

Ethics and Stare Decisis: The Functions and Overlap in Ethical Obligations and Adherence to Precedent

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INTRODUCTION

The doctrine of stare decisis is fundamental to the operation of the judicial system and promotes a wide range of policy goals. Most people are likely unaware of its ubiquity in judicial opinions and only encounter the doctrine when it fails—that is, when precedent is overturned. Recently, however, stare decisis has been a topic of much discussion after the Supreme Court overturned its past precedent in several high-profile cases.¹

Without taking a position on whether those cases were rightly or wrongly decided, this Note explores how the Canons in the Judicial Code of Conduct interact with stare decisis. Part I defines stare decisis, providing a doctrinal overview, its policy goals, and its limits. Part II covers the relevant judicial ethical canons and rules, explaining their history, policy objectives, and operation. Finally, Part III explores the overlap between the two, how both operate together, and whether those similar operations achieve similar substantive ends.

I. WHAT IS STARE DECISIS?

Stare decisis—despite its striking and somewhat magical sound—is what first-year law students and some Supreme Court Justices equally dislike: Latin legal jargon. Nevertheless, its Latin form reflects its historical roots. So, prior to exploring its ethical dimensions, an overview of its definition, history, philosophy, and application in the legal system will provide the necessary foothold for further discussion.

A. DOCTRINAL OVERVIEW

1. BROAD CONTOURS AND DEFINITIONS

Stare decisis—a Latin term which means “to stand by things decided”²—is a judicial doctrine on how a judge values and applies precedent.³ The doctrine is often invisible in judicial opinions, obscured under the routine practice of common law, but is nevertheless operative in every case decided.⁴ Simply put, stare decisis stands for the idea that once a court applies the law to resolve a case, that court should adhere to its precedent when resolving future cases involving sufficiently similar facts.⁵

1. *See, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)); *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (overturning *Chevron U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

2. *Stare Decisis*, Black’s Law Dictionary (12th ed. 2024).

3. *See id.*

4. *See* Joseph A. Greenaway, *Reflections on Stare Decisis*, 83 MD. L. REV. 1, 1-2 (2023) (noting that, as a matter of judicial course, stare decisis “is so engrained in our collective psyches that we just do it”).

5. *See supra*, Black’s Law Dictionary, note 2.

The doctrine exists on two dimensional planes: vertical and horizontal. Vertical stare decisis exists between courts of different levels—*e.g.*, the Seventh Circuit and the United States Supreme Court. To maintain vertical stare decisis, the lower court adheres “to the decisions of courts with supervisory jurisdiction, or courts ‘with the power to reverse’ the judgment.”⁶ In other words, the lower court follows the precedent of the higher court—*e.g.*, the Seventh Circuit will apply the Supreme Court’s holding when confronted with a sufficiently similar case.

On the other plane, horizontal stare decisis is how courts deal with their own precedent. The horizontal plane asks an introspective question, as opposed to the vertical plane’s hierarchical one, providing judges with a more difficult analysis.⁷ Interestingly, horizontal stare decisis largely does not exist at the district court level; only federal circuit courts and, more famously, the Supreme Court wrestle with what degree of deference to give their own precedent.⁸ The Supreme Court considers several factors when determining the level of deference to afford its precedent. Upon balancing these factors, the Court decides whether its prior decision remains good law.

2. POLICY OBJECTIVES

The stare decisis doctrine serves multiple policy objectives, both for the broader public good and for the functioning of the judiciary. The stare decisis doctrine’s public policy aims are to achieve stability, predictability, and fairness. Similarly, it intends to benefit the judicial system itself by promoting judicial economy, judicial restraint, and public confidence in the courts’ ability and legitimacy.

