

THE THRUST AND PARRY OF STARE DECISIS IN THE ROBERTS COURT

Professor Karl Llewellyn famously demonstrated that for almost every canon of statutory interpretation, there exists an opposite and equally plausible countercanon.¹ Fashioning a fencing analogy, he described each pair of dueling canons as containing a “[t]hrust” and “[p]arry.”² More than seventy years after Llewellyn’s seminal work, the same dynamic of thrust and parry appears to be operating behind the Supreme Court’s reasoning in a context different from — and potentially more alarming than — statutory interpretation: stare decisis. While one should beware any attempt to reduce the Roberts Court’s jurisprudence into a simplistic arc,³ this Court is undeniably marked by many moments of overturning precedent.⁴ This Note assembles and structuralizes the various modes of reasoning used by the Justices in either preserving or discarding precedent to demonstrate that stare decisis is not, as some may believe, “a bedrock principle of the rule of law”⁵ but rather a malleable rhetorical tool.

The raw observation that the Roberts Court has on many occasions flouted stare decisis is not in itself groundbreaking.⁶ Indeed, evidence tends to refute the notion that the Roberts Court has been any more inclined than prior Courts to overrule precedent.⁷ Nonetheless, today’s Supreme Court serves as a useful specimen for studying the manipulability of stare decisis for at least two reasons. First, the decline in public support for the Court accentuates the need to investigate just how principled stare decisis is, insofar as the principle serves as a foundation of the Court’s legitimacy.⁸ Second, even if the Roberts Court is not unique in its departures from precedent, it frequently offers open evaluations of

¹ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

² *Id.* at 401.

³ See, e.g., *What’s Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, and Fed. Rts. of the S. Comm. on the Judiciary*, 117th Cong. 2 (2021) (testimony of Jonathan H. Adler, Director, Coleman P. Burke Center for Environmental Law, Case Western Reserve University School of Law) (“Much public commentary . . . seeks to apply reductionist labels to the Court’s work.”).

⁴ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

⁵ Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1537 (2008).

⁶ See, e.g., Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 53 (2022) (“[T]he Roberts Court does not appear to consider itself particularly bound by stare decisis.”).

⁷ See, e.g., Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 401 (2007); Jonathan H. Adler, *The Stare Decisis Court*, REASON: VOLOKH CONSPIRACY (July 8, 2018, 10:05 AM), <https://reason.com/volokh/2018/07/08/the-stare-decisis-court> [<https://perma.cc/7LRK-NJCD>].

⁸ See *infra* pp. 696–97.

stare decisis.⁹ Amidst this increased attention on stare decisis, Llewellyn’s framework enables a valuable exercise in “demonstrat[ing] *concretely*” and *systematically* that the reasoning for or against stare decisis is “easily manipulated.”¹⁰ Just as the dueling canons induce the concern that judges can utilize canons as post hoc justifications for statutory interpretations,¹¹ the thrust and parry of stare decisis illustrates the considerable leeway Justices enjoy in making outcome-driven decisions about whether to respect precedent. Part I of this Note presents the pairs of thrusts and parries à la Llewellyn and substantiates each pair with examples from the Roberts Court’s cases. The scope of the argument should not be overstated. The manipulability of stare decisis does not amount to the damning diagnosis that precedent holds no importance. In many instances, precedent will continue to control if the case at bar squarely falls within the bounds of relevant caselaw. However, the thrust and parry matters a great deal in edge cases — cases where the applicability and correctness of precedent are not obvious. A conventional understanding of stare decisis as a firm tenet of fidelity would dictate that judges follow precedent in edge cases; under a weak stare decisis, the edge cases risk turning into toss-ups. Moreover, the thrust and parry offers Justices rhetorical cover for overturning precedent, even when its applicability is indisputable.¹²

Part II considers the implications that Part I’s descriptive project has for the Court’s legitimacy. It cautions against hastily assuming that a weakened stare decisis delegitimizes the Court, based on two considerations: (1) the possibility of personal precedent¹³ as a new locus of judicial legitimacy, and (2) acknowledgement of the Court’s function in airing and generating public discourse. Without committing to the position that a weak stare decisis is on balance better or worse for the judicial system, this Part seeks to contribute new criteria to the conversation on the relationship between stare decisis and judicial legitimacy.

I. THE DUELS

The Roberts Court has on several occasions engaged in introspection about when to overrule precedent and why. Its opinions provide some

⁹ See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411–16 (2020) (Kavanaugh, J., concurring in part); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134–35 (2020), *abrogated by Dobbs*, 142 S. Ct. 2228.

¹⁰ Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 916 (2016).

¹¹ *Id.* at 916–17.

¹² *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, is a good example. The Mississippi abortion ban in *Dobbs* fell squarely within the bounds of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See *Dobbs*, 142 S. Ct. at 2244–45. Yet the Court overturned both precedents. See *id.* at 2279.

¹³ To adopt Professor Richard Re’s formulation, personal precedent refers to “a judge’s presumptive adherence to her own previously expressed legal views, as paradigmatically expressed in a separate opinion.” Richard M. Re, Essay, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 828 (2023) (footnote omitted).

guidance into common factors that the Court purports to consider in such an analysis.¹⁴ In practice, these factors do not exhaust the Court's varied explanations for keeping or discarding precedent. For example, every stare decisis question must, as a threshold matter, characterize the precedent in such a way that renders pertinent the inquiry of whether it should be overruled; there is no reason to overrule a precedent about apples in a case about oranges. The thrust and parry can occur at this preliminary stage, even if the Court does not explicitly consider "correct characterization of precedent" a stare decisis factor.

The table below focuses on six factors, or modes of reasoning, with each mode containing a pair of opposing arguments. For some modes of reasoning, the indeterminacy arises because the same trait about a precedent feeds into conflicting aphorisms. For others, the relevant standard is so vague as to lack any concrete, neutral content, rendering the debate a free-for-all; the sixth mode provides the clearest example (what counts as "egregious"?). In either case, the aim is to demonstrate that the reasoning of stare decisis often lacks bite because it is easily neutralized by a plausible counter.

	THRUST	BUT	PARRY
A. Characterization	The present case offers an opportunity to overrule the previous case because the precedent was about this issue in the present case.		While the present case concerns this issue, the precedent is distinguishable because it concerns that issue.
B. Exception	We should overrule the precedent because the desirable outcome in the present case is irreconcilable with the precedent.		The precedent contains a doctrinal exception that reconciles it with the outcome of the present case.
C. Workability/ Flexibility	The precedent is too flexible and susceptible to arbitrary application.		The flexibility of the precedent allows the Court to appropriately make fine distinctions.
D. Age	The precedent is outdated in light of new social developments.		The Court should beware overturning a precedent that has withstood the test of time.
E. Reliance Interests	The reliance interests associated with the precedent are limited or not concrete enough.		The reliance interests are sufficiently concrete and important.

¹⁴ See *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part) (listing quality of precedent's reasoning, precedent's coherence with other decisions, changed law and facts since precedent, workability, reliance interests, and age); *Dobbs*, 142 S. Ct. at 2265 (listing the nature of error, quality of reasoning, workability, disruptive effect on other areas of law, and absence of reliance).

