lesson bears directly on current Court decisionmaking.

Start with the case’s holding. *Casey* is often remembered for preserving the “central holding” of *Roe v. Wade*.⁹⁸ Yet *Casey*’s legal effect was to replace the institutional precedent established in *Roe* with the personal precedent most associated with Justice O’Connor.⁹⁹ In other words, *Roe*’s trimester framework was out, and the “undue burden” test

⁹² *Id.*

⁹³ See *Re*, *supra* note 8.

⁹⁴ See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

⁹⁵ *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting); see also Gerhardt, *supra* note 30, at 952 (“A change in personnel on the Supreme Court is unquestionably the main trigger to a shift in precedent. . . . In only four cases has a Court with no change in membership overruled itself.”); L.A. Powe, Jr., *Intragenerational Constitutional Overruling*, 89 NOTRE DAME L. REV. 2093, 2119–22 (2014).

⁹⁶ There are exceptions — and they are often notorious. In recent decades, the most famous instance of an outcome-determinative vote against personal precedent is probably Justice Blackmun’s opinion for the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which he had joined. See *Garcia*, 469 U.S. at 531.

⁹⁷ 505 U.S. 833 (1992), overruled by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁹⁸ 410 U.S. 113 (1973), overruled by *Dobbs*, 142 S. Ct. 2228; e.g., *Casey*, 505 U.S. at 843, 853; *id.* at 873 (joint opinion of O’Connor, Kennedy & Souter, JJ.).

⁹⁹ See generally *Roe*, 410 U.S. at 164–65; *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 530 (1989) (O’Connor, J., concurring in part and concurring in the judgment).

was in.¹⁰⁰ And that change in standard, far from merely theoretical, dictated the Court's ultimate disposition in the case: institutional precedent gave way roughly to the extent that it diverged from Justice O'Connor's personal precedent.¹⁰¹

Moreover, what we might call the "central holding" of *Casey*, particularly its redefinition of the right to abortion, appeared in a joint opinion authored by three named Justices — not the Court as an institution.¹⁰² The clear import of that mode of authorship and opinion designation was to foreground the personal identities of the three pivotal Justices. Their personal guarantee was what gave the new "undue burden" test its staying power, not whatever institutional precedent could be extracted from the fragmented decision of the Court. Justice Blackmun's separate writing similarly cast the result in expressly personal terms. "Make no mistake," he wrote, "the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage."¹⁰³ Meanwhile, "four Justices anxiously await the single vote necessary" to reject abortion rights.¹⁰⁴ Justice Blackmun knew that individuals, not any formal rule or the Court as an institution, had made the difference — and would continue to do so. As we have seen, events in *Dobbs* bear out that conclusion.¹⁰⁵

Further, both the majority and the joint opinion by Justices O'Connor, Kennedy, and Souter were extraordinarily concerned with personal precedent. Justice O'Connor's separate opinions alone are cited over a dozen times.¹⁰⁶ Early on, the majority opinion noted that "two of the present authors questioned the trimester framework in a way consistent with our judgment today," citing an opinion joined by Justice Kennedy and another authored by Justice O'Connor.¹⁰⁷ Later, the joint opinion recognized that the "concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent."¹⁰⁸ The string citation that followed included three separate opinions by Justice

¹⁰⁰ See *Casey*, 505 U.S. at 874 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (collecting support for the "undue burden" standard in a string cite consisting of six separate opinions by Justice O'Connor, one separate opinion by Justice Kennedy, and a fleeting reference in *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)).

¹⁰¹ Cf. *id.* at 934 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing for invalidation of "all the challenged provisions").

¹⁰² See *id.* at 843 (majority opinion); *id.* at 874 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

¹⁰³ *Id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* pp. 825–26.

¹⁰⁶ See *Casey*, 505 U.S. at 858, 860; *id.* at 873–74, 876–77, 899 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

¹⁰⁷ *Id.* at 858 (majority opinion).

¹⁰⁸ *Id.* at 876 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

O'Connor and one by Justice Kennedy.¹⁰⁹ And, after attempting to clarify the relevant standard, the joint opinion concluded: "Even when jurists reason from shared premises, some disagreement is inevitable," with the cite referencing separate opinions by Justices Kennedy and O'Connor.¹¹⁰ Not to be left out, Justice Souter, then serving only his second Term at the Court, was name-checked for a separate opinion he had recently written on, of all things, the importance of conventional stare decisis.¹¹¹

The other writings in the case also placed unusual emphasis on personal precedent. Justice Stevens's separate opinion cited and reiterated his own past opinions on abortion rights.¹¹² Justice Scalia opened his dissent by similarly reasserting his own past views, as expressed in prior separate opinions.¹¹³ And Justice Scalia also took pains to show precisely how the joint opinion had adjusted the views expressed in Justice O'Connor's past opinions on the "undue burden" standard.¹¹⁴ As he put it, "two of the three" Justices who formed the lead opinion "had to abandon previously stated positions."¹¹⁵ In fact, only one Justice was focused on preserving *Roe*'s actual holding, and that was Justice Blackmun — who of course had personally authored *Roe* itself.¹¹⁶ Meanwhile, Chief Justice Rehnquist followed his own dissent from *Roe*.¹¹⁷ So, on reflection, every opinion in *Casey* attended to personal precedent, and no Justice relied on institutional precedent alone. In all these ways, the reasoning and debate in *Casey* centered on the personal opinions of various Justices, not on institutional precedent.

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 878.

¹¹¹ *Id.* at 854 (majority opinion) (citing *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., joined by Kennedy, J., concurring)). This parenthetical citation was careful to note Justice Kennedy's join.

¹¹² *See id.* at 914 (Stevens, J., concurring in part and dissenting in part) (citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 563–72 (1989) (Stevens, J., concurring in part and dissenting in part)).

¹¹³ Justice Scalia's opinion began: "My views on this matter are unchanged from those I set forth in my separate opinions in *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (opinion concurring in part and concurring in judgment), and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990) (*Akron II*) (concurring opinion)." *Id.* at 979 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Scalia then cited his own opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Casey*, 505 U.S. at 981 (Scalia, J., concurring in the judgment in part and dissenting in part).

