THE PARADOX OF PRECEDENT ABOUT PRECEDENT

When the Supreme Court overrules or declines to overrule a past decision, it typically invokes precedent about precedent.[1] These are prior cases that establish a framework for when stare decisis counsels for or against overruling a decision.[2] "Perhaps the most famous"[3] of these is *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[4] *Casey* and its stare decisis factors have long been the dominant framework endorsed by the Court in constitutional cases.[5] And even in cases in which the Court did not cite *Casey*, it employed a framework that mirrored the one *Casey* developed.[6] But *Casey* is not alone as a precedent about stare decisis. Precedent about precedent exists to help judges (and litigants) deal with a host of stare decisis questions.[7] This Note deals with precedent about precedent as a conceptual whole, but *Casey* and *Dobbs v. Jackson Women's Health Organization*[8] make for ideal examples of the phenomenon on which this Note focuses.

Without a doubt, *Dobbs* overruled aspects of *Casey*'s framework even as it employed some of the factors that *Casey* laid out.[9] *Dobbs*'s treatment of *Casey* as precedent about precedent has drawn significant

---

[1] *See, e.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989)); Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2264 (2022) (citing Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478–79 (2018); *Ramos*, 140 S. Ct. at 1414–16 (Kavanaugh, J., concurring in part)).

[2] *See, e.g.*, *Franchise Tax Bd.*, 139 S. Ct. at 1499 ("The Court's precedents identify a number of factors to consider[:] . . . the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." (citing *Janus*, 138 S. Ct. at 2478–79; United States v. Gaudin, 515 U.S. 506, 521 (1995))).

[3] BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 360 (2016).

[4] 505 U.S. 833 (1992).

[5] *See* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1878–80 (2023). *But see Dobbs*, 142 S. Ct. at 2266 (describing the *Casey* framework as an "exceptional version of *stare decisis* that . . . this Court had never before applied and has never invoked since").

[6] *See, e.g.*, *Janus*, 138 S. Ct. at 2478–79; *Franchise Tax Bd.*, 139 S. Ct. at 1499 (citing *Janus*, 138 S. Ct. at 2478–79); Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019) (quoting *Janus*, 138 S. Ct. at 2478–79); *Ramos*, 140 S. Ct. at 1405 (quoting *Franchise Tax Bd.*, 139 S. Ct. at 1499); *see also id.* at 1414–16 (Kavanaugh, J., concurring in part).

[7] *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)) (stare decisis for fractured opinions); Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) (citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)) (stare decisis in the statutory context).

[8] 142 S. Ct. 2228 (2022).

[9] *See id.* at 2276–77 (quoting *Casey*, 505 U.S. at 856); *see also* Varsava, *supra* note 5, at 1881 (characterizing *Dobbs* as a "stark rejection of *Casey*'s stare decisis approach"); Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 732 (2024) (claiming *Dobbs* "fundamentally altered the scope and substance of the stare decisis calculus").

criticism, including in the pages of this law review.[10] These critics argue that the Court's stare decisis analysis in *Dobbs* was misguided because it departed from *Casey*'s conception of stare decisis either in theory or in application.[11] But if *Casey*'s conception of stare decisis was incorrect from the start, then the *Dobbs* majority would have erred by employing that same conception of stare decisis. The fact that *Dobbs* refused to invoke *Casey*'s understanding of how stare decisis worked is not solely a function of the Court's rightward shift — it is a function of precedent about precedent.

This Note argues that precedent about precedent is unique within the system of stare decisis because precedent about precedent is not entitled to the stare decisis weight to which it, as precedent about precedent, would entitle all other cases. Part I further sketches out the notion of precedent about precedent and employs *Dobbs* and *Casey* as examples of precedent about precedent in practice. Part II then argues that precedent about precedent's unique status poses a paradox. Finally, Part III explores some of the problems that develop within any theory of precedent about precedent because of the implications that flow from its paradoxical nature.

I. Precedent About Precedent

This Part defines precedent about precedent — what it is, and what it isn't. It then uses *Dobbs* and *Casey* to explore the idea of overruling precedent about precedent.

A. The Concept of Precedent About Precedent

"Precedent about precedent" or "precedent on precedent" is a "prior opinion[] identifying whether and how [a court] will regard its past precedents."[12] In other words, precedent about precedent is what establishes the framework through which a court evaluates horizontal precedent. Precedent about precedent tells future courts what factors to consider

---

[10] Varsava, *supra* note 5, at 1847–48; Murray & Shaw, *supra* note 9, at 732; *see also* David Litt, *A Court Without Precedent*, The Atlantic (July 24, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576 [https://perma.cc/HP9Y-2HMX]; Becky Sullivan, *What Conservative Justices Said — And Didn't Say — About* Roe *at Their Confirmations*, NPR (June 24, 2022, 3:44 PM), https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings [https://perma.cc/XV4P-WW8U] (noting that Democratic leaders said: "Several of these conservative Justices . . . have lied to the U.S. Senate.").

[11] *See, e.g.*, Varsava, *supra* note 5, at 1847–48, 1911–12; Murray & Shaw, *supra* note 9, at 753; Litt, *supra* note 10.

[12] Melissa Murray, *The Supreme Court, 2019 Term — Comment: The Symbiosis of Abortion and Precedent*, 134 Harv. L. Rev. 308, 328 (2020). This Note focuses for simplicity on precedent about precedent at the Supreme Court, but precedent about precedent exists beyond the federal Supreme Court. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev. L.J. 787, 794–800 (2012). The implications of this Note are the same for all courts, state and federal, that have some sort of horizontal stare decisis doctrine.

and how to weigh them as part of their stare decisis analysis.[13] So, questions such as, "What counts as a reliance interest?"[14] or even, "Should the Court consider reliance interests?"[15] are all questions for which precedent about precedent provides an answer. Additionally, precedent about precedent needs to be one of two things: (1) an explicit holding about how to treat other precedents; or (2) otherwise controlling,[16] either because some other precedent makes it so[17] or because the Court treats it as such.[18] Therefore, the individual views of Justices do not create precedent about precedent for the Court, but they can affect how precedent about precedent applies in practice.[19] This idea of precedent about precedent is not foreign to the Court or scholarship surrounding stare decisis. For example, then-Judge Kavanaugh invoked the concept when discussing *Casey* at his confirmation hearing,[20] and literature evaluating the Roberts Court's approach to stare decisis relies on the concept of precedent about precedent.[21]

There are concepts to which this Note does not use the term "precedent about precedent" to refer. Importantly, precedent about precedent as this Note uses it does not implicate vertical precedent. To be sure,

---

[13] *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1440 (2020) (Alito, J., dissenting) (describing *Ramos* as "an important precedent about *stare decisis*" that he "assume[d] . . . w[ould] apply . . . in future cases"); *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 127–29, 157, 342 (2018) [hereinafter *Confirmation Hearing*] (statement of Judge Brett Kavanaugh) (describing *Casey* as "precedent on precedent" because of how it applied the stare decisis factors).

[14] *See* Varsava, *supra* note 5, at 1847 (discussing *Dobbs*'s different conception of reliance interests from *Casey*).

[15] *See* Gamble v. United States, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring) (arguing that "demonstrably erroneous precedent[s]" should be overruled regardless of reliance interests).