F. Quality of Reasoning	The precedent's quality of reasoning is egregiously poor.	The precedent's reasoning is defensible and, at the very least, not egregiously poor.
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A. Characterization

While not explicitly included in the Court's list of factors, characterization of precedent is a hot battleground for stare decisis. Suppose that a majority of Justices think that the right outcome in an edge case requires deviating from the precedent's rule. In such a case, a middle-of-the-road Justice in that majority who wishes to preserve the precedent is likely to distinguish, rather than overrule, the precedent.

That middle-of-the-road Justice also goes by John Roberts. Whether it be doctrinal nuance or political balancing, Chief Justice Roberts has on many occasions made this maneuver to avoid overruling precedent. In *Dobbs v. Jackson Women's Health Organization*,¹⁵ which overruled *Roe v. Wade*¹⁶ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁷ the Chief parried the majority's thrust by characterizing the issue narrowly as whether to overrule the "subsidiary rule" in *Roe* "that the State's interests are not constitutionally adequate to justify a ban on abortion until viability."¹⁸ He admonished the majority for reaching the question of whether "the Constitution protects the woman's right to abortion,"¹⁹ when it could have simply discarded the viability rule and "le[ft] the constitutional question] for another day."²⁰ By contrast, the majority viewed the viability rule as "a critical component of the holdings in *Roe* and *Casey*."²¹ Thus, in its view, *Dobbs* was the appropriate vehicle for overturning the two precedents.

The point is not that reasonable minds can disagree about the proper contours of a precedent's holding. Rather, characterization of precedents involves inherent ambiguity. The nature of a judicial opinion is that the boundaries between holding and reasoning, between *core* and *peripheral* holdings, and even between holding and dicta are rarely demarcated with clarity.²² Thus, the proposition that precedent *X* controls case *Y* can, under fastidious review, almost always be challenged.

¹⁵ 142 S. Ct. 2228.

¹⁶ 410 U.S. 113.

¹⁷ 505 U.S. 833.

¹⁸ *Dobbs*, 142 S. Ct. at 2315 (Roberts, C.J., concurring in the judgment).

¹⁹ *Id.*

²⁰ *Id.* at 2314 (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518, 521 (1989) (plurality opinion)).

²¹ *Id.* at 2281 (majority opinion) (citing *Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring)).

²² See generally, e.g., Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661 (2017).

Seila Law, LLC v. CFPB,²³ where the Chief again distinguished two precedents rather than overrule them, illustrates the significant extent to which parrying Justices can play with characterization to save precedent. *Seila Law* addressed the constitutionality of a for-cause protection against the President's power to remove a single director of an independent agency, the Consumer Financial Protection Bureau.²⁴ The conclusion that such a protection was unconstitutional required dealing with *Humphrey's Executor v. United States*²⁵ and *Morrison v. Olson*,²⁶ which respectively upheld a removal restriction against a Federal Trade Commission (FTC) commissioner²⁷ and an independent counsel.²⁸ Justice Kagan's dissent offered persuasive reasons why those precedents should govern *Seila Law* — reasons that would force someone wishing to strike down the CFPB removal protection into a position of thrust.²⁹ *Humphrey's Executor* relied mainly on the FTC's quasi-legislative and quasi-judicial character, which meant that its commissioner was not a "purely executive officer[]" and hence deserving of removal protection.³⁰ The CFPB, another quasi-legislative and quasi-judicial agency, would likely deserve a similar removal protection.³¹ Next, Justice Kagan framed *Morrison's* key test for the constitutionality of removal restriction as asking "whether such a restriction would 'impede the President's ability to perform his constitutional duty.'"³² It was far from clear that the removal restriction for the CFPB director would fail this test.

The Chief had two paths toward reaching the unconstitutionality of the removal restriction. First, he could grant Justice Kagan's characterization of the precedents but nonetheless overrule them. Such an approach would disagree with the Chief's respect for precedent and risk the appearance of imprudence. He thus elected the second path of parrying Justice Kagan's thrust by recasting the precedents in an entirely different, if implausible, way. In his view, *Humphrey's Executor* and *Morrison* were but "two exceptions to the President's unrestricted removal power. . . . [*Humphrey's Executor*] held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. . . . [*Morrison*] held that Congress could provide tenure protections to certain *inferior* officers with narrowly

²³ 140 S. Ct. 2183 (2020).

²⁴ *See id.* at 2191.

²⁵ 295 U.S. 602 (1935).

²⁶ 487 U.S. 654 (1988).

²⁷ *Humphrey's Executor*, 295 U.S. at 631–32.

²⁸ *Morrison*, 487 U.S. at 696–97.

²⁹ *Seila L.*, 140 S. Ct. at 2234–35 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

³⁰ *Humphrey's Executor*, 295 U.S. at 628.

³¹ *Seila L.*, 140 S. Ct. at 2238–39 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

³² *Id.* at 2235 (quoting *Morrison*, 487 U.S. at 691).

defined duties.”³³ Now, *Humphrey’s Executor* and *Morrison* were about oranges while *Seila Law* was about apples: the CFPB was headed by a single Director who was a *principal*, not inferior, officer.³⁴ However, neither characterization seemed faithful to the original precedents. *Humphrey’s Executor* never once mentioned “group” or “multimember”; similarly, *Morrison* “used the word ‘inferior’ in just one sentence.”³⁵ Chief Justice Roberts thus conjured rather anomalous characterizations of precedents to depart from them without bearing the heavy responsibility of overruling precedent. Whatever rigidity stare decisis demands, *Seila Law* demonstrated that it is easily offset by the great pliability in the Justices’ framing of precedent.

B. Exception

The second mode is an offshoot of the first. One way in which a precedent-saving Justice could characterize precedent is by recasting it as a doctrine with a recognized exception, which would then allow her to argue that the present case falls under that exception, obviating any need to wrestle with stare decisis. Yet this second mode bears separate mention because it points out a different type of judicial leeway than the broader liberty to reformulate past holdings: namely, the leeway to revive little-used doctrine.

For example, amidst anticipation that the Court would finally put the nail in the coffin of *Employment Division v. Smith*,³⁶ Chief Justice Roberts displayed another elaborate precedent-saving maneuver in *Fulton v. City of Philadelphia*.³⁷ The case considered a free exercise challenge to Philadelphia’s refusal to contract with a Catholic foster care agency unless it agreed to certify same-sex couples as foster parents.³⁸ The thrust to overrule precedent was clear: Philadelphia had explicitly relied on *Smith*’s holding that a neutral and generally applicable state action was exempt from strict scrutiny, even if it burdened religious conduct.³⁹ Thus, the “desirable” outcome from the perspective of the Court’s conservative majority — siding with the foster care agency⁴⁰ — would require overruling *Smith*.

Not according to Chief Justice Roberts. He managed to reconcile the two goals and avoid the dilemma via a forgotten escape hatch that

³³ *Id.* at 2192 (majority opinion) (citations omitted) (citing, inter alia, *Humphrey’s Executor*, 295 U.S. 602; *Morrison*, 487 U.S. 654).

³⁴ *Id.* at 2200.

³⁵ *Id.* at 2236 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

³⁶ 494 U.S. 872 (1990).

³⁷ 141 S. Ct. 1868 (2021).