¹¹⁴ For instance, Justice Scalia asserted that the "joint opinion finds it necessary expressly to repudiate the more narrow formulations used in Justice O'Connor's earlier opinions." *Casey*, 505 U.S. at 988 (Scalia, J., concurring in the judgment in part and dissenting in part).

¹¹⁵ *Id.* at 997.

¹¹⁶ Even Justice Blackmun's *Casey* opinion opened with citations to two of his own past dissents. *Id.* at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹¹⁷ *See id.* at 952 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing *Roe v. Wade*, 410 U.S. 113, 139–40 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *id.* at 176 n.2 (Rehnquist, J., dissenting)).

The point here is not that institutional precedent was irrelevant to *Casey*. Rather, the point is that institutional precedent was accompanied, mediated, undermined, and reinforced by personal precedent. To view *Casey* purely as a case about institutional precedent would miss at least half the story.

C. Litigating Personal Precedent

Advocates have noticed the Justices' reliance on personal precedent and so make ample use of it as well. Personal precedent is thus an important component of actual litigation practice, especially among sophisticated parties and in major cases.

The most well-known way of advocating based on personal precedent is to center briefing on the separate writings of median or "swing" Justices. In the early 2000s, for instance, commentators often remarked on the prevalence of the "Kennedy brief," that is, a brief that references opinions authored by Justice Kennedy — who at that time just happened to be the decisive vote on many issues.¹¹⁸ As Professor Jeffrey Rosen then noted, Kennedy briefs were "so common that they've become an inside joke within the Supreme Court bar."¹¹⁹ For example, in *Obergefell v. Hodges*,¹²⁰ all the party briefs, as well as the United States's amicus brief, cited Justice Kennedy's separate opinions, with the reply brief citing five of them.¹²¹

The Court's most recent Term offers an even starker example. In *New York State Rifle & Pistol Association v. Bruen*,¹²² perhaps the most important Second Amendment case since *District of Columbia v. Heller*,¹²³ the parties and many amici drew on a *dissenting* opinion from a *circuit court* ruling.¹²⁴ To heap attention on such an obviously non-precedential opinion is extraordinary — and impossible to square with any formal rule of precedent. But the logic here was obvious: the circuit court dissent in question had been authored by now-Justice Kavanaugh, and it reflected his thorough consideration of the relevant issues.¹²⁵ Moreover, Justice Kavanaugh's vote was widely expected to be critical. Both parties accordingly cited now-Justice Kavanaugh's circuit dissent

¹¹⁸ See, e.g., Rosen, *supra* note 37.

¹¹⁹ *Id.*

¹²⁰ 135 S. Ct. 2584 (2015).

¹²¹ See Brief for Petitioners at 24, 40, *Obergefell* (No. 14-556); Brief for Respondent at 14, 20, *Obergefell* (No. 14-556); Reply Brief for Petitioners at 3-4, 7, 15, 18, 23, *Obergefell* (No. 14-556); Brief for the United States as Amicus Curiae Supporting Petitioners at 35, *Obergefell* (Nos. 14-556, 14-562, 14-571 & 14-574).

¹²² 142 S. Ct. 2111 (2022).

¹²³ 554 U.S. 570 (2008).

¹²⁴ See Brief for Petitioners at 40, 45, *Bruen* (No. 20-843); Brief for Respondents at 20, *Bruen* (No. 20-843); Brief for the United States as Amicus Curiae Supporting Respondents at 10-12, 14, 16, *Bruen* (No. 20-843).

¹²⁵ See *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

despite its complete lack of formal pedigree, with the United States as amicus doing so nine times.¹²⁶ And the Court's opinion ultimately quoted or cited the circuit dissent four times.¹²⁷

Personal precedents can even include a Justice's nonjudicial writings,¹²⁸ such as law review articles, as advocate behavior again illustrates.¹²⁹ Take then-Professor, now-Justice Elena Kagan's 2001 article *Presidential Administration*.¹³⁰ Before 2009, when now-Justice Kagan became Solicitor General and an obvious contender for the Court berth, that article had never been cited in a Court brief.¹³¹ Since then, it has been cited in over thirty Court briefs, including about ten times in just the last few years.¹³² Likewise, the Justices had never cited the article before 2009.¹³³ But they have now done so four times, with Justice Kagan herself doing so twice.¹³⁴ Another example is Chief Justice Roberts's 1993 article on standing.¹³⁵ That paper was not cited in a Court brief until 2006, about a year after Chief Justice Roberts reached the Court.¹³⁶ It has subsequently been cited over fifty times in Court briefs and once by the Court itself — in a 2021 decision that Chief Justice Roberts joined.¹³⁷

D. Absences of Precedent

The significance of personal precedent is also discernible in the *absence* of various forms of precedent. That is, judicial norms often aim to avoid the creation of precedent. And personal precedent helps explain those practices, too.

¹²⁶ See sources cited *supra* note 124. Nor is this an isolated example: the next most-cited separate opinion by any sitting Justice was also a lower court dissent — this time, by now-Justice Barrett. See Brief for Petitioners, *supra* note 124, at 5–6, 23, which thrice quotes *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting).

¹²⁷ See *Bruen*, 142 S. Ct. at 2129 n.5, 2134, 2137.

¹²⁸ Consider the Correspondence of the Justices, which is treated as a canonical precedent even though it consists of an extrajudicial letter. See, e.g., *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 808 (2021) (Roberts, C.J., dissenting) (quoting Letter from John Jay, C.J. & Assoc. JJ., U.S. Sup. Ct., to George Washington, President (Aug. 8, 1793), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488, 488 (Henry P. Johnston ed., 1891)).

¹²⁹ Cf. Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1341 (2015) (noting that “some courts” have “relied on” Justice Scalia's scholarship on standing “to more fully understand *Lujan*'s reasoning”).

¹³⁰ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹³¹ These results are based on the LexisNexis briefs databases.

¹³² See *supra* note 131.

¹³³ I again use LexisNexis databases to generate the main-text figures.

¹³⁴ See *Collins v. Yellen*, 141 S. Ct. 1761, 1802 (2021) (Kagan, J., concurring in part and concurring in the judgment in part); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2225 n.1, 2236–37 (2020) (Kagan, J., concurring in the judgment in part and dissenting in part); *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality opinion).

¹³⁵ See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993).

¹³⁶ See *supra* note 131.