[16] To be sure, some scholars have attempted to reconceptualize precedent as not binding, *see, e.g.*, Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 908–12 (2021), but the Court and most scholars view stare decisis as constraining to some degree, *see, e.g.*, Richard H. Fallon, Jr., Essay, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1714 (2013). This Note uses the term "binding" to describe the notion that the Court at least treats prior cases as constraining. Of course, as a practical matter the Supreme Court is never truly bound by anything more than its own willingness to treat itself as constrained by prior cases because it is not subject to appellate review. In other words, if the Court tomorrow decided to discard all of its precedents, nothing really stops it from doing so other than a sense of constraint from its own norms about stare decisis. Thus, when one speaks of the Court being "bound," one is really speaking about varying degrees of constraint, all of which can be overcome.

[17] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[18] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2264–66, 2275–76 (2022) (repeatedly citing Justice Kavanaugh's partial concurrence in *Ramos* as authority on the stare decisis framework).

[19] *See infra* p. 815.

[20] *Confirmation Hearing*, *supra* note 13, at 127–29, 157, 342 (statement of Judge Brett Kavanaugh).

[21] *See, e.g.*, Nina Varsava, Essay, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 133 (2020) (analyzing *Ramos* as precedent on precedent).

there is precedent about vertical precedent — namely, that it binds lower courts.[22] But as a general matter, each court that employs some form of horizontal precedent can choose its stare decisis framework for itself.[23] Whether the Supreme Court could employ its supervisory power to impose a binding, vertical precedent about horizontal precedent is another question.[24] For now, it is enough to acknowledge the Court has never attempted to do so.[25] The precedent about precedent this Note is concerned with, therefore, is the horizontal precedent that describes how a court should evaluate its own precedents.

Finally, it is important to mention that precedent about precedent can change over time. This Note is premised on the idea that the Court can and does overrule or change aspects of its precedent about precedent.[26] That matters because it means sometimes the Court needs to employ some sort of framework to decide when to modify its precedent about precedent. And when that modification happens, one central question is: From where does the framework for reevaluating a precedent about precedent come? In other words, does the Court use the existing framework that it is supposed to be reconsidering, or does it employ what it believes to be a new, better framework?[27] Answering these questions is key to understanding precedent about precedent more deeply.

B. Casey *and* Dobbs*: A Case Study*

Casey and *Dobbs* provide excellent examples of precedent about precedent in practice and the overruling of precedent about precedent. As a result, they can help one understand the theory behind precedent about precedent and how the Court evaluates precedent about precedent in practice. Of course, both *Casey* and *Dobbs* were and remain polarizing decisions,[28] but it is in the abortion context that the contours

---

[22] GARNER ET AL., *supra* note 3, at 27.

[23] *See id.* at 492–94.

[24] *Cf.* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 332–33 (2006) (attempting to delineate the scope of the Supreme Court's supervisory power). Whether a rule of horizontal precedent is even a procedural rule is another question, but some courts of appeals have adopted their current stare decisis frameworks through Circuit Rules or Internal Operating Procedures. Mead, *supra* note 12, at 799; *see also* Michael S. Kanne, *The "Non-*Banc En Banc*": Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. ILL. U. L.J. 611, 611–13, 617 (2008) (outlining the Seventh Circuit's unique horizontal precedent procedure and drawing comparisons to informal mechanisms in the Second and D.C. Circuits).

[25] *See* Barrett, *supra* note 24, at 328–32 (cataloging the Court's use of its supervisory power).

[26] *See, e.g.*, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1948 & n.28 (2019) (suggesting the *Marks* rule was an innovation).

[27] To be clear, the Court can have multiple frameworks depending on the situation. The question is whether the Court will apply a particular framework to the framework itself.

[28] *Compare, e.g.*, Alyson M. Cox & O. Carter Snead, *"Grievously and Egregiously Wrong": American Abortion Jurisprudence*, 26 TEX. REV. L. & POL. 1, 22–23 (2021), *with* J. Shoshanna Ehrlich, *Why the* Dobbs *Court Got It Wrong: Connecting the Dots Between Opposition to Abortion and Gender Animus*, 22 SEATTLE J. FOR SOC. JUST. 461, 511–14 (2024).

of precedent about precedent become the sharpest.[29] So, putting aside the merits of those decisions for a moment, it is possible to explore how precedent about precedent functions in practice.

Start with what made *Casey* the Court's central "paean to *stare decisis*" for so many years.[30] *Casey* not only synthesized the prior factors the Court had employed into one, (relatively) clear stare decisis framework,[31] but also painstakingly detailed how to apply those factors.[32] In doing so, *Casey* became an authority moving forward for how the Court would think about stare decisis.[33] Whether or not *Casey*'s framework was *actually* binding on future decisions is another question,[34] but what matters is that, for a time, when the Court was faced with overruling a prior case, it would dutifully wheel out *Casey*'s framework and, at a minimum, purport to apply it.[35] Thus, *Casey* was "precedent on precedent."[36]

Enter *Dobbs*. The *Dobbs* majority rejected *Casey*'s framework in two meaningful respects. First, it overruled *Casey*'s approach to reliance interests by rejecting *Casey*'s intangible reliance interests analysis.[37] Second, the majority discarded the weight *Casey* gave to the impact of overruling *Roe* on the Court's legitimacy by focusing on *Roe*'s

---

[29] *See* Murray, *supra* note 12, at 310.

[30] Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting); *see also* Varsava, *supra* note 5, at 1878–80 (detailing the rise and fall of the Court's invocations of *Casey* as authority on stare decisis).

[31] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924); Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)) (explaining that courts should consider workability, reliance interests, and legal and factual developments).

[32] *See id.* at 855–69.

[33] *See* Varsava, *supra* note 5, at 1878–80.

[34] *See* Re, *supra* note 16, at 919–22.

[35] For a collection of cases, see Murray, *supra* note 12, at 329–30. To be sure, the Court would sometimes apply a *Casey*-esque framework without citing *Casey*, Varsava, *supra* note 5, at 1878, 1880, but that shift is correlated with "some [J]ustices view[ing] the decision as tainted and illegitimate" on the merits, Adam Liptak, *The Threat to* Roe v. Wade *in the Case of the Missing Precedent*, N.Y. TIMES: SIDEBAR (Sept. 17, 2018), https://www.nytimes.com/2018/09/17/us/politics/kavanaugh-abortion-precedent.html [https://perma.cc/V2X3-ACSP] (quoting Professor Justin Driver), not a rejection of *Casey*'s factors.

[36] *Confirmation Hearing*, *supra* note 13, at 128 (statement of Judge Brett Kavanaugh). Some scholars have argued that *Casey* was actually an outlier when it comes to precedent about precedent, *see, e.g.*, Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 962 (2008), and both pre- and post-*Casey* decisions demonstrate that *Dobbs* was actually just returning to the status quo. If that's true, then the critique of *Dobbs* looks even weaker, so this Note will assume that *Casey* was a valid precedent about precedent. *See* sources cited *supra* notes 30–35.

[37] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276–77 (2022) (quoting, inter alia, *Casey*, 505 U.S. at 856; *id.* at 957 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)); *see also* Varsava, *supra* note 5, at 1873–74. To be specific, *Dobbs* gave no weight to the fact that women may have ordered their lives around the assumption that *Roe* was good law. *Dobbs*, 142 S. Ct. at 2276 (quoting *Casey*, 505 U.S. at 957 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)).

and *Casey*'s political divisiveness.[38] In doing so, however, the Court did not use *Casey*'s analysis to determine whether *Casey*'s analysis should be overruled. If the Court had done so, *Casey* would have survived because overruling *Casey*'s understanding of intangible reliance interests would have, for example, itself undermined intangible reliance interests.[39] Instead, *Dobbs* employed what it viewed as the proper stare decisis framework and evaluated *Casey* in light of that conception of stare decisis.[40] In overruling *Casey* as a precedent about precedent, *Dobbs* did not treat *Casey*'s precedent about precedent as controlling.