³⁸ *Id.* at 1875–76.

³⁹ *Id.* at 1887 (Alito, J., concurring in the judgment).

⁴⁰ See Nelson Tebbe, *The Supreme Court, 2020 Term — Comment: The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 317 (2021).

Justice Scalia had left in *Smith*: “A law is not generally applicable if it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions.’”⁴¹ The Chief observed that section 3.21 of the city’s standard foster care contract allowed the Commissioner of the Department of Human Services to exercise discretion in granting an exception for foster agencies.⁴² Contrary to the City’s claim, he argued, its policy would be unconstitutional even under *Smith* because “[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable” and thereby subjects it to strict scrutiny.⁴³ It did not matter to the Chief that the City had “never granted such an exemption and had no intention of handing one” to the foster agency;⁴⁴ nor did it matter that he had to resort to a legal technicality sure to confound the public.⁴⁵

The most puzzling aspect of the Chief’s opinion in *Fulton* from the perspective of stare decisis, however, is neither its implausibility nor its obscurity, but rather its brazen conjuring of a legal mechanism that “had never been solely relied on for a holding by the Supreme Court.”⁴⁶ Indeed, it is possible that Justice Scalia included the exception only as a face-saving move to distinguish *Smith* from previous cases with similar fact patterns that had come out the other way.⁴⁷ Summoning a forgotten exception in the name of stare decisis is ironically self-defeating. The Chief himself in a different opinion described the benefits of stare decisis as restraining judicial arbitrariness and promoting predictability.⁴⁸ It was hardly predictable that the Chief would invoke the individualized-exemptions exception. Moreover, to resolve a controversial, high-stakes clash between religious liberty and antidiscrimination on a theretofore nonexistent doctrine exudes the very essence of arbitrariness.

C. Workability/Flexibility

Unlike the first two modes, workability has been explicitly included in the Court’s list of stare decisis factors, and consistently so.⁴⁹ Yet the meaning of workability is far from obvious. The lack of objective content means that the concept can be easily molded to fit competing maxims. *Dobbs*’s formulation that the workability of a rule pertains to “whether it can be understood and applied in a consistent and

⁴¹ *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884).

⁴² *Id.* at 1878.

⁴³ *Id.* at 1879.

⁴⁴ *Id.* at 1887 (Alito, J., concurring in the judgment).

⁴⁵ See Tebbe, *supra* note 40, at 303.

⁴⁶ *Id.* at 298.

⁴⁷ See *id.* at 299–300.

⁴⁸ See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020).

⁴⁹ See cases cited *supra* note 14.

predictable manner”⁵⁰ helps little, as it merely echoes the broader benefits of stare decisis.

Opinions from two 2019 cases, *Kisor v. Wilkie*⁵¹ and *American Legion v. American Humanist Ass’n*,⁵² shed some light, even though they did not expressly discuss workability. In *Kisor*, Justice Gorsuch chided the majority for failing to muster the courage to overrule *Auer v. Robbins*,⁵³ which required a federal court to defer to an agency’s interpretation of its own rule.⁵⁴ His criticism of *Auer* deference emphasized, among other things, its lack of consistency and uniformity owing to the political reality that a change in presidential administration would likely result in a new interpretive rule that alters the “meaning” of an agency regulation.⁵⁵ The implication was that a workable rule should be insulated from extrajudicial factors, like political tides.⁵⁶ A workable rule must also address measurable properties. In *American Legion*, Justice Gorsuch criticized the *Lemon*⁵⁷ test for posing no plausible metric against which to measure its prongs: “How much ‘purpose’ to promote religion is too much . . . ? How much ‘effect’ of advancing religion is tolerable . . . ?”⁵⁸

Workability, however, is too malleable to give any real force to these thrusts. What Justice Gorsuch called inconsistency was, to Justice Kagan, desirable flexibility: “*Auer* deference gives an agency significant leeway to say what its own rules mean,” thereby “enabl[ing] the agency to fill out the regulatory scheme Congress has placed under its supervision.”⁵⁹ She emphasized the agencies’ “comparative advantages”⁶⁰ in their scientific and technical expertise that allowed them to apply regulations in response to “complex or changing circumstances.”⁶¹ *Auer* deference purposefully permitted variability so that agencies could produce interpretations appropriately tailored to new developments. Similarly, Justice Kagan in *American Legion* pushed back against the purported unworkability of the *Lemon* test by suggesting that an elastic application of the test would vindicate its core purpose of checking any religious leanings from the government.⁶² Even as she conceded the value of

⁵⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2272 (2022).

⁵¹ 139 S. Ct. 2400 (2019).

⁵² 139 S. Ct. 2067 (2019).

⁵³ 519 U.S. 452 (1997).

⁵⁴ *See id.* at 461.

⁵⁵ *Kisor*, 139 S. Ct. at 2443 (Gorsuch, J., concurring in the judgment).

⁵⁶ *Cf. Am. Legion*, 139 S. Ct. at 2082–83 (arguing that the *Lemon* test demands difficult inquiries into the purpose behind religious monuments, which multiply and evolve with time).

⁵⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁵⁸ *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring in the judgment).

⁵⁹ *Kisor*, 139 S. Ct. at 2418.

⁶⁰ *Id.* at 2413.

⁶¹ *Id.* (quoting *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 151 (1991)).

⁶² *See Am. Legion*, 139 S. Ct. at 2094 (Kagan, J., concurring in part) (“Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test’s focus on purposes and effects is crucial in evaluating government action in this sphere . . .”).

historical guidance, she qualified her statement by stressing her preference for doing so on a case-by-case basis,⁶³ implying that one mark of a virtuous rule was its capacity to admit of fine distinctions across cases.

D. Age

The rationale underlying the thrust side of this mode is clear: if a precedent is too old, it likely fails to comport with changed circumstances. Examples abound of Justices' invocation of age to depart from stare decisis. In *Berisha v. Lawson*,⁶⁴ Justice Gorsuch dissented from the denial of certiorari to urge reconsideration of the actual malice standard of *New York Times Co. v. Sullivan*⁶⁵ in light of the technological changes that have shifted the main locus of news from traditional press to online media platforms.⁶⁶ Likewise, in *Citizens United v. FEC*,⁶⁷ Justice Kennedy appealed to "the advent of the Internet and the decline of print and broadcast media"⁶⁸ to bolster his case for overruling *Austin v. Michigan Chamber of Commerce*,⁶⁹ which had upheld corporate expenditure restrictions.⁷⁰ *Janus v. AFSCME, Council 31*⁷¹ featured a similar invocation of the mismatch between old law and new realities: Justice Alito argued that the existence and durability of federal public-sector unions, which do not mandate agency fees, disproved the premise of *Abood v. Detroit Board of Education*⁷² that agency fees were necessary to achieve labor peace.⁷³

On the parry side, Justices frequently invoke the formidability of age as a rhetorical tool for defending precedent.⁷⁴ Such expression of confidence in the wisdom of time-worn rules can raise the bar for the required strength of precedent-discarding arguments. In *Evans v. Michigan*,⁷⁵ the Court considered arguments to overturn precedents that interpreted the Double Jeopardy Clause as barring retrial of a criminal defendant following a trial court's erroneous application of law.⁷⁶ Because the existing rules had "stood the test of time,"⁷⁷ the Court found "no reason to

⁶³ *Id.*

⁶⁴ 141 S. Ct. 2424 (2021) (mem.) (denying certiorari).