Beginning with the policy goals affecting the public, the doctrine promotes stability. In the commercial context, legal relationships often depend on common law principles—such as those often found in property or contract law—and would be significantly less stable if those principles were at risk of being abandoned by judges every time they arise.⁹ Additionally, litigants commonly use precedent to value legal claims, leverage settlements, or both.¹⁰ Even more broadly, adherence to precedent bolsters the reliance interests of individuals who have come to order their thinking and living around decisional law well beyond the commercial context.¹¹

6. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790 (2012).

7. *See id.*

8. *Id.* at 794 (“In contrast [to federal appellate courts], district court stare decisis practices are unclear and often non-existent.”).

9. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 654, 652-53 (1999) (explaining policy considerations).

10. *See* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (explaining stare decisis is desirable to “furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise”).

11. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“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[.]”).

Finally, *stare decisis* attempts to make the law predictable and fair.¹² Evenhanded and consistent application of the law leads to, in a temporal sense, the litigants of today enjoying the same legal rights and remedies as those similarly situated litigants of yesterday.¹³ As put more pithily by Justice Douglas: “[T]here will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon.”¹⁴ As such, legal rights are based on the facts and law presented—not arbitrary and varying criteria.¹⁵

The judiciary also is a beneficiary of *stare decisis* because adherence to the doctrine promotes judicial economy, judicial restraint, and legitimacy. First, courts are more efficient if their energy can be narrowed to the new issues each case presents.¹⁶ As then-Judge Cardozo aptly noted, judicial labor would reach a “breaking point if every past decision could be reopened in every case” because then judges “could not lay [their] bricks on the secure foundation of the courses laid by others who had gone before him.”¹⁷ Otherwise, judicial opinions would include precedent boilerplates, which would, for example, reestablish that it is “emphatically the province and duty of the judicial department to say what the law is” prior to analyzing the merits of a case.¹⁸ In short, *stare decisis* allows for judges to spend their limited time addressing the matter squarely before the court, focusing on resolving the controversy and affording the complainant relief rather than building new doctrines from the ground up.

While *stare decisis* focuses judicial economy by allowing for *precision*—that is, presenting the issue narrowly before the court—the doctrine also promotes judicial restraint which focuses judicial labor *accurately*. Similar to Article III’s case or controversy requirement,¹⁹ *stare decisis* limits a judge from arbitrarily deciding cases or reaching issues not before the court by resolving matters with a thumb on the scale in favor of adhering to past precedent.²⁰ Otherwise, a judge

12. See Mead, *supra* note 6, at 792 (“The Supreme Court has identified four virtues of the consistency that *stare decisis* brings: predictability, fairness, appearance of justice, and efficiency.”).

13. See Hohn v. United States, 524 U.S. 236, 251 (1998) (“*Stare decisis* is ‘the preferred course because it promotes the evenhanded, predicable, and consistent development of legal principles [and] fosters reliance on judicial decisions[.]’”) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

14. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

15. See Mead, *supra* note 6, at 793 (“Inconsistent application of law is unfair because it violates the fundamental premise in our legal system that similar litigations should be treated similarly.”).

16. Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1305 (2008) (“From the perspective of courts and litigants, *stare decisis* saves time and effort.”).

17. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

18. *Marbury v. Madison*, 5 U.S. 137, 178 (1803); see also Roosevelt, *supra* note 16, at 1305 (“Constitutional litigation could hardly proceed if every issue (for instance, the application of the Bill of Rights to the states) were up for grabs anew in every case.”).

19. Some Justices, including Justice Brett Kavanaugh, argue that *stare decisis* is incorporated in Article III. *Ramos v. Louisiana*, 590 U.S. 83, 116 (2020) (Kavanaugh, J., concurring in part) (“The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the ‘judicial Power’ and rooted in Article III of the Constitution.”).