¹³⁷ See *supra* note 131; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Jurists and commentators alike have observed that methodological principles are not afforded stare decisis effect in the same way as other aspects of judicial reasoning.¹³⁸ For example, Court opinions either using or casting doubt on legislative history are not thought to bind later Justices.¹³⁹ Likewise, discrete Court opinions that appear to embrace textualism or originalism are not thought to require use of similar methods in all later cases. At the same time, individual Justices routinely assert fidelity to their own preferred methodologies, even when doing so is avowedly against the grain. Justice Scalia, for example, can be viewed as a persistent dissenter as to the interpretive relevance of legislative history — a position that he committed to as a circuit court judge.¹⁴⁰

The pervasiveness of methodological personal precedent is perhaps best illustrated by the longtime rivalry between Justices Scalia and Breyer. Whereas Justice Scalia was an avowed originalist and textualist who long advanced a rule-like approach to *Chevron*¹⁴¹ deference, Justice Breyer supported “active” constitutionalism and consideration of legislative history, as well as a more standard-like *Chevron* doctrine.¹⁴² And these Justices advanced their opposing views not just in opinions but also in well-known books.¹⁴³ As this study in contrasts illustrates, methodological precedent is institutionally weak but personally strong. That combination is no accident: the fact that so many Justices are strongly committed to distinctive interpretive methods likely explains the general lack of strong institutional precedent on questions of methodology.¹⁴⁴

Even *Chevron* deference — once regarded as the exception to the rule that there is no methodological stare decisis¹⁴⁵ — has seemingly

¹³⁸ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment) (“[W]e do not regard statements in our opinions about such generally applicable interpretive methods . . . as binding future Justices with the full force of horizontal stare decisis.”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 389 (2005); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1757 (2010); Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 106 (2020).

¹³⁹ For example, the Court sometimes considers “legislative history” only “[f]or those who find it relevant,” thereby acknowledging a lawful option to proceed either way. *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017).

¹⁴⁰ See, e.g., *Ill. Com. Comm’n v. ICC*, 749 F.2d 875, 893 (D.C. Cir. 1984) (Scalia, J., dissenting).

¹⁴¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁴² Compare, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 12–25 (Amy Gutman ed., 1997), with STEPHEN BREYER, *ACTIVE LIBERTY* 5 (2005). See also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 198–204 (2006).

¹⁴³ See sources cited *supra* note 142.

¹⁴⁴ See Evan J. Criddle & Glen Staszewski, *Essay, Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1593 (2014) (arguing that interpretive method is “frequently intertwined with a judge’s most fundamental beliefs and commitments about the rule of law and democracy”); Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1149 (2019).

¹⁴⁵ See, e.g., Gluck, *supra* note 138, at 1817.

expired at the Court.¹⁴⁶ Why? Because enough Justices with anti-*Chevron* personal precedents arrived,¹⁴⁷ replacing Justices with pro-*Chevron* records.¹⁴⁸ Meanwhile, longtime lower court judges steeped in *Chevron* continue to apply it.¹⁴⁹ The personal nature of *Chevron*'s rise and fall is perhaps most vivid with respect to Justice Scalia. He had long been known for being even more broadly supportive of *Chevron* deference than *Chevron*'s author, Justice Stevens.¹⁵⁰ And, when conservatives later began to turn against *Chevron*,¹⁵¹ Justice Scalia admitted its incompatibility with statutory text but nonetheless clung to it — based on one of his own past dissents.¹⁵²

Ironically, stare decisis itself offers a compelling example of the personal nature of methodological precedent at the Court. To some extent, there is institutional precedent on precedent, with a few factors — namely reliance, well-reasonedness, workability, and doctrinal consistency — enjoying special salience.¹⁵³ Yet some Court decisions embellish those factors in remarkably exotic ways.¹⁵⁴ And, these days, it seems that almost every Justice harbors his or her own unique approach to stare decisis.

Take *Ramos v. Louisiana*,¹⁵⁵ which reveals at least four (and probably six or seven¹⁵⁶) distinctive approaches to stare decisis. Justice Gorsuch's lead opinion drew on the standard factors while also considering points that some members of the majority rejected.¹⁵⁷ Justice

¹⁴⁶ See Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 297 (2022) ("*Chevron* has been unmentionable in the Supreme Court the past few years.>").

¹⁴⁷ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

¹⁴⁸ I of course have in mind Justices Scalia, Kennedy, and Ginsburg. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290 (2013) (Justice Scalia writing for the Court in support of *Chevron*, with Justice Ginsburg joining); *Entergy v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (Justice Scalia writing for the Court in support of *Chevron*, with Justice Kennedy joining).

¹⁴⁹ E.g., *Cigar Ass'n of Am. v. FDA*, 5 F.4th 68, 77 (D.C. Cir. 2021).

¹⁵⁰ See, e.g., Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1757 (2010).

¹⁵¹ Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 624 (2021).

¹⁵² See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 111–12 (2015) (Scalia, J., concurring in the judgment) (citing *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)). Justice Scalia did repudiate a deference rule that he was less associated with — and, in doing so, both acknowledged and downplayed his own past support for it. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("[W]hile I have in the past uncritically accepted that rule [of judicial deference to agency interpretations of agency regulations], I have become increasingly doubtful of its validity." (citing *Auer v. Robbins*, 519 U.S. 452 (1997) (Scalia, J.))).

¹⁵³ E.g., *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

¹⁵⁴ See e.g., *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478–86 (2018) (discussing a host of factors).

¹⁵⁵ 140 S. Ct. 1390 (2020).

¹⁵⁶ Justices Breyer, Ginsburg, and Kagan selectively joined only portions of the various opinions on stare decisis.

¹⁵⁷ *Ramos*, 140 S. Ct. at 1402–05 (opinion of Gorsuch, J.).