⁶⁵ 376 U.S. 254 (1964).

⁶⁶ *Berisha*, 141 S. Ct. at 2426–27 (Gorsuch, J., dissenting from the denial of certiorari).

⁶⁷ 558 U.S. 310 (2010).

⁶⁸ *Id.* at 352.

⁶⁹ 494 U.S. 652 (1990), overruled by *Citizens United*, 558 U.S. 310 (2010).

⁷⁰ *Id.* at 655.

⁷¹ 138 S. Ct. 2448 (2018).

⁷² 431 U.S. 209 (1977).

⁷³ *Janus*, 138 S. Ct. at 2466.

⁷⁴ See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (arguing that overruling *Auer* would cause instability by overruling a long line of precedents "going back 75 years or more"); *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting) ("The majority overthrows a decision entrenched in this Nation's law — and in its economic life — for over 40 years.")

⁷⁵ 568 U.S. 313 (2013).

⁷⁶ *Id.* at 315–17.

⁷⁷ *Id.* at 328.

believe the existing rules have become so ‘unworkable’ as to justify overruling precedent.”⁷⁸ The implication is that the Court can use a precedent’s age to put its thumb on a scale in other modes of reasoning, such as workability. It is easy to imagine similar moves vis-à-vis reliance interests and quality of reasoning.

Arguments about age may also weigh in favor of keeping precedent that is peppered with an originalist flavor. Tellingly, both Justices Gorsuch and Alito in the thrust-side examples above framed their target precedents as standing at odds with a broader tradition. Justice Gorsuch described the principle that the freedom of the press is conditioned on its duty to get the facts right as “[t]he accepted view’ in this Nation for more than two centuries,” interrupted only in 1964 by *Sullivan*.⁷⁹ Justice Alito likewise prepared his attack on *Abood* by summoning the allies of age and tradition: “We have held time and again that freedom of speech ‘includes both the right to speak freely and the right to refrain from speaking at all.’”⁸⁰ While neither Justice mentioned a specific precedent, their rhetoric demonstrates that age can be a powerful originalist parry against overruling a precedent insofar as it serves as a proxy for the precedent’s proximity to Founding-era practices.⁸¹

E. Reliance Interests

Reliance interests strike at the heart of stare decisis and, as such, feature heavily in the Court’s opinions overruling precedent. Much like workability and age, however, reliance often fails to settle the question. Even with colorable arguments for keeping precedent to protect reliance interests, Justices can massage the scope and nature of affected interests to discard the precedent anyway.

Justices wishing to overrule precedent will predictably want to minimize the reliance interests at stake, dismissing them as either insufficiently concrete or limited in extent. In its reliance analysis, the *Dobbs* majority argued that stare decisis should care only about “concrete,” as opposed to “intangible,” reliance interests — namely, interests that arise “where advance planning of great precision is most obviously a necessity.”⁸² Abortion did not implicate concrete reliance interests because “getting an abortion is generally ‘unplanned activity,’ and ‘reproductive

⁷⁸ *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

⁷⁹ *Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting from the denial of certiorari) (quoting *Herbert v. Lando*, 441 U.S. 153, 158–59 (1979)).

⁸⁰ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

⁸¹ *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (defending the dual-sovereignty doctrine partially based on its 170-year lineage of major decisions).

⁸² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276 (2022) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.”⁸³

The dissenting Justices’ threefold response demonstrates why the reliance prong is manipulable to support either the thrust or parry. First, the scope of the affected reliance interests is malleable. The dissenting Justices challenged the majority’s implicit point that *Dobbs* would upend the reliance interests of only a small, discrete group of women who had gotten pregnant within a few months before the announcement of the decision. Contrary to this myopic focus, “all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*’s and *Casey*’s protections.”⁸⁴

Second, indeterminacy arises from the ambiguity around which harms count as “concrete” enough to implicate reliance. The dissenting Justices explained that however one defines the boundaries of the affected group, the harms inflicted on reliant individuals must take into account burdens such as having to travel to an abortion-friendly state, losing child-care for the period of pregnancy, taking time off work, and giving birth against their will.⁸⁵ These harms may not neatly fit the narrow profile of contract- or property-like reliance interests stressed by the majority,⁸⁶ but they could bring materially and physically disastrous consequences on many women, and as such, plausibly qualify as “concrete” interests in the ordinary sense of the word.⁸⁷ After all, the majority never offered persuasive reasons why we should treat “concrete” reliance interests as synonymous with traditional, common law reliance interests.

Third, and most interestingly, the form of reliance fails to settle whether “intangible” interests should matter.⁸⁸ Unable to substantively refute the importance of such interests, the majority resorted to claiming the Court’s incompetence in assessing “generalized assertions about the national psyche” and the empirical difficulty of measuring intangible reliance.⁸⁹ These concerns talk past the dissent’s powerful point that an abortion right is a core component of a woman’s autonomy and, hence,

⁸³ *Id.* (quoting *Casey*, 505 U.S. at 856).

⁸⁴ *Id.* at 2343 (Breyer, Sotomayor & Kagan, JJ., dissenting). Relatedly, the mode of reliance also fails to settle the question of whether the scope of affected rights is large or small. In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which overruled an earlier case holding that the Sixth Amendment did not require a unanimous jury verdict, Justices Kavanaugh and Alito agreed that reliance interests were limited to Louisiana and Oregon, the two states employing nonunanimous juries, but disagreed over whether these interests were “limited” or “enormous.” Compare *id.* at 1419 (Kavanaugh, J., concurring in part), with *id.* at 1425 (Alito, J., dissenting).

⁸⁵ *Dobbs*, 142 S. Ct. at 2345 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁸⁶ *Id.* at 2276 (majority opinion).

⁸⁷ *Id.* at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁸⁸ For a detailed discussion and critique of *Dobbs*’s narrow focus on tangible interests and the competing recognition of intangible interests in *Casey*, see Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1863–84 (2023).

⁸⁹ *Dobbs*, 142 S. Ct. at 2276 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)).

her status as an equal citizen.⁹⁰ For women who grew up under the promise that they could make decisions about their own bodies, having that promise taken away comes as a blunt loss of the respect they counted on receiving from society. The tension between the tangible and intangible is not unique to *Dobbs*. Notably, the Court in *Casey* had explicitly repudiated the *Dobbs* majority's narrow conception of contract- or property-like reliance, which would "limit cognizable reliance to specific instances of sexual activity."⁹¹ Stressing that the Constitution serves "human values," *Casey* phrased reliance interests in terms of the general liberty of the woman "to participate equally in the economic and social life of the Nation."⁹²

Casey was arguably one of the most self-aware and intentionally meticulous opinions concerning stare decisis from the Court.⁹³ The *Dobbs* majority's brazen characterization of *Casey* as deploying "a novel version"⁹⁴ of stare decisis is doubly symptomatic of a cavalier attitude toward precedent: not only did *Dobbs* overturn precedent, but it also flouted a precedent about precedent.