20. See Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (“*Stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.”).

might reach beyond the current controversy to define law not in question based on her own personal proclivities, undercutting the stability and development of the law.²¹ To be sure, judges must sometimes expand on the issue before them even when it may not be directly applicable to the question presented. These extra deliberations, known as “dicta,” are helpful in the grander scheme of developing the law because they often provide the outer bounds of the law which—although not directly presented in the immediate case—provides helpful guidance for lower courts and citizens alike. Yet, for stare decisis concerns, this dicta does not gain the same precedential weight—if any—as those legal rules or holdings that control the litigation’s outcome. While a judge may reach beyond the case to comment on related legal principals, stare decisis does not normally provide those comments the same force.

B. LIMITS ON ADHEREING TO PRECEDENT

To avoid undermining its own policy concerns and to achieve others, stare decisis must yield in certain situations. As put by the Supreme Court: “stare decisis is not an inexorable command.”²² If followed blindly, adhering to past *inaccurate* legal judgements—although predictable—cuts against fairness. Indeed, a court relying on precedent that was wrongly decided potentially perpetuates past injustices solely because a majority of judges previously ruled incorrectly.²³

To be sure, the doctrine is not blind to concerns of inaccuracy and impasse. Rather, it represents a broad policy judgment that, on balance, “it is usually more important that the applicable rule of law be settled than that it be settled right.”²⁴ Thus, the cost of stare decisis is “sticking to some wrong decisions.”²⁵

Nor is stare decisis, as a general matter, understood to be constitutionally required.²⁶ Accordingly, the Court may diverge from its own precedent when the policy objectives of stare decisis are sufficiently outweighed by other concerns.²⁷ Often a court’s divergence from precedent, however, may not break stare decisis, but merely bend it. When a court finds that a significant change from a particular precedent is required, it may distinguish, qualify, or recharacterize that precedent

21. *See id.*

22. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

23. *See Payne v. Tennessee*, 501 U.S. 808, 834 (Scalia, J. Concurring) (disagreeing that a “governing principal of [the] Court” is to uphold wrong decisions “for the sole reason that it once attracted five sole votes”).

24. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 406 (Brandeis, J., dissenting)).

25. *Id.* at 455.

26. *See Mead*, *supra* note 6, at 792 n.32 (“[T]he vast majority of the scholarship view stare decisis as a policy that can be changed at will by the courts.”).

27. *See, e.g., Payne*, 501 U.S. at 828 & n.1 (collecting thirty-three instances in which, over the period of twenty Supreme Court terms prior to 1991, the Court “overruled in whole or in part . . . its previous constitutional decisions”).

without overruling it.²⁸ In doing so, the policy considerations of stare decisis remain largely intact. That is, those who relied on the precedent are less likely to be completely displaced, a more pronounced legal standard develops out of the old decision, and the ability to predict the direction the law is trending remain.

II. GAUGING THE STRENGTH OF STARE DECISIS

Nevertheless, overruling past precedent is sometimes unavoidable—and at times even unquestionably the correct outcome.²⁹ The standard test for overruling precedent begins with understanding the weight of stare decisis relative to the specific precedent under scrutiny. This first depends on the law and issue it addresses; thus, a careful characterization of the precedent is required. A court characterizing the precedent—which is often performed implicitly, not explicitly, in a stare decisis review³⁰—must identify both (1) the law at issue in the precedent and (2) the breadth of the precedent’s holding on that issue.

First, the law at issue greatly affects the weight afforded to stare decisis. When the Supreme Court, for instance, is presented with a constitutional question, the policy judgment inherent in stare decisis favoring “settled” over “settled right” loses value.³¹ While predictability and stability would seem even more important when resolving questions of a constitutional dimension, the Court instead reasons that accuracy in constitutional interpretation serves as a check on the Court’s own power in the event its prior ruling was incorrect.³² Put simply, the Court is more willing to overturn constitutional case law because Congress cannot override the Court’s errors. In contrast, when interpreting a statute, “critics [of the Court’s ruling] . . . can take their objections across the street, and Congress can correct any mistake it sees.”³³ Thus, the high bar set to amend the Constitution makes justices’ errors more pronounced and permanent, so the Court lowers the weight afforded to precedent—and therefore create a weaker version of stare decisis—in an effort to resolve the case correctly.³⁴

28. See, e.g., *Seila Law LLC v. Consumer Fin. Protection Bureau*, 591 U.S. 197 (2020) (distinguishing without overruling previous cases relating to the constitutional requirements for appointment and removal of officers).

29. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

30. See *Greenaway*, *supra* note 4.

31. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

32. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (“[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”); *id.* at 406-07 (“[I]n cases involving the federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.”).

33. *Kimble v. Marvel Ent.*, 576 U.S. 446, 456 (2015).

34. Some commentators argue that stare decisis is unconstitutional when an Article III judge interprets the Constitution because a judge would abandon her duty to follow the Constitution if—believing the Constitution commands a different outcome—she nevertheless resolves the case on the basis of precedent. See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 18-22 (2007). Indeed, there is even tension on the Supreme Court as to whether the Constitution prohibits or

Notwithstanding the law at issue, the Court's interpretation of the breadth of the precedent also affects the strength of stare decisis. The line between a court's holding and mere dictum is often unclear, allowing the reviewing court to determine how much of the precedent controls the current case.³⁵ Despite this ambiguity, the core holdings in the precedent—*i.e.*, the issue that was briefed by the parties and directly decided by the court to resolve the controversy—have stronger stare decisis power than peripheral holdings or dicta do.³⁶ Additionally, factual similarities between the current case before a court and the facts in the precedent-setting case at issue influence the strength of stare decisis. Thus, a judge's characterization of the precedent's facts and law greatly influence the degree stare decisis will control the current case or whether that precedent is even operative at all.³⁷

Alternatively, a judge might distinguish the precedent from the case before the court in a manner that—although framing the precedent negatively—avoids overruling it by outlining an exception to it.³⁸ While this may arguably be side-stepping a difficult stare decisis analysis altogether rather than a faithful application of the doctrine, creating exceptions can nevertheless further the underlying principles of stare decisis in certain circumstances.³⁹ Finally, there are a variety of rare or nuanced details regarding the precedent—such as whether the case was heard en banc—which either make stare decisis stronger or weaker.⁴⁰ In sum, the weight afforded to stare decisis is important because it sets the threshold for

incorporates stare decisis in Article III. *Compare* Ramos v. Louisiana, 590 U.S. 83, 116 (2020) (Kavanaugh, J., concurring in part) (explaining that the founders believed “stare decisis is part of the ‘judicial Power’ and rooted in Article III”), with Gamble v. United States, 587 U.S. 678, 711 (2019) (Thomas, J., concurring) (“[T]he Court’s typical formulation of the stare decisis standard does not comport with our judicial duty under Article III[.]”). Accordingly, this note does not take a position on that question.

35. See *Thrust and Parry of Stare Decisis in the Roberts Court*, 137 HARV. L. REV. 684, 687-88 (2023) (“[T]he boundaries between . . . holding and dicta are rarely determined with clarity.”) [hereinafter *Thrust and Parry*].

36. The power of drawing the line between a precedent's holding and dictum can lead the Court to either address an issue and overrule it or narrow the past holding and distinguish it as different or as an exception. See *id.* at 687-89. However, the Supreme Court's dictum and holding distinction disappears when a circuit court is in a vertical stare decisis posture. See Greenaway, *supra* note 4 at 1 (“At the circuit level, . . . [w]e are bound by Supreme Court precedent, whether the actual holding or dicta. We are guided by the teachings of the Court and cannot act inconsistently with its edicts.”).

37. See *Thrust and Parry*, *supra* note 35 (explaining that a judge's characterization of the issue and its impact using *Seila Law, LLC v. CFPB* as an example).

38. See, e.g., *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (invoking an exception rather than overruling *Emp. Div. v. Smith*, 494 U.S. 872 (1990)).