In sum, precedent about precedent tells future Courts how to evaluate precedent — the weight to give to reliance interests, how wrong the prior decision needs to be to overrule it, and so forth. But sometimes the Court overrules a prior precedent about precedent, as it did in *Dobbs*. In deciding whether to overrule the *Casey* framework, the Court did not employ the *Casey* framework. That decision is the central focus of this Note, which now turns to the paradox that necessitates that decision.

II. THE PARADOX

As the discussion of *Dobbs* and *Casey* suggests, precedent about precedent faces a unique wrinkle when it comes to stare decisis. This Part offers a theoretical explanation for this unique status by suggesting that precedent about precedent is paradoxical in nature. It then explores this paradox in practice by returning to *Dobbs* and some of the criticisms of *Dobbs*'s treatment of *Casey* as a precedent about precedent.

A. Theory

The paradox of precedent about precedent is this: When the Court overrules a precedent about precedent, it cannot employ that precedent about precedent to evaluate the original precedent itself. As a result, precedent about precedent entitles all other cases to a certain amount of stare decisis weight before they are overruled, but the same stare decisis weight does not attach to the precedent about precedent when it faces its own repudiation. Unlike all other cases, precedent about precedent does not operate under the very rules the precedent establishes.

A real-world example at the extreme demonstrates the underlying theory of why a precedent about precedent cannot be evaluated on its

---

[38] *See Dobbs*, 142 S. Ct. at 2278–79 (quoting *Casey*, 505 U.S. at 865, 867); *see also* Murray & Shaw, *supra* note 9, at 732. Again, to be specific, *Dobbs* rejected *Casey*'s concern that the Court would be seen as succumbing to political pressure if it overruled *Roe*. *Dobbs*, 142 S. Ct. at 2278 (quoting *Casey*, 505 U.S. at 865, 866–67) (citing *Casey*, 505 U.S. at 869).

[39] *Cf.* Varsava, *supra* note 5, at 1882, 1894 (arguing that "reliance interests may take an abstract form and may accrue at the societal level," *id.* at 1882).

[40] *See Dobbs*, 142 S. Ct. at 2276–79; *see also id.* at 2347–48 (Breyer, Sotomayor & Kagan, JJ., dissenting) (criticizing the majority for not following *Casey*'s stare decisis considerations).

own terms. For a roughly sixty-eight year stretch, the House of Lords in the United Kingdom considered stare decisis absolute[41] until it overruled that practice.[42] In other words, the House of Lords' precedent about precedent did not permit it to ever overrule a precedent,[43] but it nevertheless did so without feeling constrained by that precedent about precedent.[44] If the Supreme Court were to adopt that approach and then later decide that such an approach was misguided, surely it could overrule its absolutist position, just as the House of Lords did, even though the absolutist approach to stare decisis would suggest that it could never itself be overruled. An alternative view would mean that the House of Lords acted illegitimately when it overruled its own absolutist meta-precedent, but there are a couple of problems with that view. First, such a position would raise serious questions about the ability of one majority to truly bind a future majority to a particular framework.[45] A judge-made rule that could not be amended is like a statute that purports to be unamendable by Congress. So long as the source of the law is the same, there is no reason why a subsequent rule cannot replace a prior one.[46] Second, such a position would present opportunities for gamesmanship.[47] Therefore, the experience of the House of Lords demonstrates why it would be theoretically untenable to suggest that a precedent about precedent applies to itself.

A simplified, numerical example helps illustrate this point for nonabsolute rules of meta-precedent. Imagine that the Court's existing framework for stare decisis established in *Case A* required the majority to be at least 90% certain that a prior case was wrongly decided before

---

[41] *See* John A. Fairlie, *The Doctrine of Stare Decisis in British Courts of Last Resort*, 35 MICH. L. REV. 946, 953–54 (1937) (quoting London St. Tramways Co. v. London Cnty. Council [1898] AC 375 (HL) 379 (appeal taken from Eng.)).

[42] Julius Stone, *1966 and All That! Loosing the Chains of Precedent*, 69 COLUM. L. REV. 1162, 1162 (1969). The House of Lords example is complicated by the mixing of judicial, ministerial, and legislative functions that occurred in the House of Lords, *see id.* at 1162–63, but for purposes of the underlying theoretical point, it is enough to treat the House of Lords here as the United Kingdom's highest court overruling a prior precedent about precedent.

[43] *London St. Tramways* [1898] AC at 379.

[44] *See* Practice Statement [1966] 1 WLR 1234 (HL) 1234.

[45] *Cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment) (arguing that stare decisis does not permit one majority to bind future majorities to a particular methodological framework in statutory interpretation); Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1158 (2019) (same); Evan J. Criddle & Glen Staszewski, Essay, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1595–96 (2014) (same).

[46] Thus, a constitutional amendment requiring an absolutist rule of stare decisis *would be* legitimate because it is from a higher source of law.

[47] Imagine if *Casey* had said as a precedent about precedent that *Roe* was forever off the table for future overruling — or if *Dobbs* had said the same thing about itself. *Cf.* Dobbs v. Jackson Women's Health Org., 142 S Ct. 2228, 2278 (2022) ("The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles.").

overruling that case.[48] Now imagine that in *Case B* the Court has come to believe that its 90% bar was too high. Instead, the Court would like to use *Case B* as a vehicle to establish a new stare decisis framework. Under *Case B*'s proposed rule, the Court could overrule a case when it is 75% certain the prior case was wrongly decided. Obviously, doing so would require overruling *Case A* as precedent about precedent. But here's the catch: Can the Court overrule *Case A* if it is only 80% sure *Case A* was wrongly decided? The answer should be "yes" for the same reason that the House of Lords could overrule its absolutist stare decisis position. If the House of Lords could overrule an absolutist rule without employing the absolutist rule, then *Case B* can overrule *Case A* without employing *Case A*'s rule. Therefore, the old *Case A*'s 90% framework will be subjected to *Case B*'s new 75% framework instead of *Case A*'s own framework. If *Case B* were merely overruling a run-of-the-mill merits decision in *Case C*, *Case B* would be bound by the normal rules of stare decisis to apply *Case A*'s 90% framework. But because *Case B* is overruling a precedent about precedent, *Case A* does not receive the same stare decisis consideration that *Case C* would. That makes *Case A*, as a precedent about precedent, unique among other cases when it comes to stare decisis.

Therein lies the heart of the paradox. A precedent about precedent is not entitled to the same stare decisis weight as all other precedent despite establishing how much stare decisis weight other precedents are to be given. Requiring the Court to employ the stare decisis framework that it views as incorrect to evaluate whether stare decisis compels it to retain that very framework would be both illogical and impractical. It would mean that one Court could set the rules of precedent about precedent for all time, a position that eschews traditional approaches to stare decisis. It would also mean that a Court could create special rules for favored cases, undermining the evenhanded application of stare decisis. Therefore, when asking whether *Case B must* use *Case A*'s stare decisis framework to overrule *Case A*'s framework, the answer is "no." It is this inability to operate within the very framework that it establishes and that all other cases operate within that makes precedent about precedent unique.