F. Quality of Reasoning

In a rare instance of near unanimity, the Justices agree that overturning a precedent requires showing not only that it was wrong, but also that it was *egregiously* wrong.⁹⁵ That maxim rings hollow without some metric for egregiousness. Of course, no such metric has been adopted by the Court. One would think that the very fact of disagreement about the correctness of a precedent among nine highly educated and judicious individuals should itself constitute the strongest evidence that the error is not egregious. But time and again, the Justices have proven themselves insensitive to such collegial humility and doubled down on positions that effectively commit them to calling each other egregiously wrong.⁹⁶

The *Chevron*⁹⁷ framework provides an instructive parable. When reviewing an agency's interpretation of a statute it administers, the

⁹⁰ *Id.* at 2345–46 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁹¹ *Casey*, 505 U.S. at 856.

⁹² *Id.* In several other instances, the Court had similarly indicated that "the goal of stability [espoused by stare decisis] encompasses reliance interests that extend beyond the commercial context." Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 653 (1999); *see also, e.g.*, *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

⁹³ *Cf. Varsava, supra* note 88, at 1847 (describing *Casey* as an important precedent about precedent).

⁹⁴ *Dobbs*, 142 S. Ct. at 2272.

⁹⁵ *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part). *But see Gamble v. United States*, 139 S. Ct. 1960, 1981–82 (2019) (Thomas, J., concurring) (arguing against the need for a special justification to overturn a precedent beyond its error).

⁹⁶ *See, e.g., Dobbs*, 142 S. Ct. at 2260.

⁹⁷ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

framework first asks whether the statute's meaning is ambiguous; if it is, then the court defers to the agency's reasonable interpretation of that statute.⁹⁸ Because proceeding to step two almost invariably means upholding the agency's interpretation, the site of disagreement often shifts to step one: whether the statute was ambiguous.⁹⁹ Here, an interesting puzzle arises when Justices disagree about the unambiguously correct interpretation of a statute: "[I]f five Justices say that the statute clearly means *X* and four Justices say that it clearly means *Y*, isn't that at least some evidence that the statute is ambiguous?"¹⁰⁰ Professors Eric Posner and Adrian Vermeule famously argue that such disagreement among Justices should bear on the ambiguity of statutory meaning.¹⁰¹ In the event of such disagreement, the Justices should take "a stiff dose of epistemic humility" and "update their views" to recognize the ambiguity of the statute.¹⁰² Posner and Vermeule's argument may have portended *Chevron's* demise: it demonstrated the framework's reliance on standardless gradations between *unambiguously correct* interpretations and *merely reasonable* ones.

The resemblance in the stare decisis context is hard to miss: the Court has articulated no clear, principled method to determine whether the quality of reasoning in a precedent is egregiously wrong, as opposed to merely wrong.¹⁰³ And just as the Justices have never considered one another's votes under *Chevron*, so too do they not update their views on whether a precedent was egregious error even when one or more of their colleagues defend it.¹⁰⁴ More than any other argument in stare decisis, the argument from quality of reasoning seems likely to be little more than lip service to the allegedly fundamental doctrine of stare decisis.

II. A LEGITIMACY METAMORPHOSIS

What is the upshot of all this? Doctrinally, the answer is unclear. Perceived by many as the most ringing blow against stare decisis, *Dobbs* produced varying levels of alarm among commentators, ranging from assurance that other precedents on substantive due process rights are safe for the near future¹⁰⁵ to a charged wake-up call that the Court is arrogating power to itself from all other political branches.¹⁰⁶ It is

⁹⁸ See *id.* at 842–43.

⁹⁹ See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229, 244–45 (1994).

¹⁰⁰ Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 161 (2016).

¹⁰¹ *Id.* at 163–64.

¹⁰² *Id.* at 163.

¹⁰³ See William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 317–19 (2020).

¹⁰⁴ Compare, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 (2020) (Kavanaugh, J., concurring in part) (describing a precedent as egregiously wrong), with *id.* at 1432–35 (Alito, J., dissenting) (defending the reasoning in that same precedent).

¹⁰⁵ See, e.g., Dale Carpenter, *Why Other Fundamental Rights Are Safe (at Least for Now)*, REASON: VOLOKH CONSPIRACY (June 24, 2022, 3:56 PM), <https://reason.com/volokh/2022/06/24/why-other-fundamental-rights-are-safe-at-least-for-now> [<https://perma.cc/N5DF-F6A4>].

¹⁰⁶ See, e.g., Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).

beyond the scope of this Note to weigh in on this doctrinal tea-leaf reading. Nor does this Note seek to downplay the concerns of judicial arbitrariness that intuitively follow from the observations in Part I. Instead, this Part demonstrates that conflating the manipulability of stare decisis with the demise of judicial legitimacy is hasty. It seeks to enrich the discussion on the relationship between stare decisis and judicial legitimacy — by considering, first, the role of personal precedent, and second, the Court’s function in generating discourse.

A. Personal Precedent: A New Foundation of Legitimacy?

We are living through a time when public approval of the Court is at a record low.¹⁰⁷ As Justice O’Connor presciently observed, the Court’s image is intrinsically tied to its legitimacy: “The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”¹⁰⁸ This Note makes no claims about whether the weakening of stare decisis has caused the unprecedented public disapproval of the Court. But there is no denying that stare decisis constitutes, or is widely treated as constituting, a foundation block for judicial legitimacy.¹⁰⁹ Stare decisis feeds into legitimacy in at least two ways: it reinforces the judiciary’s apolitical status (in perception, if not in reality) and it reassures the public that the content of laws endures regardless of individual Justices’ preferences. However, the manipulability of the different modes of reasoning in stare decisis means that the Court’s decision yesterday does not reliably predict the Court’s decision in an edge case tomorrow. It may also encourage the public to believe that Justices reach decisions based on their political beliefs, rather than the objective and unchanging content of the law.¹¹⁰ At a minimum, the thrust and parry of stare decisis makes it more difficult to articulate a defense of the Court’s legitimacy.

¹⁰⁷ Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Oct. 6, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx> [<https://perma.cc/S3MW-E34V>].

¹⁰⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

¹⁰⁹ See Derigan Silver & Dan V. Kozlowski, *Preserving the Law’s Coherence: Citizens United v. FEC and Stare Decisis*, 21 COMM’N L. & POL’Y 39, 48 (2016) (“Modern authors typically agree that [one of] the major functions of *stare decisis* [is] to protect the Court’s legitimacy by reinforcing the public’s opinion of an apolitical judiciary . . .” (footnote omitted)); Northwestern Pritzker School of Law, *U.S. Supreme Court Justice Elena Kagan in Conversation with Dean Hari Osofsky*, YOUTUBE, at 28:00–30:15 (Sept. 16, 2022), https://www.youtube.com/watch?v=9AWZcsp6wGc&ab_channel=NorthwesternPritzkerSchoolofLaw [<https://perma.cc/N4SK-FCGQ>] (Justice Kagan explaining that a court “acts like a court” when it “abides by precedent, except in unusual circumstances”); cf. Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1115–20 (1995) (explaining that *Casey* reflects a prudential conception of stare decisis, which recognizes “the importance of maintaining the Court’s image” and “treat[s] this rationale as a reason for decision,” *id.* at 1118).