Kavanaugh proposed reorganizing stare decisis around three entirely new factors.¹⁵⁸ Justice Sotomayor argued that stare decisis should favor novel rights-based claims.¹⁵⁹ And Justice Thomas rejected the standard factors in favor of a far less precedent-protective approach that he had outlined in a prior separate opinion.¹⁶⁰ Justice Alito was then left to insist — in dissent — that it is “important that the Court as a whole adhere to its ‘precedent about precedent[s],’” for “[i]f individual Justices apply different standards for overruling past decisions, the overall effects of the doctrine will not be neutral.”¹⁶¹ Amusingly, Justice Alito could find no better citation for this claim than (you guessed it) another one of his own dissents.¹⁶²

Personal precedent also substantially underlies the quasi-judicial norm that Supreme Court nominees should decline to offer detailed legal views during judicial confirmation hearings. Though today often referred to as the “Ginsburg rule” due to then-Judge Ginsburg’s zippy statement of it,¹⁶³ the relevant principle was earlier and perhaps most forcefully defended by Justice O’Connor. As she put it during her own confirmation hearing:

I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position.¹⁶⁴

This argument assumes that personal precedent matters: to opine on a legal question is to have “prejudged” or “morally committed” oneself, even if no formal rule of precedent is at stake.¹⁶⁵ Tacitly recognizing as much, sitting Justices sometimes consult the transcripts of their own confirmation hearings when deciding cases.¹⁶⁶

¹⁵⁸ *Id.* at 1414–16 (Kavanaugh, J., concurring in part).

¹⁵⁹ *See id.* at 1408–09 (Sotomayor, J., concurring as to all but Part IV-A).

¹⁶⁰ *See id.* at 1421 (Thomas, J., concurring in the judgment).

¹⁶¹ *Id.* at 1432 n.16 (Alito, J., dissenting) (first alteration in original) (quoting *Alleyne v. United States*, 570 U.S. 99, 134 (2013) (Alito, J., dissenting)).

¹⁶² *See id.*

¹⁶³ *See Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 323 (1993) (statement of then-Judge Ginsburg) (“[N]o hints, no forecasts, no previews.”); Lori A. Ringhand & Paul M. Collins, Jr., *Neil Gorsuch and the Ginsburg Rules*, 93 CHI-KENT L. REV. 475, 476 (2018).

¹⁶⁴ *Nomination of Sandra Day O’Connor: Hearings Before the S. Comm. on the Judiciary on the Nomination of Judge Sandra Day O’Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States*, 97th Cong. 57–58 (1981) (statement of then-Judge Sandra Day O’Connor); *see also* Stephen Carter, Essay, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1193 (1988).

¹⁶⁵ There is of course a risk of overreading ambiguous remarks made during confirmation hearings. *See* G. Alexander Nunn & Alan M. Trammell, *Settled Law*, 107 VA. L. REV. 57, 113–14 (2021).

¹⁶⁶ *Cf.* *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (Justice Kagan quoting her remarks from a lecture that “[w]e’re all textualists now” (alteration in original)).

III. REFORMS

Once personal precedent's role is appreciated, can the legal system better take advantage of it, or mitigate its downsides?

A. *Eliminate, Embrace, or Manage?*

In light of the pervasive but underappreciated interactions between institutional and personal precedent, should judicial decisionmaking change? This question asks us to identify realistic reforms to legal rules or culture that would foster sensible decisional principles, as contrasted with purposeless disruption, arbitrary or unpredictable outcomes, and partisan hackery. But before considering specific reform proposals, we must address a more fundamental question: What basic attitude should a reformer, or the Court itself, adopt with respect to personal precedent?

One stark possibility is that stare decisis enthusiasts should strengthen personal precedent by rendering it more institutional. As we have seen, personal precedent already underlies some of the most effective aspects of institutional precedent. So perhaps the best way to reinforce institutional precedent is to formalize its currently informal foundations. For instance, stare decisis could be revised to allow for perpetual dissent, at least under certain circumstances.¹⁶⁷ Perpetual dissent would then appear less like an act of institutional disobedience and more like the exercise of an entitlement or privilege. Going still further, we could imagine that the Court's stare decisis inquiry included specific consideration of whether and how the current Justices had decided relevant cases. An institutional ruling joined by only a minority of the Court's current Justices might then occupy second-tier precedential status.¹⁶⁸ The two forms of precedent would thus become integrated, yielding a formal precedential regime with both institutional and personal aspects.

But while personal precedent both underwrites and inflects institutional precedent, the two are also in competition. More personal precedent means more conflicts with institutional precedent, many of which will be resolved at institutional precedent's expense. Further, institutional precedent, to the extent it has any independent force, seems to depend on its association with both legal formality and judicial impersonality. The Justices, that is, sometimes seem to care about preserving at least the perception, or aspiration, that the Court operates with an

¹⁶⁷ Some commentators have already gone so far as to view persistent dissent as an exception to stare decisis. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 74 (2008); Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865, 870 (1998).

¹⁶⁸ See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 387 n.6 (1997) ("[S]ix current Members of this Court have joined opinions in the past that have (at least implicitly) endorsed this theory . . .").

institutional identity.¹⁶⁹ Yet making the Justices more comfortable with claiming individualistic exceptions to the Court's formal rules would tend to legitimize informality and erode institutionalism. In other words, formalizing personal precedent, even as a set of exceptions, would greatly undermine institutional precedent by taking away the traits that make it special.

The problems with elevating personal precedent point toward the opposite strategy: waging war on personal precedent, except insofar as it contributes to institutional precedent. This approach is arguably the official position of the doctrine of *stare decisis*, which recognizes only institutional precedent.¹⁷⁰ Yet because institutional opinions usually do not acknowledge personal precedent, the two forms of authority are allowed to occupy somewhat different if overlapping zones of judicial decisionmaking. As we have seen, institutional precedent dominates in Court opinions, personal precedent takes a larger role in separate writings, and virtually every Justice considers both when deciding how to rule in any given case.¹⁷¹ We can imagine efforts to disrupt that *détente* by more assertively opposing personal precedent. All references to separate opinions, including in briefs, could be prohibited by rule. And the Court (or other trendsetters of legal culture) could try to stigmatize Justices who exhibit vanity in the form of excessive attention to their own juridical personality. Going still further, the legal system could prohibit separate opinions, or even signed opinions altogether.¹⁷² These reforms might aim to restore the opinion-writing norms of the Marshall Court or to emulate some foreign judicial systems.¹⁷³

That program of depersonalization would be misguided. For one thing, we have seen that personal precedent has pre- or nonlegal foundations and so is unlikely to be vanquished, no matter how hard its opponents try. It is frankly hard to imagine that many Justices would, or even could, abide by a formal rule against considering their own past views. And the Justices would find ways of working around rules that obscure or suppress their individuality. Further, personal precedent's demise — even if attainable — would facilitate worse ways of defying

¹⁶⁹ Apart from symbolic expressions like “opinions of the Court” and the uniform of black robes, the Justices have made this point explicitly. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (“Like the character of an individual, the legitimacy of the Court must be earned over time.”).