B. Practice

In practice, this means that when the Court overrules aspects of its precedent about precedent, such as *Casey*, it cannot and will not use that precedent about precedent's framework. The theory behind the paradox of precedent about precedent means that a precedent about

---

[48] The "certainty percentage" is an easy example because it allows for the use of discrete numbers, but obviously Justices do not use this framework in practice. Substitute the certainty percentage for tangible reliance interests, workability, or any other potential stare decisis factor, and the results are the same.

precedent should not be used to evaluate itself. This plays out in numerous cases involving revisions to precedent about precedent. *Dobbs* is a prime example,[49] but there are others. *Casey* itself, in synthesizing a new stare decisis framework, did not purport to apply any particular prior framework.[50] The *Ramos v. Louisiana*[51] plurality, in attempting to overrule part of the *Marks v. United States*[52] rule, did not first apply *Marks*; instead, it claimed *Marks* did not cover situations like the one in *Ramos*.[53]

Therefore, in some respects, the critics of the *Dobbs* majority have a point. *Dobbs* discarded or modified aspects of *Casey*'s stare decisis analysis without analyzing the *Casey* framework through any sort of stare decisis lens.[54] But it is important to differentiate two different lines of criticism surrounding *Dobbs*'s treatment of *Casey*. First, there is a "merits" claim. This is simply the claim that as a matter of stare decisis — regardless of the framework — *Casey* should not have been overruled.[55] Fair enough. It is the second line of criticism that matters for this Note's purposes. This is the "meta-precedent" claim, meaning that it involves precedent about precedent. This criticism argues that *Dobbs* should have upheld *Casey* based on *Casey*'s own stare decisis framework.[56]

The paradox of precedent about precedent demonstrates that this claim cannot be true. For one, it would create a theoretical mess. For another, practice surrounding precedent about precedent confirms that when Justices overrule (or attempt to modify) aspects of precedent about precedent, they do not apply the original precedent about precedent.[57] In fairness, the lines often blur between the merits and meta-precedent

---

[49] *See Dobbs*, 142 S. Ct. at 2276–77.

[50] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–69 (1992) (including only a single "*cf.*" citation to *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955), for *Casey*'s new judicial legitimacy analysis).

[51] 140 S. Ct. 1390 (2020).

[52] 430 U.S. 188 (1977). The *Marks* rule instructs that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[53] *Ramos*, 140 S. Ct. at 1403 (opinion of Gorsuch, J.). *Ramos* is a particularly complex example because although the plurality claimed that *Marks* did not apply to Justice Powell's opinion in *Apodaca v. Oregon*, 406 U.S. 404 (1972), the exact contours of the *Marks* rule are not clear from *Marks* itself, *see* Re, *supra* note 26, at 1976–93 (suggesting four different ways to read *Marks*), and what is even more unclear is the precedential status under *Marks* of a plurality opinion that potentially modifies *Marks*, *see infra* pp. 811–12. Importantly, however, six Justices believed the *Ramos* plurality was attempting to overrule an aspect of *Marks*. *See infra* note 96 and accompanying text.

[54] *See Dobbs*, 142 S. Ct. at 2276–77, 2278–79.

[55] *See, e.g.*, Litt, *supra* note 10.

[56] *See* Varsava, *supra* note 5, at 1847–48 (arguing *Dobbs*'s new stare decisis framework does not give sufficient weight to the reliance interests at stake in *Casey*); *cf.* Melissa Murray, Essay, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1526 (2024) (noting that *Dobbs* invoked other factors outside the normal stare decisis framework for overruling *Casey*).

[57] *See supra* notes 49–53 and accompanying text.

arguments.[58] When someone thinks that the original precedent about precedent was correct, he or she is likely to believe that a new stare decisis framework should not be applied because the old framework was correct on the merits.[59] Again, nothing about the paradox of precedent about precedent suggests that the merits claim is illegitimate. When that claim becomes blurred with a meta-precedent claim, however, the criticism's footing becomes shakier. In other words, arguments that *Dobbs* should not have overruled *Casey* based on *Dobbs*'s own conception of stare decisis[60] are fair game. So too are arguments that *Dobbs* misconceived vital aspects of stare decisis.[61] What the nature of precedent about precedent prevents is arguments that *Dobbs* erred by not applying *Casey*'s formulation of stare decisis.

In short then, precedent about precedent's unique paradoxical nature prevents it from applying to itself. What exists in theory plays itself out in practice, as *Dobbs* (and *Ramos*) demonstrate. But this paradox is only the beginning. The strange nature of precedent about precedent gives rise to other theoretical problems — problems that the Court has not reasoned through.

III. THE PROBLEMS

This paradox that precedent about precedent creates presents a host of problems. This Part examines those problems and offers a preliminary account of how judges and scholars ought to think about them. It also shines light on an area of law the Court too often neglects to theorize adequately.

A. The Problem of Overruling Precedent About Precedent

The first problem that this theory of precedent about precedent presents is what to do about overruling precedent about precedent. Previously, this Note has focused on the theory behind overruling a precedent about precedent in order to lower the bar for overruling cases. But the problem of overruling precedent about precedent exists in both directions — making it easier to overrule precedent and making it harder.

1. Lowering the Bar for Overruling. — The first problem with overruling precedent about precedent occurs whenever the Court makes it easier to overrule precedent — in other words, when the Court lowers the bar for overruling prior cases by modifying the prior precedent about precedent. For most cases, this is relatively straightforward. When the

---

[58] *See* Varsava, *supra* note 5, at 1856–57; Murray & Shaw, *supra* note 9, at 732.

[59] *Cf. Dobbs*, 142 S. Ct. at 2319–20 (Breyer, Sotomayor & Kagan, JJ., dissenting) (criticizing the majority for disregarding both *Casey* as precedent about precedent and *Casey*'s application of stare decisis).

[60] *See* Varsava, *supra* note 5, at 1866–72.

[61] *See* Murray & Shaw, *supra* note 9, at 763–66 (arguing the *Dobbs* majority seriously misunderstood democracy even as it invoked democracy as a factor counseling overruling *Roe*).

Court weakens or overrules a real-world stare decisis factor, it employs the new calculus to overrule the prior precedent about precedent.[62] This is the key insight of recognizing that precedent about precedent presents a paradox.

Dobbs is once again a prime example of this. In rejecting *Casey*'s judicial-legitimacy justification for retaining *Roe*,[63] the Court focused on *Roe*'s and *Casey*'s disruption of democratic deliberation around the abortion question.[64] It did not employ *Casey*'s conception of stare decisis. Many of the factors it invoked were the same,[65] but *Dobbs* used its own stare decisis calculus to decide whether *Casey*'s stare decisis analysis was correct.[66] To the extent that one thinks this approach to stare decisis in the precedent about precedent context is problematic, it is largely inescapable. An alternative solution is simply not feasible for logical and practical reasons.[67]

There is a larger problem looming, however. So far, this Note has assumed that *Case A* (requiring 90% certainty) meets *Case B*'s criteria for overruling (requiring 75%). But what happens if *Case A* comes up short? This would occur if the Court was only 70% certain that *Case A* was wrong. Is *Case A* as a precedent about precedent entitled to *any* stare decisis respect? In these instances, precedent about precedent presents the problem that this Note has only so far hinted at — can one Court bind a future Court methodologically?[68]

In practice, the Court seems not to bother with stare decisis when it modifies precedent about precedent. For example, rather than determine whether *Casey*'s conception of reliance was workable, had itself engendered reliance interests, and so forth, the *Dobbs* Court made a merits judgment that *Casey* was wrong about reliance, and then it overruled *Casey* on that point.[69] This suggests that stare decisis for precedent about precedent is empty (or so extremely merits sensitive that it overrides any other considerations).[70] In other words, the Court makes a merits decision about what the correct rule of precedent is, and then it implements that rule regardless of whether the old precedent about

---

[62] *See, e.g.*, *id.* at 753–54 (explaining the *Dobbs* majority's application of new democratic factors when overruling *Casey*).