¹¹⁰ See Hellman, *supra* note 109, at 1117.

Erosion of faith in institutional precedent can shift the locus of the Court's legitimacy to personal precedent. Professor Richard Re defines personal precedent as "a judge's presumptive adherence to her own previously expressed legal views, as paradigmatically expressed in a separate opinion."¹¹¹ Institutional inconsistency is not a composite of individual inconsistencies. In fact, we can observe a decent amount of consistency in each Justice.¹¹² Chief Justice Roberts is likely to save precedent by capitalizing on doctrinal nuance.¹¹³ Justice Gorsuch tends to emphasize uniformity and determinability of rules,¹¹⁴ whereas Justice Kagan often praises flexibility and fine distinctions.¹¹⁵ Justice Thomas stresses the clear error of precedents with which he disagrees and wields that certainty to quash other substantive concerns.¹¹⁶

Re argues that personal precedent can effectively constrain judicial arbitrariness.¹¹⁷ As a predictive matter, the wealth of resources regarding each Justice's personal jurisprudence renders it a manageable task to predict her stance on an edge case.¹¹⁸ Personal precedent may have superior predictive value because a jurist has the best access to and thus is most likely to follow her own opinions, whereas she "might not view her predecessors' opinions as good proxies for her own."¹¹⁹ To the extent that criticisms of the Court's legitimacy are based upon its unpredictability, the viability of individualized forecasts would help the Court to retain some legitimacy. And to the extent that criticisms focus on the law's vulnerability to personal predilections, the expectation that a Justice stick to her previous views can place a more meaningful constraint than the expectation that a Justice follow institutional precedent, which she can massage with an idiosyncratic interpretation.

And as a normative matter, perhaps personal precedent *should* replace stare decisis as the key lever of judicial legitimacy insofar as it avoids the flaws of institutional consistency. The term "institution" should not mask the reality that the Court hands down the law through the aggregate voting of nine unelected individuals, a system vulnerable

¹¹¹ Re, *supra* note 13, at 828 (footnote omitted).

¹¹² Cf. *id.* ("[I]ndividual Justices sometimes commit themselves, and their future votes, to idiosyncratic views of the law."). For more examples of individual Justices' adherence to personal precedent, see *id.* at 839–44.

¹¹³ See, e.g., *supra* pp. 687–90.

¹¹⁴ See, e.g., *supra* p. 691.

¹¹⁵ See, e.g., *supra* pp. 691–92.

¹¹⁶ See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring) (arguing that "[c]onsiderations beyond the correct legal meaning, including reliance [and] workability, . . . are inapposite" to stare decisis).

¹¹⁷ See Re, *supra* note 13, at 827. The precise relationship between personal precedent and stare decisis is complicated. On one hand, there is the obvious point that personal precedent stands at odds with stare decisis insofar as a Justice's individual views diverge from settled law. On the other hand, there is the equally obvious point that the tension becomes live only when new Justices join the bench, at least so long as we stipulate that each Justice adheres to her views.

¹¹⁸ See *id.* at 832.

¹¹⁹ *Id.* at 829.

to bugs such as the cycling problem¹²⁰ or strategic voting.¹²¹ A conception of judicial legitimacy grounded in personal precedent would remove the need to wrestle with these logical inconsistencies.

If these points have merit, then we should exercise caution against taking the manipulability of stare decisis as hard evidence of judicial illegitimacy. Perhaps the *sine qua non* of judicial legitimacy is just a jurist's personal consistency.¹²² This potential shift to personal precedent as the locus of judicial legitimacy has important jurisprudential ramifications by bringing to the philosophical fore an interesting variant of legal positivism. At the risk of oversimplification, legal positivism views laws as rules derived from social norms and institutional power,¹²³ in contrast with natural law theory, which views laws as deriving their authority from higher moral standards.¹²⁴ Under positivism, the law is less an embodiment of normative value and more a result of social facts, whether those facts be the election of certain legislators or the prevalence of particular ideologies.¹²⁵ As is immediately obvious, the positivist thesis that law derives from social facts leaves much to be debated about precisely what those facts are. H.L.A. Hart, one of the most influential legal positivists of the twentieth century,¹²⁶ emphasized the general, shared practices of courts, officials, and private persons.¹²⁷ The possibility of personal precedent as a basis of legal legitimacy may offer

¹²⁰ In a case involving multiple legal issues, it is possible to have a scenario where the majority of Justices rule in favor of one party on each issue, yet the Court nonetheless decides against that party due to fractured alignments. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815–17 (1982). For an argument that a similar voting paradox can be present even in a case that only involves one legal issue, see David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183, 186 (2010).

¹²¹ See Easterbrook, *supra* note 120, at 821–23.

¹²² Professor Richard Fallon implicitly endorses a variant of this thought when he presents his taxonomy of the Supreme Court's legitimacy. In contrast to moral legitimacy (should a legal system be viewed as worthy of obedience when evaluated against moral precepts?) and sociological legitimacy (does the public regard a legal system as worthy of obedience?), the concept of legal legitimacy “depends on intrasystemic criteria” — namely, “whether the Justices' decisions accord with or are permissible under constitutional and legal norms.” RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 35 (2018). A key desideratum of legal legitimacy is each Justice's individual consistency: “[L]egitimacy in constitutional decision making in the Supreme Court has an individual, process-based aspect. We care whether the Justices, *individually*, are methodologically consistent and principled in their decision making.” *Id.* at 131 (emphasis added).

¹²³ See generally, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961).

¹²⁴ See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* *41 (“This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.”).

¹²⁵ Some positivists — most notably, Professor Joseph Raz — take the strong position that law is solely a result of social facts. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 53 (1979) (“[T]he content and existence of the law can be determined by reference to social facts and without relying on moral considerations.”).

¹²⁶ See Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 323 n.3 (2021).

¹²⁷ See HART, *supra* note 123, at 101.

a fresh avenue for challenging that consensus-centric view: “To a great extent, the accumulated views of various judges is just what the law *is*.”¹²⁸

A jurisprudence plotted on personal precedent may be deflationary, but it can be useful. First, a full commitment to this jurisprudence would allay our discomfort with the reality that “the Justices of the Supreme Court disagree about how to interpret the Constitution.”¹²⁹ The compilation of the Justices’ perspectives and the existence of ensuing disagreements would simply be the mosaic state of our law, not a problem that demands monolithic unity.¹³⁰ Under this view, calls for methodological uniformity — for example, proposing that the Court “draw on stare decisis to impose a uniform methodology on itself and the federal judiciary”¹³¹ — are misguided projects that fail to appreciate the pluralistic nature of the law. To be clear, meaningful disagreements can still occur between competing legal approaches — say, between an originalist reading of the Second Amendment and a living constitutionalist reading. Those disagreements, however, would go to the relative persuasiveness and utility of each methodology in the specific context rather than the validity per se of originalism or living constitutionalism. Hence, an almost democratic vision empowers the jurisprudence of personal precedent: rather than ostracizing groups with disfavored or out-numbered perspectives as losers, it allows them seats at the debating table and enables their allegiance to the state of the law even as they may disagree with the mainstream view.¹³²

Second, and relatedly, accepting personal precedent as a key foundation of judicial legitimacy may shift the political rhetoric in judicial nominations. Under a conception of judicial legitimacy that depends on stare decisis, one acceptable expression of cynicism about the law stems from the disappointing reality that membership changes on the bench significantly impact the fate of some institutional precedents.¹³³ One might follow Professor Tara Leigh Grove in problematizing this dynamic as an “externally imposed [legitimacy] dilemma,”¹³⁴ one in which “[the Court’s] institutional reputation depends on the actions of the other branches of government.”¹³⁵ However, the cynicism loses much of its

¹²⁸ Re, *supra* note 13, at 827.