¹⁷⁰ See cases cited *supra* note 15.

¹⁷¹ See *supra* section II.C, pp. 845–46.

¹⁷² See Lerner & Lund, *supra* note 8, at 1282; James Markham, Note, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923 (2006); Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 197 (2020).

¹⁷³ See Markham, *supra* note 172, at 929, 939.

institutional precedent. Partisan hackery leaps to mind.¹⁷⁴ A jurist who is uncommitted to personal consistency, or is conditioned to ignore it, will be that much more eager to follow his favorite political fads. Personal precedent is thus a complement to personal integrity and an antidote to cynicism.¹⁷⁵ So depersonalizing the Court would make sense, if at all, only as part of an even broader rethinking of the Justices' role.

If personal precedent should not be formalized or eliminated, then some form of management is called for. On this intermediate approach, personal precedent abides but also maintains its informality. The upshot would be two parallel precedential tracks: a formal, majoritarian one for institutional precedents and an informal, personal one for individual Justices writing separate opinions. This managerial strategy suggests certain practical adjustments with respect to both majority opinions and separate writings.

B. Four Principles

Four principles should guide the Justices' use, or avoidance, of personal precedent. A single theme unites them all: institutional and personal precedent should each be given its own distinctive zone or manner of operation, with neither effacing the other.

First, opinions for the Court should generally avoid arguments predicated on personal precedent. This precept is a form of rhetorical restraint, even self-sacrifice: authors of majority opinions should refrain from shoring up their own positions with essentially negative or ad hominem arguments based on the personal precedents of dissenting Justices. The temptation to level accusations of personal inconsistency may often be hard to resist, especially when one's own position is wobbly or one's adversaries are vulnerable. But any short-term rhetorical benefit that accrues to the majority opinion author comes at the expense of majority opinions in general. As a result, opinions for the Court that dabble in

¹⁷⁴ By "partisan hackery" I mean obedience to the current wishes of a political party or other special interest, usually for reasons of personal gain and not based on any legitimate principle. So defined, partisan hackery is distinguishable from ideological agreement with a party or other group. Notably, Justice Barrett recently gave a speech that used this term to identify what the Justices are not. See Dominick Mastrangelo, *Barrett: Supreme Court "Not Comprised of a Bunch of Partisan Hacks,"* THE HILL (Sept. 13, 2021, 9:14 AM), <https://thehill.com/homenews/571935-coney-barrett-supreme-court-not-comprised-of-a-bunch-of-partisan-hacks/amp> [<https://perma.cc/AJ9K-QEQ9>]; see also Mark Joseph Stern, *Clarence Thomas, Liberal,* SLATE (June 18, 2013, 1:23 PM), <https://slate.com/news-and-politics/2013/06/clarence-thomass-liberal-rulings-how-the-supreme-court-justices-originalism-leads-him-to-side-with-liberals.html> [<https://perma.cc/F8XG-92EJ>] ("Supreme Court Justice Clarence Thomas is frequently accused of being a partisan hack, a conservative lackey serving only the interests of the Republican Party. . . . But . . . [he] is much more than a Tea Party mouthpiece.").

¹⁷⁵ For a related view focusing on the Court's unimpressive performance when issuing unsigned summary rulings, see William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 22–24 (2015).

personal precedent ultimately succeed only in undermining their own formality.

Opinions for the Court already tend to avoid discussing personal precedent, though that norm may be eroding. Most striking is *Edwards v. Vannoy*,¹⁷⁶ where the majority criticized the author of the lead dissent for adopting one position in a prior dissent and then “turn[ing] around” in the case at hand to advance an allegedly inconsistent position.¹⁷⁷ Or take the *Dobbs* majority opinion, which not only buttressed its stare decisis analysis by repeatedly citing a past concurrence by Justice Kavanaugh,¹⁷⁸ but also tussled with the Chief Justice by twice quoting his past work on judicial restraint.¹⁷⁹

Second, opinions for the Court should be maximalist with respect to reciting or summarizing past case law. That is, the authors of majority opinions should seek out opportunities to restate, and self-consciously work within, preexisting doctrine, so as to create new personal precedents in sync with institutional precedent. Over time, institutional and personal precedent would become increasingly aligned, and the Justices would become accustomed to thinking in terms of the institutional precedents that they have personally endorsed.¹⁸⁰ This proposal casts doctrinal recitations in a different light: apart from providing background or setting the stage, as commentators have observed,¹⁸¹ doctrinal recitations make personal precedent work to institutional precedent’s advantage, thereby strengthening stare decisis and overall legal stability.¹⁸²

One might object that erring in favor of including doctrinal recitation is unnecessary, given the Court’s independent need to decide the case at hand. How, after all, could any Court decision issue without a discussion of existing legal principles? But doctrinal recitations can be of varying detail or sweep, and the proposal here is to include as much as feasible. Further, the Justices sometimes assume that institutional precedent is correct before disposing of the case on that *arguendo* basis.¹⁸³ And those efforts often do more to undermine precedent than

¹⁷⁶ 141 S. Ct. 1547 (2021) (Kavanaugh, J.).

¹⁷⁷ *Id.* at 1562; *see also id.* at 1560 (alleging inconsistency as to Justices Breyer and Sotomayor); Richard M. Re, *Reason and Rhetoric in Edwards v. Vannoy*, 17 DUKE J. CONST. L. & PUB. POL’Y 63, 90–91 (2022); Driver, *supra* note 37, at 1265 n.7 (discussing “jurisprudential gotcha”). For one of Justice Kavanaugh’s more recent claims involving personal precedent, see Transcript of Oral Argument at 55, *United States v. Texas*, No. 22-58 (U.S. argued Nov. 29, 2022) (“And you say [D.C. Circuit judges were] not paying attention to the text. Yeah, we did.”).

¹⁷⁸ *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2264–67, 2275–76 (2022).

¹⁷⁹ *See id.* at 2281, 2283.