[63] *Dobbs*, 142 S. Ct. at 2278–79.

[64] *Id.* at 2265, 2279; *see also* Murray & Shaw, *supra* note 9, at 753–54 (noting this phenomenon).

[65] Murray & Shaw, *supra* note 9, at 753.

[66] *See Dobbs*, 142 S. Ct. at 2265–77 (listing the factors and applying them).

[67] *See supra* notes 45–47 and accompanying text.

[68] *See* sources cited *supra* note 45; *see also supra* note 16 (discussing how questions of "binding" methodologies are really just questions of constraint).

[69] *See Dobbs*, 142 S. Ct. at 2276–77.

[70] *See* Re, *supra* note 16, at 938–40 (describing the merits-sensitive view of precedent). For an alternative view arguing that, at least as a theoretical matter, merits-sensitive stare decisis is flawed, see Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 824–25 (2018), and Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416–21 (2010).

precedent meets the new criteria for overruling. So if the Court is only 70% sure *Case A* was wrong, it still overrules *Case A* and adopts a 75% threshold in *Case B*. The Court does not in practice apply the new stare decisis framework to the old one.

This is both a problem and a potential solution. On the one hand, it undermines the idea of precedent about precedent as binding in practice. And if precedent about precedent isn't binding, why do judicial nominees profess fidelity to it,[71] and what good is it? So that is a problem. On the other hand, if precedent about precedent does not get *any* stare decisis effect, then there is a way to explain the Court's practice of seemingly ignoring stare decisis when it comes to precedent about precedent: The Court does not bother going through the stare decisis factors when overruling precedent about precedent because it is a purely merits-motivated decision.

A couple of implications flow from this position. First, the Court and judicial nominees can still claim that they are bound by precedent about precedent in almost all cases.[72] Overruling precedent about precedent is a special case where precedent about precedent does not apply. This understanding of precedent about precedent comports with the theoretical point from earlier that precedent about precedent does not apply to itself.[73] It also allows one to retain the view that precedent about precedent is constraining to some degree.[74] It is just not constraining when it comes to itself — hence, the paradox. Recognizing that overruling precedent about precedent is a purely merits-based decision also solves the problem of what to do when *Case B* wants to overrule *Case A* as precedent about precedent, but *Case A* does not meet *Case B*'s criteria for overruling. Because the decision to overrule *Case A* as precedent about precedent is a pure merits question, it does not matter if *Case A* satisfies *Case B*'s framework.[75] Finally, from a positivist

---

[71] *E.g.*, *Confirmation Hearing*, *supra* note 13, at 128 (statement of Judge Brett Kavanaugh).

[72] *See, e.g.*, *id.*; *Dobbs*, 142 S. Ct. at 2261–62 (citing, inter alia, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)); Kisor v. Wilkie, 139 S. Ct. 2400, 2422–23 (2019) (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014); Payne v. Tennessee, 501 U.S. 808, 827 (1991); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478–79 (2018) (quoting, inter alia, *Payne*, 501 U.S. at 827; Pearson v. Callahan, 555 U.S. 223, 233 (2009)). *But see Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting) (criticizing the Court for not following its precedents about precedent); *Kisor*, 139 S. Ct. at 2445 (Gorsuch, J., concurring in the judgment) (quoting *Pearson*, 555 U.S. at 233; Arizona v. Gant, 556 U.S. 332, 348 (2009); *Janus*, 138 S. Ct. at 2478–79) (same); *Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting) (quoting *Kimble*, 576 U.S. at 455) (same).

[73] *See supra* section II.A, pp. 802–04.

[74] *See supra* note 16 and accompanying text. This is true even for members of the Court who take a more flexible view of precedent. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2279–81 (2024) (Gorsuch, J., concurring).

[75] In this way, the baseline norm is that precedent about precedent is not entitled to any stare decisis effect, but the situation discussed in section II.A, pp. 802–04, is a special case in which one does not need to consider these problems because *Case A* meets *Case B*'s overruling criteria.

perspective, it seems to provide a descriptively correct account of the law. If one accepts the view that the Court can create binding precedent about precedent, understanding the paradox of precedent about precedent in this way helps explain behaviors in some of the Court's most recent cases involving precedent about precedent.[76]

To be sure, viewing precedent about precedent as binding except when its own framework is at issue is not the only possible solution to this problem. Another solution is to reject the idea that one Court can methodologically bind future Courts. This would do away with precedent about precedent as a concept. On the one hand, this might be a compelling solution because there are certainly some situations in which it seems the Court cannot methodologically bind itself.[77] However, adopting this view runs into a couple of problems. First, it would not explain why the Court talks about precedent about precedent in the way it does. If precedent about precedent is not binding in cases where the precedent itself is at issue, why does the Court repeatedly suggest that precedent about precedent matters?[78] Second, there are instances in which the Court does adopt binding methodologies.[79] Perhaps this is incorrect,[80] or precedent about precedent can be differentiated from these situations,[81] but at the very least, discarding the idea of precedent about precedent is a drastic step.

A final, related solution would be to view precedent about precedent as permissive but not mandatory in all cases. This would make precedent about precedent a special case of the view that Professor Richard Re has outlined.[82] Following Re's approach, the Court could invoke precedent about precedent to "establish[] the lawfulness of a particular course of action without requiring any additional inquiry," but "[i]t would remain fully open to the judge to deviate from the precedent,

---

[76] *See, e.g.*, *Dobbs*, 142 S. Ct. at 2276–79 (discarding aspects of *Casey*'s stare decisis analysis without applying any stare decisis weight to them); Ramos v. Louisiana, 140 S. Ct. 1390, 1402–03 (2020) (opinion of Gorsuch, J.) (attempting to carve out an exception to the *Marks* rule without applying any stare decisis weight to the rule).

[77] *See* Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 135, 151–54 (Christopher J. Peters ed., 2013) (arguing against stare decisis for constitutional interpretation methodology); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1873–77 (2008); Kozel, *supra* note 45, at 1148.

[78] *See, e.g.*, cases cited *supra* note 1.

[79] *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244. In some respects, *Loper Bright* could be seen as a precedent about precedent, *see Loper Bright*, 144 S. Ct. at 2292–93 (Gorsuch, J., concurring), but the heart of *Loper Bright*'s stare decisis analysis mirrored the approach endorsed in *Dobbs*, *see id.* at 2270 (majority opinion) (quoting Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019)).

[80] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment); Kozel, *supra* note 45, at 1158; Oldfather, *supra* note 77, at 151–54.

[81] *Cf.* Barrett, *supra* note 16, at 1713 (explaining that stare decisis varies across different types of decisions).

[82] *See generally* Re, *supra* note 16, at 919–22.

provided that doing so is otherwise lawful."[83] In other words, it is lawful for the Court to retain precedent about precedent *because* it is precedent, but it is also lawful for the Court to choose to ignore or revoke the permission that precedent about precedent bestows.[84] On the descriptive side, the precedent about precedent permission model avoids reading too much into the Court's statements that precedent about precedent has some binding force; while the Court may proclaim that precedent about precedent is binding, "the Justices may help themselves to a rhetoric of bindingness while engaging in a practice that is best described in terms of permissions."[85] Thus, the permission model describes the Court's practices in a "do-as-I-do," not in a "do-as-I-say," manner, which is a less drastic step than discarding the concept of precedent about precedent in toto, but it still requires one to discount significantly the purported constraint of precedent about precedent.