¹²⁹ Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 1 (2014).

¹³⁰ See FALLON, *supra* note 122, at 131 (indicating that many different interpretive methodologies may be legitimate).

¹³¹ Oldfather, *supra* note 129, at 33.

¹³² See LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 57–58 (2001).

¹³³ Judge Posner articulated this sentiment best: “If changing judges changes law, it is not even clear what law is.” RICHARD A. POSNER, HOW JUDGES THINK 1 (2008).

¹³⁴ Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2272 (2019) (reviewing FALLON, *supra* note 122).

¹³⁵ *Id.* at 2246.

force under a jurisprudence that treats the political nomination of judicial personnel not as an external constraint on the law, but rather as a way of updating the content of law. If the law is nothing more than individual jurists' personal views, appointing a new Justice would be, literally, lawmaking. Under this view, it would be justifiable, and perhaps even desirable, that the political process for judicial nominations expends a tremendous amount of time and debate — at least, so long as the debates center on substantive issues about the jurist's philosophy, rather than on tactical maneuvers to game the system. The "charge" that personal proclivities alter the law would no longer be so much a criticism as a hollow truism; more words would be spilled over precisely what the jurist's personal proclivities are, rather than on whether those proclivities should influence the law.

B. A Generative Role for the Court

Recognizing the thrust and parry of stare decisis imbues the doctrine with a new function of generating an active and pluralistic discourse. We should beware the easy argument that because stare decisis is manipulable, it fails as a policy. The familiar cautions about the erosion of stare decisis deserve attention, no doubt. Nonetheless, fully digesting the implications of a weaker stare decisis requires recognizing new judicial functions that follow from the thrust and parry, not merely those that are abrogated by it.

It bears repeating that the Roberts Court is not unusual in its overturning of precedents.¹³⁶ As such, whatever new judicial role that "follows" from a weaker stare decisis is unlikely to be novel in existence. However, a great deal can hinge on whether we view the implications of a weaker stare decisis as unwanted side effects or natural functions of the Court. The goal of the discussion here is to invite a reimagination of the boundaries of the Court's role.

The indeterminacy of stare decisis invites us to cast the principle in a generative role as well as an adjudicatory role, both with respect to the public and to the Court. First, the thrust and parry in a courtroom can cause the judicial arguments to be reproduced in the public forum. Stare decisis is as much a token of authority as it is a policy of self-restraint. Following precedent is the Court's way of justifying to the public its power to say what the law is. Without that authoritative substratum, the *persuasive* force of a judicial opinion overruling precedent derives solely from the quality of its reasoning, much like a Senator's floor statement or a legal pundit's blog post. The Court places itself more at level with the public — that is, a *judicial* opinion is taken off its pedestal and becomes more like *an* opinion. The Court thus spurs public discourse by licensing the public to engage in substantive debates

¹³⁶ See sources cited *supra* note 7.

that underlie the formalistic question presented by stare decisis: whether to follow precedent. Public discourse can pick up where the judicial thrust and parry left off, developing a rhetorical stalemate into a dialectic. In other words, the public can treat the Court's opinions as "contingent resolutions of disputes about the content of the Constitution."¹³⁷

An analogy to the debate between rules and standards illustrates the potential benefit of a softer stare decisis. Professor Seana Shiffrin surprisingly argues that the opacity of standards can sometimes be a virtue, because it stimulates moral deliberation from citizens who have to reason through whether their conduct fits hazy concepts like reasonableness.¹³⁸ In traffic law, for example, an overabundance of hard rules "carr[ies] the hazard that we will absorb the rule or signal unthinkingly and comply merely by rote."¹³⁹ In contrast, opaque standards that call for, say, considerate or reasonable driving may enhance traffic safety by "prompt[ing] drivers to pay greater attention to their driving, to think about how to negotiate a road, and to think about how to treat the specific cars and pedestrians around them."¹⁴⁰ There may be an analogous role for a weakened stare decisis. It can invite citizens to engage in substantive discussions about the reliance interests in unanimous jury trials, the value of letting states legislate on gun control, the proper degree of respect owed to tradition in free speech cases, the virtues of a bright-line rule for religious rights, and so forth. Rather than awarding precedents the presumptive status of validity, the public can deliberate on what the law *should* be, not merely what it *is*.

The Court's recent affirmative action decision is telling. In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*¹⁴¹ (*SFFA*), the Court effectively overruled *Grutter v. Bollinger*,¹⁴² which had upheld a university's race-based admissions as serving the compelling interest of diversity in higher education.¹⁴³ *SFFA* will likely have tremendous doctrinal consequences, but its impact on public discourse is also noteworthy. Many universities reacted to *SFFA* by issuing public statements affirming their commitment to diversity in education and explaining the benefits of such diversity — in essence, arguing with the Court.¹⁴⁴ Universities and policy experts across the nation are engaging

¹³⁷ Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1723 (2013).

¹³⁸ Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222–26 (2010).

¹³⁹ *Id.* at 1219–20.

¹⁴⁰ *Id.* at 1220.

¹⁴¹ 143 S. Ct. 2141 (2023).

¹⁴² 539 U.S. 306 (2003); *SFFA*, 143 S. Ct. at 2207 (Thomas, J., concurring).

¹⁴³ *Grutter*, 539 U.S. at 328.

¹⁴⁴ See, e.g., Lawrence S. Bacow et al., *Supreme Court Decision*, HARV. ADMISSIONS LAWSUIT (June 29, 2023), <https://www.harvard.edu/admissionscase/2023/06/29/supreme-court-decision> [https://

in debates about diversity, equity, and inclusion;¹⁴⁵ in some instances, those debates extend beyond the immediate subject of *SFFA* — race-conscious admissions policies — to related topics like legacy admissions.¹⁴⁶ Setting aside the merits of the respective arguments in these debates, it may well be a net positive for society that educational institutions reflect intentionally on the values they seek to promote and communicate their commitments to the public. If nothing else, *SFFA* encouraged schools, students, and parents alike to fill in the substance of hollowed-out concepts like fairness. The thrust and parry of stare decisis thus puts a new gloss on the value of the principle — not as a legal tool of determination, but as a democratic catalyst that allows the airing of salubrious debates.¹⁴⁷ In this way, a weak presumption of stare decisis can be both a feature and a servant of our pluralistic society.¹⁴⁸

Second, the thrust and parry of stare decisis forces the Court itself to pay more attention to *its* reason-giving, increasing the Court's *dialectic* accountability even as it appears to weaken the Court's *institutional* accountability. In addition to being a token of authority, stare decisis is a mechanism of judicial self-restraint. It is a second-order rule advising judges to follow precedent, even if the precedent is not the best application of law under first-order reasons. Like all second-order rules, stare decisis functions as an accountability valve — that is, judges do not need to explain themselves when following an applicable precedent. Thus, abrogating that mechanism of self-restraint necessarily exposes the Court to greater accountability, likely pressuring it to issue more persuasive, considered opinions that are responsive to public sentiment.