¹⁸⁰ *See Barrett*, *supra* note 74, at 1713 (“Precedent . . . gives a [J]justice a way of thinking about the problem she must decide.”).

¹⁸¹ *See KOZEL*, *supra* note 1, at 31 (discussing uses of precedent as “stage setting” or “as a means of framing and bolstering their opinions”); WEST, *supra* note 53.

¹⁸² Similarly, judicial nominees might endeavor to endorse settled legal principles — and be criticized if they decline to do so.

¹⁸³ *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

sustain it. Normally, the better approach is to endorse, rather than reserve, institutional precedents.

One might further object that maximalism with respect to doctrinal recitation is at odds with judicial minimalism. Perhaps caution dictates that the Court should reserve institutional precedent's correctness whenever possible, on the theory that anything else would decide more than necessary.¹⁸⁴ But the idea is to be maximalist only about what has already been decided. That is, the Court would be maintaining a trail that had already been made, rather than setting out on a new path. And a practice that erred on the side of reserving past precedents would not preserve what has been decided but subtly undermine it, as every reservation would show a gap between the institution and the individual Justices speaking for it. So, in this context, seeming restraint is actually revision, as existing law is gradually eroded, rather than reinforced.

Third, the Justices should generally write separately to explain significant deviations from personal precedent.¹⁸⁵ This principle would often call for nothing more than a brief note indicating acquiescence to conventional *stare decisis*.¹⁸⁶ Opinions of that type foster individual accountability while reinforcing institutional precedent.¹⁸⁷ But some breaks from personal precedent are more complicated or questionable — and the Justices often recognize as much. We have seen Justices explain why they stop persistently dissenting on a particular issue.¹⁸⁸ In addition, Justices sometimes explain why they are voting at odds with their personal precedents today, even as they intend to adhere to their personal precedents in future cases.¹⁸⁹

Of course, Justices will often prefer not to explain their own deviations from past statements, perhaps because they hope that these wrinkles might go unnoticed. Yet their hawk-eyed colleagues are well-positioned to observe and draw attention to these changes in position. Concurring and dissenting Justices should accordingly follow Justice Scalia's example in calling out their colleagues for breaking from their own past rulings.¹⁹⁰ This essentially negative practice strengthens the affirmative principle in favor of adhering to personal precedent. The expectation that each Justice should explain her own deviations from

¹⁸⁴ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (1999); *PDK Lab'ys Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

¹⁸⁵ See Driver, *supra* note 37, at 1276 ("Justices should venture at least some explanation of what, precisely, they saw on the road to Damascus.")

¹⁸⁶ See, e.g., *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) (Souter, J., concurring).

¹⁸⁷ *Stare decisis* makes judges feel more secure in abandoning personal precedent in a specific situation: when they are following institutional precedent. The effect is to weaken personal precedent when judges are most justified in breaking from it. See Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 927–28 (2021).

¹⁸⁸ See *supra* section I.A, p. 828.

¹⁸⁹ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011) (Thomas, J., concurring).

¹⁹⁰ See *Boumediene v. Bush*, 553 U.S. 723, 830 (2008) (Scalia, J., dissenting).

personal precedent thus comes with an important corollary: when writing separately, the Justices should be prepared to point out their colleagues' inconsistencies.

The point of focusing on deviations from personal precedent is to hold accountable Justices who might flip-flop for hackish or otherwise improper reasons. Given the power of motivated reasoning and political polarization, Justices should think twice, and speak openly, before abandoning their own considered views in favor of what feels intuitive or easy today. Perhaps surprisingly, given his frequent attention to personal precedent, Justice Scalia offers an example of this problem. In *Gonzales v. Raich*,¹⁹¹ Justice Scalia separately espoused a capacious account of Congress's lawmaking authority under the Commerce Clause and Necessary and Proper Clause.¹⁹² Later, Justice Scalia's theory was widely viewed as supporting the constitutionality of the Affordable Care Act,¹⁹³ and Justice Ginsburg's separate opinion in *National Federation of Independent Business v. Sebelius*¹⁹⁴ (*NFIB*) drew on Justice Scalia's separate opinion for that very reason.¹⁹⁵ But in signing on to the joint dissent in *NFIB*, Justice Scalia avoided any engagement with his own *Raich* analysis.¹⁹⁶ The worry here is that Justice Scalia sought to escape accountability for his own past views when they became politically inconvenient.

Fourth, the Justices should curb the creation of some personal precedent. This reform must be targeted, as many separate writings create personal precedents that are beneficial. When individual Justices float tentative thoughts regarding unposed questions, they generally help develop the collective thinking of the bench and bar, without committing themselves to any set view.¹⁹⁷ More assertively, the Justices sometimes join opinions for the Court while adding concurrences containing their own more specific or worked-out thoughts on the question at hand.¹⁹⁸ That practice, too, is beneficial insofar as it creates strong personal precedents in accord with institutional precedent. So the stockpile of shared case law increases, and the author is inoculated against hackery. Ditto

¹⁹¹ 545 U.S. 1 (2005).

¹⁹² *Id.* at 33–38 (Scalia, J., concurring in the judgment).

¹⁹³ See, e.g., Ariane de Vogue, *Health Care: Liberals Eye Scalia and Roberts Vote*, ABC NEWS (Mar. 14, 2012, 10:04 AM), <https://abcnews.go.com/Politics/OTUS/health-care-liberals-eye-scalia-roberts-vote/story?id=15918156> [<https://perma.cc/6WH7-82EJ>]. The U.S. brief in *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519 (2012), cited Justice Scalia's *Raich* concurrence six times. Brief for Petitioners (Minimum Coverage Provision) at 22, 26, 43, 46, *NFIB* (No. 11-398).

¹⁹⁴ 567 U.S. 519.

¹⁹⁵ See *id.* at 618 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment)).

¹⁹⁶ See *id.* at 654 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (distinguishing the *Raich* majority opinion but not Justice Scalia's separate writing).

¹⁹⁷ See NEIL DUXBURY, *THE INTRICACIES OF DICTA AND DISSENT* 32 (2021).

¹⁹⁸ See generally Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018).

for dissents that express views at odds with positions staked out by the Court.