Thus, whenever the Court makes it easier to overrule precedent about precedent, there is a chance that a theoretical problem will present itself. However, there are a couple of ways to reconceptualize precedent about precedent in order to get around this problem, depending on one's view of whether one majority can methodologically bind a future majority. Each potential solution has its merits and drawbacks. The point here is not to definitively defend one solution but to demonstrate that the paradoxical nature of precedent about precedent requires more theorization about precedent and its constraining power — theorization at which the Justices have only waved their hands.[86]

2. Raising the Bar for Overruling. — When the Court raises the bar for overruling precedent, it triggers the second problem with overruling precedent about precedent. This problem is more complex than the problem that arises from lowering the bar for overruling precedent, but it again serves the point of highlighting the paradoxical nature of precedent about precedent. The issue imagined here is reversal of the prior examples; instead of establishing a 75% threshold for overruling a case (call that *Case X*), the Court wants to establish a 90% certainty requirement (call that *Case Y*). If the Court is 95% confident that *Case X* is wrong as a precedent about precedent, then there is no problem at all because the Court's decision satisfies both *Case X*'s and *Case Y*'s requirements. The difficulty arises when the Court is only 80% sure *Case X* is wrong. In that instance, *Case X* should be overruled on its own terms, but *Case Y*, which is supposed to be the new stare decisis framework, suggests that overruling would be inappropriate.

---

[83] *Id.* at 920.

[84] One can add increasing nuance to this position as necessary. *See, e.g.*, *id.* at 942–46. This is merely a barebones framework for thinking about precedent about precedent as permissive.

[85] *Id.* at 937.

[86] *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1981–88 (2019) (Thomas, J., concurring); Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment); Ramos v. Louisiana, 140 S. Ct. 1390, 1402–03 (2020) (opinion of Gorsuch, J.); *id.* at 1431 (Alito, J., dissenting).

The *Marks* rule is instructive. Imagine if a plurality of the Court were to adopt the view that *Marks* should be abandoned so that only a majority opinion created binding precedent,[87] and a fifth Justice whose vote was necessary to create a judgment in the case adopted the position that *Marks* was never actually binding law because it was an interpretive methodology for precedents like *Auer*[88] deference is for regulations.[89] Under *Marks*, the plurality position would be binding as the "narrowest grounds" of agreement.[90] But the plurality position would be that *Marks* is overruled and only a true majority position is binding. In other words, following *Marks*'s own rule, *Marks* would be overruled, but following the precedent that the *Marks* rule purports to establish via the plurality opinion, *Marks* would not be overruled.

Granted, such a situation would probably be a rarity. *Ramos*, however, came close to exemplifying this problem. There, a plurality claimed that *Apodaca v. Oregon*[91] provided no binding precedent under the *Marks* rule because Justice Powell's separate opinion, which was necessary to create a judgment of the Court, would have overruled prior precedent[92] — a position which the other eight Justices in *Apodaca* rejected.[93] Therefore, the *Ramos* plurality would have adopted a rule of precedent about precedent that the *Marks* rule does not create binding precedent when the controlling opinion "repudiate[s] this Court's repeated pre-existing teachings on" an area of law.[94] In other words, the plurality would have modified the *Marks* rule to ensure "a single Justice writing only for himself" does not have "the authority to bind this Court to propositions it has already rejected."[95] To be sure, the plurality did not view this as a partial repudiation of the *Marks* rule — but the other

---

87 *Cf.* Re, *supra* note 26, at 1946 (urging a majority of the Court to discard *Marks*).

88 Auer v. Robbins, 519 U.S. 452 (1997).

89 *Cf. Kisor*, 139 S. Ct. at 2444 (Gorsuch, J., concurring in the judgment) (claiming that an abstract interpretive methodology is not binding on future Courts). For the notion that precedent requires interpretation, see Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 383–86 (2016), and Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 557 (2017) (reviewing GARNER ET AL., *supra* note 3).

90 Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

91 406 U.S. 404 (1972).

92 Ramos v. Louisiana, 140 S. Ct. 1390, 1402–04 (2020) (opinion of Gorsuch, J.).

93 *Compare* Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., concurring) (rejecting the idea that the Sixth Amendment applies identically to the states even post-incorporation), *with id.* at 388 (Douglas, J., dissenting) (rejecting Justice Powell's dual-track approach), *id.* at 395–96 (Brennan, J., dissenting) (same), *Apodaca*, 406 U.S. at 406 (plurality opinion) (same), *and id.* at 414–15 (Stewart, J., dissenting) (same). Confusingly, *Apodaca* was decided alongside *Johnson*, which meant that many of the opinions, such as Justice Powell's disputed *Apodaca* opinion, were actually filed under *Johnson*. Nevertheless, *Apodaca* was the splintered opinion that created the bizarre situation confronted in *Ramos*. *Compare Johnson*, 406 U.S. at 357 (commanding five votes), *with Apodaca*, 406 U.S. at 405 (plurality opinion) (commanding only four votes).

94 *Ramos*, 140 S. Ct. at 1404 (opinion of Gorsuch, J.).

95 *Id.* at 1402.

six Justices did.[96] So, taking the plurality's approach as an attempt to overrule *Marks* in part,[97] it is interesting that Justice Gorsuch did not acknowledge the awkwardness of his position.[98] The plurality's position was that a mere plurality could not — consistent with *Marks* — overrule settled precedent. Yet, the lead opinion in *Ramos* was a plurality attempting to overrule what the other Justices took as a settled application of *Marks*.[99] Assume for a minute that Justice Gorsuch's position was the narrowest one in *Ramos* concerning *Marks*.[100] Under *Marks*, the view that a plurality opinion cannot overrule prior precedent therefore would be controlling.[101] But under the *Ramos* plurality's view that the *Marks* rule now says is controlling, a plurality opinion that overrules prior precedent cannot be controlling.[102] By attempting to raise the bar for overruling precedent, the *Ramos* plurality has ensured that its own rule is invalid.[103] The point is that the nature of precedent about precedent creates this paradoxical situation that makes one's head hurt if thought about for too long. As a result, there needs to be a way out of this problem.

Fortunately, the solutions from before can help. If the decision to raise the bar for overruling — just like the decision to lower the bar — is truly a merits question without any consideration for stare decisis, then it does not matter if *Case X* does not meet *Case Y*'s new criteria for overruling. *Case Y* can simply replace *Case X*'s framework based on a merits judgment that *Case X* was wrong. And if stare decisis does not attach to precedent about precedent, then it is possible to avoid the *Marks*/*Ramos*-plurality problem. It does not matter whether the *Ramos* plurality's view of *Marks* is precedential or not because the Court in a future case can always resolve the question anew based on its own view

---

[96] *Compare id.* at 1403 (claiming *Apodaca* is not binding), *with id.* at 1409–10 (Sotomayor, J., concurring in part) (treating *Apodaca* as precedent), *id.* at 1416–20 (Kavanaugh, J., concurring in part) (same), *and id.* at 1427–29 (Alito, J., dissenting) (same). Justice Thomas also treated *Apodaca* as binding for the Due Process Clause, *see id.* at 1424–25 (Thomas, J., concurring in the judgment), but he would have decided the case under the Privileges or Immunities Clause, *id.* at 1425.