One can find an interesting analogy between this osmosis of accountability in stare decisis and judicial review of an agency's reason-giving. In an article focusing on two cases from the Roberts Court that struck down agency actions — *Department of Homeland Security v. Regents of the University of California*¹⁴⁹ and *Department of Commerce v. New York*¹⁵⁰ — Professor Benjamin Eidelson argues that the Supreme Court has used and can continue to use judicial review under the Administrative

perma.cc/HBY5-DK98]; see also Simrin Singh, *Harvard, Universities Across U.S. React to Supreme Court's Affirmative Action Ruling*, CBS NEWS (June 29, 2023, 6:03 PM), <https://www.cbsnews.com/news/supreme-court-affirmative-action-ruling-universities-react-harvard-north-carolina> [https://perma.cc/UA97-LW2U] (canvassing public responses to *SFFA* from universities).

¹⁴⁵ See, e.g., Joe Killian, *Supreme Court's Affirmative Action Ruling Spurs a Political Battle over College Admission Policies*, PULITZER CTR. (July 26, 2023), <https://pulitzercenter.org/blog/supreme-courts-affirmative-action-ruling-spurs-political-battle-over-college-admission> [https://perma.cc/Q44R-8M8S].

¹⁴⁶ See, e.g., Jeannie Suk Gersen, *The End of Legacy Admissions Could Transform College Access*, NEW YORKER (Aug. 8, 2023), <https://www.newyorker.com/news/daily-comment/the-end-of-legacy-admissions-could-transform-college-access> [https://perma.cc/S97X-METE].

¹⁴⁷ See Barrett, *supra* note 137, at 1723–24.

¹⁴⁸ See *id.* at 1723.

¹⁴⁹ 140 S. Ct. 1891 (2020).

¹⁵⁰ 139 S. Ct. 2551 (2019).

Procedure Act (APA) to ensure that an agency's reason-giving is subject to robust political accountability.¹⁵¹ In essence, this model envisions courts as “political ombudsmen . . . who will police the reason-giving process to ensure that the public has a fair opportunity to evaluate and respond to [agencies'] decisions.”¹⁵² Pointing out this political feature of APA review, Eidelson challenges the conventional picture that views the APA and political accountability as *distinct* channels.¹⁵³

Similarly, we can conceive of the Court as facing two different channels of accountability: the self-imposed policy of stare decisis and public perception. The latter channel has been growing in importance “in a world in which legal decisions are crowd-sourced online — through blogs and tweets and podcasts aimed at the justices' ears.”¹⁵⁴ The latest ethics scandals involving Justices have fueled demands for public oversight of the Supreme Court.¹⁵⁵ All in all, the role of contemporary media likely means that today's Court receives an amount of attention unprecedented in the history of the supposedly most insular branch. And there is good reason to believe that the Court is self-conscious of this spotlight;¹⁵⁶ many even argue that Justices occasionally vote for outcomes they believe to be legally incorrect to save face.¹⁵⁷ Amidst this increased interaction between the Court and public opinion, weakening the stare decisis channel of accountability will mean heightened public scrutiny of the Court's opinions for their merits. Wittingly or not, by relegating stare decisis from principled policy to manipulable rhetoric, the Court has taken on the burden of generating opinions that more closely engage with the first-order considerations underlying a decision.¹⁵⁸

Again, the point should not be overstated. Any discursive virtues of a manipulable stare decisis may very well be outweighed by the obvious harms of increased unpredictability and arbitrariness. However, our

¹⁵¹ Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1751–52 (2021).

¹⁵² *Id.* at 1755.

¹⁵³ *Id.* at 1752.

¹⁵⁴ Allison Orr Larsen, *Why the Word “Doctrine” Matters in the Major Questions Doctrine*, BLOOMBERG L. (July 6, 2023, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/why-the-word-doctrine-matters-in-the-major-questions-doctrine> [<https://perma.cc/5MAU-E8TP>].

¹⁵⁵ See, e.g., Jamelle Bouie, Opinion, *Clarence Thomas Can't Undermine the Legitimacy of the Supreme Court Fast Enough*, N.Y. TIMES (May 12, 2023), <https://www.nytimes.com/2023/05/12/opinion/clarence-thomas-supreme-court-legitimacy.html> [<https://perma.cc/23B6-KQN5>].

¹⁵⁶ Recently, in an unusual turn of events, Justice Alito published an op-ed in the *Wall Street Journal* preempting *ProPublica*'s charges against him for unethical conduct. See Samuel A. Alito, Jr., Opinion, *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b5reda> [<https://perma.cc/7EXY-226J>].

¹⁵⁷ See, e.g., JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 221–22, 233–48 (2019).

¹⁵⁸ Cf. Reva B. Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional Law* 18–19 (unpublished manuscript), https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf [<https://perma.cc/V8MP-Y7Q3>].

evaluation of stare decisis should take into account the new generative role that it will likely imbue upon the Court.

CONCLUSION

No one was ever under the illusion that the Supreme Court hews as closely as possible to stare decisis.¹⁵⁹ The Court itself has emphasized that stare decisis is “a principle of policy, and not . . . an inexorable command.”¹⁶⁰ For that policy to have bite, however, it must operate in a way that consistently and reliably pushes the outcome of a case in a precedent-saving direction. Multiple examples from the Roberts Court illustrate that in practice, the reasoning surrounding stare decisis is hardly determinative — not merely because erratic misapplications of the principle result in occasional mishaps, but also because the indeterminacy is built into the logic of the game. Sometimes, the same trait of a precedent can cut both ways. Other times, a mode of reasoning is so standardless as to render it manipulable to serve either outcome. Far from being “a bedrock principle of the rule of law,”¹⁶¹ stare decisis seems to amount to little more than rhetorical flourish.

That is not to say that stare decisis has lost all meaningful function, or even that recognizing its indeterminacy commits us to a pessimism about the future of law. At the very least, this Note has argued, the thrust and parry invites new approaches toward judicial legitimacy and function. First, insofar as institutional precedent formed a key leg of the Court’s legitimacy, we might do well to consider alternative candidates, such as personal precedent. Personal precedent’s importance in turn should make us reassess the fractured status quo of legal methodologies and reevaluate the proper role of political rhetoric in judicial nominations. Second, we should reconsider the role of stare decisis in generating an active, pluralistic discourse, both in the public and among judges. While it has always been true that judicial decisions feed into and off public opinions, today’s environment enables a particularly interactive relationship between the two. With neither the sanction nor restraint of stare decisis, the Court might increasingly find itself cast in the role of saying what the law *should* be, rather than what the law *is*.

¹⁵⁹ See Baude, *supra* note 103, at 316 (“Nobody on the Court believes in absolute stare decisis.”).

¹⁶⁰ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (internal quotation marks omitted) (citations omitted) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

¹⁶¹ Stone, *supra* note 5, at 1537.