The difficulty arises when separate opinions gratuitously repudiate institutional precedent. These opinions disclaim the Court's past rulings based on some newly discovered personal insight. Such dramatic statements can be tempting because they seem fresh, bold, and clear, thereby allowing a Justice to create or promote his brand. But the statements are also likely to be rash, oversimple, and hard to walk back. Because they are unnecessary to resolve a presented dispute, they may spring from an excessive desire for celebrity at the expense of accuracy, or from the lobbying efforts of a particularly zealous law clerk. And, having staked out a position that is distinctive, even daring, few Justices would later want to compromise, much less admit error. In some ways, these gratuitous rejections of case law resemble conventional dicta — except that they erode institutional precedent, instead of supplementing it.

To avert this problem, the Justices — as individuals — might adopt a rule of thumb such as the following. Separate writings may disavow Court precedent only when the precedent is: (i) integral to deciding the case at hand; (ii) adequately debated; and (iii) unprotected by *stare decisis*. These requirements help ensure that strong personal precedents are created only after appropriate deliberation, rather than recklessly. The *Casey* joint opinion is a model, as all three conditions were met.¹⁹⁹ And Justice Gorsuch's recent concurrence in *Edwards v. Vannoy* offers an antimodel, as none of the conditions was met.²⁰⁰

An interesting intermediate example can be found in Justice Scalia's dissent in *Tennessee v. Lane*.²⁰¹ Justice Scalia opened his opinion by acknowledging that he had previously joined the relevant Court precedent.²⁰² But, he explained, "experience" had convinced him that his earlier join had been an error and that the test enshrined in Court precedent was unworkable.²⁰³ After explaining his newly preferred approach, Justice Scalia candidly noted that the "major impediment to the approach I have suggested is *stare decisis*."²⁰⁴ He then discussed past Court decisions and isolated an important principle that he would continue to honor "principally for reasons of *stare decisis*."²⁰⁵ This entire analysis is exemplary in its self-consciousness, candor, and interest in accommodating institutional precedent. However, no challenge to the

¹⁹⁹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–61 (1992); *supra* section II.B, pp. 842–45.

²⁰⁰ See *Edwards v. Vannoy*, 141 S. Ct. 1547, 1572–73 (2021) (Gorsuch, J., concurring). Justice Gorsuch did not conduct a serious *stare decisis* analysis with respect to his proposal. *Cf. id.* at 1573 & n.7.

²⁰¹ 541 U.S. 509, 554 (2004) (Scalia, J., dissenting).

²⁰² *Id.* at 556.

²⁰³ *Id.* at 557–58.

²⁰⁴ *Id.* at 560.

²⁰⁵ *Id.* at 564.

relevant institutional precedent was either raised or debated, and Justice Scalia seems to have believed that the same result would follow if he hewed to *stare decisis*.²⁰⁶ Justice Scalia might have felt that it was unnecessary to wait any longer before expressing his new views. But even if so, he should have expressed his conclusions more tentatively until a case arose that compelled him to choose between personal and institutional precedent.

One might object that my account of personal precedent as largely self-interested is followed by an unduly public-spirited proposal for restraint.²⁰⁷ But my argument openly accepts both the ineradicability of personal precedent and the self-interested motives underlying it. The goal is therefore to manage personal precedent on realistic terms, not wish it away.²⁰⁸ Further, my argument recognizes that Justices are partly motivated by institutionalist considerations.²⁰⁹ Thus, cogent appeals to institutional factors have force, especially if the Justices have not yet appreciated the relevant tradeoffs. Finally, the foregoing proposals are addressed not just to the good consciences of self-interested Justices but also to you, dear reader, and to readers like you. Precisely because the Justices are self-interested, they are mindful of what their potential fanbase craves. Thus, persuasive appeals to the legal community can influence how the Justices use personal precedent. For example, judicial behavior would change if the readers of judicial opinions came to believe that Justices who gratuitously reject institutional precedent are egotistical. Part of this Essay's goal is therefore to persuade the legal community to be more critical of personal precedent specifically where it is most objectionable.

IV. JURISPRUDENCE

What is the law? The standard positivist answer, famously offered by Professor H.L.A. Hart, begins by identifying a fundamental rule that judges accept as authoritative among themselves.²¹⁰ That widely shared first principle, or "rule of recognition," is capable of validating subsidiary rules that, in turn, can generate convergent results in discrete cases.²¹¹ In this picture, a judge who accepts an idiosyncratic first principle, or any rule that is not traceable to a widely shared first principle,

²⁰⁶ See *id.* at 557 (noting the "compelling demonstration" by the Chief Justice's dissent).

²⁰⁷ This critique could be framed as an accusation that my argument commits the "inside/outside fallacy." See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

²⁰⁸ See *supra* section III.A, pp. 850–52.

²⁰⁹ See *supra* pp. 836–37.

²¹⁰ See H.L.A. HART, *THE CONCEPT OF LAW* 100–01 (1961) (officials); *id.* at 256 (judges). I focus here on judges, but other officials can have personal precedent, too. So the present account of law's nature can stretch or contract to fit different versions of Hartian positivism, depending on the selected recognitional community.

²¹¹ *Id.* at 100–01.

may be doing justice, but she cannot possibly be applying the law.²¹² By its very nature, the law just cannot be a rule whose foundation is unique to a particular judge, or even a minority group of judges. Such personal precepts, even if important to judicial behavior, are definitionally excluded from the law's ambit.

Hart's focus on consensus agreement among judges, while a helpful simplification, is ultimately unsatisfying.²¹³ Focusing on a foundational rule that "all" judges accept would create an overly demanding definition of the law, as the practice of even a single outlier judge could disqualify all rules from being law. And focusing on what "most" judges accept would be not only arbitrary — why require fifty-one percent instead of, say, sixty-six percent?²¹⁴ — but also unnuanced. Intuitively, the content of the law is meaningfully different depending on whether a set of rules is accepted by some, most, or all judges. Moreover, a judge who adopts a minority view regarding the content of the law would seem to face a dilemma, insofar as the judge would have reasons both to adhere to her own stated convictions and to give up or qualify those convictions for the sake of fostering uniformity across jurists. Hart's simplifying focus on consensus papers over these complexities.