[97] *See* Varsava, *supra* note 21, at 125 (claiming Justice Gorsuch's approach "represents a significant departure from prevailing judicial norms").

[98] *But see Ramos*, 140 S. Ct. at 1432 (Alito, J., dissenting) (noting the "irony" of a fractured opinion criticizing *Apodaca* as "fractured" and therefore not binding (quoting *id.* at 1397 (majority opinion))).

[99] *See id.* at 1403–04 (opinion of Gorsuch, J.) (quoting *id.* at 1430–31 (Alito, J., dissenting)).

[100] This point is understandably disputable. *Cf. The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 528–29 (2020) (discussing the confused nature of *Marks* and the narrowest grounds rule post-*Ramos*).

[101] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[102] *Ramos*, 140 S. Ct. at 1402–03 (opinion of Gorsuch, J.).

[103] To tie things back together, the *Ramos* plurality is like *Case Y* with its higher bar, and the *Marks* rule is like *Case X* with its lower bar.

of the merits.[104] The same implication holds if the Court cannot methodologically bind itself; neither *Marks* nor the *Ramos* plurality's revision of *Marks* affects future Courts from a precedent about precedent perspective. The Court is entitled to determine whether a prior fractured case is entitled to stare decisis based on its own views. It is not bound by *Marks* or any other rule. Finally, if precedent about precedent is permissive, then the *Ramos* plurality could have lawfully followed *Marks*, but it did not have to do so.[105] Likewise, in the future, the Court can continue to treat *Marks* as permissive precedent about precedent,[106] or it can reevaluate its rules for fractured decisions.[107]

At bottom, if precedent about precedent does not apply to itself and overruling it does not trigger stare decisis considerations, judges and scholars can avoid some of the problems that the paradox of precedent about precedent seems to present. This is just one possible way of conceptualizing the unique status of precedent about precedent, but it has the benefit of making meta-precedent still a worthwhile inquiry for all other cases. The other conceptualizations — rejecting methodological binding and viewing precedent as permission — are also viable. Right now, however, the Court is not thinking hard about the status of precedent about precedent or its implications.

B. The Problem of Individual Approaches to Precedent About Precedent

The paradox also affects individual Justices' approaches to precedent about precedent. Yet this phenomenon too goes unrealized in the Court's current writings on precedent. Earlier, precedent about precedent was defined as, at a minimum, something a *majority* of the Court viewed as binding.[108] That means that idiosyncratic views, such as Justice Thomas's, do not count as precedent about precedent no matter how many times they are reiterated in concurrences. But what happens when members of the Court do not follow the Court's precedent about

---

[104] This does create some difficulty for lower courts attempting to determine the scope of the *Marks* rule moving forward. *See The Supreme Court, 2019 Term — Leading Cases*, *supra* note 100, at 529. *But see* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799 (2017) (arguing lower courts are already in a state of confusion regarding *Marks*).

[105] *See* Re, *supra* note 16, at 920.

[106] Whether the permissive aspect of *Marks* has been withdrawn by the *Ramos* plurality is one final wrinkle. *See id.* at 921–22. But even if *Ramos* now supplies the permissive precedent, the nature of permissive precedent means that the Court could still return to *Marks* if that were the correct rule of law. *See id.* at 920.

[107] *See, e.g.*, Re, *supra* note 26, at 1946 (proposing a complete elimination of *Marks*); Williams, *supra* note 104, at 839–44 (proposing a "shared agreement" approach to *Marks*, *id.* at 839).

[108] *See supra* note 16 and accompanying text.

precedent?[109] Or worse yet, what if a panel on the court of appeals believes that the circuit's horizontal precedent rules, which were adopted as Circuit Rules, are unconstitutional?[110] Precedent about precedent does not really matter if individual Justices or judges do not follow it.[111] This section discusses the problems that individualized approaches to stare decisis create.

The preeminent example of the problem of an individual rejection of precedent about precedent is Justice Thomas's approach in *Gamble v. United States*.[112] There, Justice Thomas outlined a different stare decisis approach that focused on the nature of the prior decision's error.[113] Justice Thomas argued that the Court *can* adhere to incorrect prior decisions so long as they are not "demonstrably erroneous," but that judges are not bound by wrongly decided precedent regardless of the precedent's workability or reliance interests.[114] Justice Thomas's view, then, looks very similar to the precedent as permission view (although with mandatory overruling of demonstrably erroneous precedents).[115] His view certainly does not follow the Court's precedents about stare decisis.[116]

---

[109] *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1981–88 (2019) (Thomas, J., concurring). Justice Thomas's view suggests that his approach to precedent about precedent is constitutionally mandated rather than a judicially crafted doctrine. *Compare id.*, *with* Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69; THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring)) (implicitly suggesting a common law basis for his approach to precedent about precedent).

[110] *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994). Interestingly, despite fulsome debate in the Supreme Court about the proper stare decisis framework, *see, e.g.*, Re, *supra* note 16, at 908 ("[T]he U.S. Supreme Court has become unusually preoccupied with issues of precedent."), there is remarkably little criticism of the law-of-the-circuit doctrine from lower court judges, *see* Mead, *supra* note 12, at 799–800 ("Today, judges accept the law-of-the-circuit rules without major objection . . . ."). For a few, limited examples of scholarly criticism, see Henry J. Dickman, Note, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1357–63 (2020), and Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1431–32, 1451 (2020). *But see* Thomas B. Bennett, *There Is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1686 (2023) (drawing an important distinction between the law of the circuit for horizontal precedent purposes and substantive law purposes that is often elided in these discussions).

[111] *See Ramos*, 140 S. Ct. at 1432 n.16 (2020) (Alito, J., dissenting) ("It is also important that the Court as a whole adhere to its 'precedent[s] about precedent.' If individual Justices apply different standards for overruling past decisions, the overall effects of the doctrine will not be neutral." (alteration in original) (citation omitted) (quoting Alleyne v. United States, 570 U.S. 99, 134 (2013) (Alito, J., dissenting))).

[112] 139 S. Ct. 1960 (2019).

[113] *See id.* at 1984–86 (Thomas, J., concurring).

[114] *Id.* at 1984.

[115] *See* Re, *supra* note 16, at 916–18 (discussing Justice Thomas's opinion in relation to precedent as permission); *see also* Varsava, *supra* note 21, at 131–32 (echoing this idea).

[116] Importantly, Justice Thomas has not just called for the Court to reconsider its approach to stare decisis, but he has also voted accordingly. *See Ramos*, 140 S. Ct. at 1424 (Thomas, J., concurring in the judgment) (rejecting the Court's due process incorporation line of cases as "demonstrably erroneous" without considering any other factors).

Voting based on a different stare decisis analysis weakens precedent about precedent overall because even if precedent about precedent is not binding on itself, the Court's rhetoric treats it as binding when applied to other cases.[117] But if one or more Justices take a different approach than the majority does about the proper standard for stare decisis, the bindingness of precedent about precedent is watered down. Imagine if the Court's precedent about precedent required a case to meet factors *A*, *B*, and *C* to warrant overruling. In a particular case, four Justices believe a prior case has met all three factors, four Justices believe the prior case has met none, and the final Justice believes the case has met factor *A*. Should the prior case be overruled? In the abstract sense, the answer should be "no" — five Justices have decided that the three factors necessary for overruling have not been met. But if the ninth Justice believes that only factor *A* should be necessary for overruling, then the Court will overrule the prior case because a majority of the Court thinks the case should be overruled, even though a majority does not think that the case satisfies the criteria that the Court's precedent about precedent outlines. Thus, one arrives at a result that seems problematic if precedent about precedent is taken seriously.

But Justice Thomas is not alone. There is also the phenomenon of the "perpetual dissent."[118] This is the practice of individual Justices continuing to author "opinions that reiterate a past dissenting view and then offer a rationale different from the majority's (either to concur or dissent)" because the "Justice refuses to accept the rule of a prior decision . . . as controlling authority."[119] The most famous of these is Justices Brennan's and Marshall's standard practice of dissenting from the constitutionality of the death penalty,[120] but the practice exists in multiple areas of law across judicial ideology.[121] Interestingly, when Justices engage in perpetual dissent, they typically do not employ the Court's stare decisis framework; instead, they focus on reiterating their view that the prior case or line of cases was wrongly decided on the

---

[117] *See, e.g.*, cases cited *supra* note 72.

[118] Allison Orr Larsen, Essay, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447 (2008); *see also* Richard M. Re, Essay, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 840 (2023) ("It seems that virtually all Justices eventually pick topics for perpetual dissent, stare decisis notwithstanding.").

[119] Larsen, *supra* note 118, at 451.

[120] They did so over 2,100 times. Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591, 593 (1995).

[121] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting in part and concurring in part) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent."); Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in the judgment) ("I . . . decline to apply the 'legal fiction' of substantive due process." (quoting McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment))).

merits.[122] That suggests that when Justices engage in perpetual dissent, they are ignoring the Court's precedent about precedent and focusing solely on the merits. Again, this waters down the practical effect of precedent about precedent. "Precedent about precedent is usually binding," the perpetual dissenters seem to say, "but not when it comes to this issue about which I really care."[123]

This rejection of precedent about precedent, either as a whole framework (in the case of Justice Thomas) or in specific applications (in the case of some perpetual dissenters), is possible because precedent about precedent is not binding on itself. Therefore, individual Justices can make a merits decision that they will not adhere to the Court's precedents about precedent in certain contexts without worrying about any other stare decisis considerations.[124] Thus, it seems that the paradox of precedent about precedent shapes judicial behavior by allowing for these individualized approaches. However, the earlier discussion of potential solutions to the problem of overruling precedent about precedent suggested that even if precedent about precedent is not binding on itself, there is value in seeing it as binding for all other cases.[125] In other words, *Casey* was not binding when determining whether to overrule *Casey* as precedent about precedent, but it was binding when deciding whether to overrule other decisions.[126] When individual Justices take a different approach, however, it looks like precedent about precedent is not binding even when applied to other cases.

There are a couple of possible solutions to this quandary as well. One possibility is to write off these individual views as illegitimate — an example of Justices "elevating [their] individual jurisprudence" above the Court's own doctrine.[127] From a purely theoretical standpoint, this position has appeal. It fits with the view that precedent about precedent is constraining at least when applied to other cases, even if not when applied to itself. When Justices ignore precedent about precedent in favor of their own views, they devalue the constraining force of precedent about precedent and thereby weaken the value of precedent as a

---

[122] *See, e.g.*, *Timbs*, 139 S. Ct. at 691–92; Alleyne v. United States, 570 U.S. 99, 133–34 (2013) (Alito, J., dissenting). *But see Kimel*, 528 U.S. at 97–99 (Stevens, J., dissenting in part and concurring in part) (engaging in a brief stare decisis analysis).

[123] For most perpetual dissents, the dissenters were also on the Court when the original precedent was decided, *see* Larsen, *supra* note 118, at 454–58 (cataloging perpetual dissents on the Rehnquist Court), but this is not a necessary condition, *see, e.g.*, United States v. Taylor, 142 S. Ct. 2015, 2033 n.1 (2022) (Alito, J., dissenting) (citing, inter alia, *Alleyne*, 570 U.S. at 132–34 (Alito, J., dissenting)) (noting his perpetual dissent with respect to Apprendi v. New Jersey, 530 U.S. 466 (2000), a case decided before he joined the Court).

[124] *See supra* section III.A.1, pp. 806–10.

[125] *See supra* section III.A.1, pp. 806–10.

[126] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844, 855–56 (1992)) (relying on *Casey*'s conception of reliance interests).

[127] Larsen, *supra* note 118, at 469.

whole.[128] From a practical standpoint, however, this view cannot explain why Justices continue to vote according to their own views on precedent rather than the Court's.[129] It also ignores the fact that there is no disciplining method for Justices who refuse to follow the Court's precedent about precedent.[130] Thus, this view fits well with some of the theoretical arguments from before, but it may suffer in its description of actual practice.

That leads to the nonbinding view of precedent about precedent again. If precedent about precedent is not constraining on the Justices either because the Court cannot methodologically bind its members or because precedent about precedent is merely permissive, then individual Justices can legitimately refuse to follow precedent about precedent in favor of their own views.[131] This view can, therefore, explain why Justices continue to favor personal precedent over institutional precedent about precedent,[132] but it does not explain why individual Justices also continue to invoke the idea that the Court as a whole must adhere to its precedent about precedent.[133]

To summarize, the paradox of precedent about precedent spills over into individual approaches to precedent about precedent. There are different ways of thinking about these individual approaches, each of which offers its own set of justifications. Those approaches each present their own weakness as well. In the status quo, however, the Court and individual Justices neglect to think about these problems when they discuss precedent about precedent.

CONCLUSION

Precedent about precedent presents a paradox that gives it a unique status within our system of stare decisis because a court overruling precedent about precedent will not apply the stare decisis framework that the precedent about precedent established. *Dobbs* is a recent example of this phenomenon, but many critics of *Dobbs* have faulted the Court for not applying *Casey*'s stare decisis framework even as *Dobbs* overruled *Casey* as precedent about precedent. These critiques make little sense in light of the unique nature of precedent about precedent. Of

---

[128] *Cf.* Varsava, *supra* note 21, at 133 ("[A] 'precedent' that stands for the view that precedent is not all that binding is self-defeating, or at least undermining.").

[129] *See* Re, *supra* note 118, at 835, 839–40.

[130] *See* Re, *supra* note 16, at 931. In this way, lower court judges with individual views about precedent might be different from Supreme Court Justices because the judges can be disciplined via appellate review.

[131] *See id.* at 946–47.

[132] *See id*; *cf.* Re, *supra* note 118, at 842–45 (explaining how personal precedent forms the basis of "[p]reserving [i]nstitutional [p]recedent," *id.* at 842).

[133] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1440 (2020) (Alito, J., dissenting); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2320 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

course, that unique nature creates issues that the Court too often ignores. In particular, the paradox of precedent about precedent raises difficult questions about whether one Court can bind a future Court to a particular stare decisis framework and about the binding nature of precedent itself. This is an especially pressing problem on a Court deeply divided about the weight and value of stare decisis.[134] It also demonstrates the difficulty that individual views about precedent create for a coherent system of precedent about precedent. This Note does not purport to resolve all of these problems, but it offers some preliminary answers. More than that, however, it is a call to future Courts and scholars to think more seriously about the concept of precedent about precedent.

---

[134] *Compare, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1981–88 (2019) (Thomas, J., concurring), *Dobbs*, 142 S. Ct. at 2279–80, *and* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2292–93 (2024) (Gorsuch, J., concurring), *with Dobbs*, 142 S. Ct. at 2348–50 (Breyer, Sotomayor & Kagan, JJ., dissenting), *and Loper Bright*, 144 S. Ct. at 2306–10 (Kagan, J., dissenting).