Personal precedent suggests a different and arguably more fundamental answer to the question of what constitutes the law. Rather than grounding the law in a rule of recognition that is common among "all or most" judges as a group,²¹⁵ positivism might account for the rules accepted by each judge. That is, one might think that any judge who publicly accepts a rule as binding on her official decisions has thereby shaped legal practice and so contributed to the overall content of the law. Each judge's personal contribution to the law may be small or even canceled out by the contributions of others. But, in combination with one another, these discrete contributions add up to the total set of rules

²¹² As Hart put it, "the ultimate rule of recognition," "if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only." *Id.* at 116; *see also* SCOTT J. SHAPIRO, LEGALITY 84 (2008) (noting that the rule of recognition is not regarded "as an idiosyncratic or personal rule that others are not required to follow").

²¹³ In a similar vein, some theorists have suggested that different groups of officials might adopt different rules of recognition. *See* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 192 (1980) (noting the possibility of "only partly overlapping[] sets of laws"); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. L. REV. 719, 745 (2006) ("Law, I suggest, is 'group-relative.'").

²¹⁴ A minority view among judges can control, such as when the minority controls a higher-tier court or appellate panel. *See also infra* note 221 and accompanying text (noting that trial court decisions may be effectively unappealable).

²¹⁵ Mark Greenberg, Response, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 113 (2017) ("On Hart's theory, then, roughly speaking, sources contribute to the content of the law in whatever way *all or most judges* treat those sources as doing so." (emphasis added)).

that govern the judiciary and, ultimately, the legal system.²¹⁶ On this view, the law would include rules that stem from consensus agreement, as under Hartian positivism.²¹⁷ In addition, however, the law would also include the motley collection of unique rules that each judge accepts as a guide to her own decisionmaking. Thus, the law would be widely shared to the extent that the rules that judges accept are widely shared. And the law would be personal to the extent that the rules that judges accept are personal.

Personal precedent's role in contributing to the law is most evident at the Supreme Court. By adopting a rule as her own, as law for herself, a single Justice also goes a great distance toward creating law for the entire country. In that rarefied context, a change in a single jurist's personal precedent can yield a major ruling and, thus, an institutional precedent that any jurisprudential theory would have to regard as legally significant.²¹⁸ The rise of textualism and originalism offers a particularly salient illustration of how trends in the Justices' personal precedents can topple not only settled doctrines but also jurisprudential understandings.²¹⁹ In these ways, a judge's personal law operates *as* law — indeed, as the law's building block. A theory of law that recognized as much would be attuned to the shifting combinations of legal views that find intermittent expression within the judiciary. And it could also explain why much more than *realpolitik* lay behind the intuition that *the law* was not quite the same after, for example, Amy Coney Barrett replaced Ruth Bader Ginsburg.²²⁰ In that moment, some legal propositions became more settled, others less so.

Stepping away from the Justices' marble palace, personal precedent contributes to the law in many other, less salient situations. In the typical trial proceeding, for instance, many issues are not realistically appealable; appeal may even be practically unavailable for an entire

²¹⁶ *But see* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 655 (1995) (objecting on rule-of-law grounds to “a conception of law as the sum of the views of the particular judges who happen to sit on the high court at any time, rather than a conception of law as an impersonal, ideal whole”). Professor Dorf focuses on law as prediction, not personal precedent as such.

²¹⁷ *See* HART, *supra* note 210, at 116.

²¹⁸ This point holds regardless of whether each judicial precedent constitutes *case law* — that is, as law in itself, akin to a statute. *Compare* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–92 (1996) (suggesting that case law partially constitutes the law), *with* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 563 (2019) (suggesting that applications of the rule of precedent are merely “as-if” law).

²¹⁹ The practical success of originalism, textualism, or other interpretive theories is often measured by their current support among Justices. *See, e.g.,* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 432 (2013). Notably, the link between appointments and legal change expressly underlays political efforts to instantiate originalism. *See* Reva B. Siegel, *The Supreme Court, 2007 Term — Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 220 (2008).

²²⁰ *See supra* pp. 825, 843.

trial-level adjudication.²²¹ The trial judge's personal precedent might then be, in effect, the law for the parties.²²² And positivism can acknowledge as much while continuing to distinguish between the law and other influences on judicial behavior, such as prejudice, ideology, random chance, and so forth. Personal precedent, as we have seen, is not just a prediction about what a judge will in fact do, for whatever reason.²²³ It is instead the set of decisional principles — the law — to which a specific judge has publicly subscribed. So perhaps personal precedent is not merely one jurist's gloss on the law, so much as the law's foundation or constitutive element.²²⁴

CONCLUSION

Personal precedent navigates between two shoals. First is the cynicism that comes from realizing that the law is often much less important than the judge who applies it. Second is the futile optimism that a truly impersonal law is realistically attainable. These traps are interrelated, in that people who expect impersonality in the law can become so disillusioned as to fall into cynicism.

The best way out of this dilemma is to recognize that law is both real and personal. For many reasons, judges place a premium on their own statements of the law. And that's especially so at the Supreme Court. Self-interested Justices promote their brands and legacies by propounding consistent legal views. And no authority is quite as persuasive as a Justice's own past self.

Personal precedent accordingly shapes every aspect of judicial behavior — and lawyers realize that. Sophisticated practitioners routinely play to individual Justices' personal precedents, even to the exclusion of institutional precedent. And *stare decisis* itself, though hailed for its impersonality, turns out to depend on the personal views of individual Justices. The fate of constitutional abortion rights long depended on that truth. And so does much else.

²²¹ See Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1, 50 n.237 (2014) ("Fewer than one district court decision in nine even generates an appeal.")

²²² Cf. Peter S. Prescott, Opinion, *They Shoot Children, Don't They?*, N.Y. TIMES (May 18, 1981), <https://www.nytimes.com/1981/05/18/opinion/they-shoot-children-don-t-they.html> [https://perma.cc/ZGY9-PNG4] (quoting a family court judge who remarked that "I overrule the Supreme Court in my courtroom every day"). We might imagine that the law for any particular litigant is an ever-shifting function of the personal precedents of the judges that actually, or will possibly, adjudicate the case. As the identities of the litigant's adjudicators become more determined, so too would the relevant law.

²²³ See Oliver Wendell Holmes, *The Path of the Law*, Address Before the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.")

²²⁴ The view sketched in the main text could be labeled "personal positivism," and its full explication and defense will have to await another time.