39. See Greenaway, *supra* note 4, at 1 (explaining that “precedents build on each other” making changes in law “generally slow . . . and are more akin to an ocean liner changing course than a hard turn by a speed boat”). But see *Thrust and Parry*, *supra* note 35, at 690 (arguing that the holding in *Fulton* invoking stare decisis was “self-defeating” because it “was hardly predictable that [Chief Justice Roberts] would invoke” the exception to resolve the case).

40. See, e.g., DANIEL H. CHAMBERLIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT 19 (1885) (explaining that other “special, but less fundamental, limitations” of stare decisis include whether it is “a single decision” which “is less authoritative than a *series*,” whether “the character of the judge or [the] court” who decided the case is in high esteem, whether the hearing was en banc, how much time has lapsed since the decision, and whether there have been other tangential developments in the law).

overturning precedent. The stronger the stare decisis force a precedent has, the harder it will be to overcome the presumption to stand by it.

III. JUDICIAL ETHICS

A. BRIEF HISTORY

The first ethical standards applicable to judges in the United States can be found in the Judiciary Act of 1789.⁴¹ This act, notable for establishing the structure of the federal judiciary, includes an oath all federal judges must take to “truly and faithfully enter” judgments and “faithfully and impartially discharge” their judicial duties without consideration of wealth or class.⁴² Additionally, two other statutes outline federal judges’ recusal requirements.⁴³ The first provides that a judge must recuse himself “in any proceeding in which his impartiality might reasonably be questioned.”⁴⁴ The second “allows a litigant to seek disqualification of a district court judge for any alleged bias or prejudice.”⁴⁵ Yet, these statutes alone proved too vague to answer close ethical questions, leading to reform in the 20th century.⁴⁶

Famously, the public’s focus on judicial ethics arose through baseball. In the 1919 World Series, eight Chicago White Sox players were accused of fixing the game.⁴⁷ To avoid further corruption in the sport, Federal District Court Judge Kenesaw Mountain Landis was selected to be the next commissioner of baseball.⁴⁸ However, his appointment raised the ethical question of whether a federal judge could concurrently serve as the commissioner of baseball.⁴⁹ And without a specific ethical code of conduct for judges, the answer was left only to public debate.⁵⁰

Prompted by this event, the American Bar Association (ABA) convened the Committee on Judicial Ethics in 1922 to create the Canons of Judicial Ethics.⁵¹ Led by Chief Justice William Howard Taft, the Committee promulgated thirty-

41. Judiciary Act of 1789, ch. 20.

42. *Id.* at § 8, 76.

43. See 28 U.S.C. §§ 144, 455(a)-(b).

44. 28 U.S.C. § 455(a); see *id.* § 455(b) (providing specific circumstances for recusal); see also Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. Rev. 943, 954-57 (2011) (explaining the history and structure of the statute and 28 U.S.C. § 144).

45. Bam, *supra* note 44, at 956-57; see 28 U.S.C. § 144.

46. M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, YALE LAW JOURNAL FORUM, Oct. 24, 2021, at 192 (noting that congressional statutes were a “starting point” and “judicial ethics codes have evolved to provide more specific guidance”).

47. See *id.* at 192-93.

48. *Id.*

49. *Id.* at 192 (“[T]he question immediately arose as to whether Landis could serve both as Commissioner of Baseball and as a federal judge.”).

50. *Id.* (noting “[n]o ethics code provided an answer” to whether Judge Landis could serve in both roles); see also *id.* (“[P]ublic outcry forced Landis to make a decision. He chose the Commissioner position, which also netted him a substantial salary increase.”).

51. American Bar Association Journal, July 1923, Vol 9, No. 7 at 449 (“The Committee on Judicial Ethics was appointed January, 1922.”).

four Canons of Judicial Ethics.⁵² These Canons, according to Chief Justice Taft, were meant to be “a guide and reminder” and not “the basis of disciplinary action” against a judge.⁵³ The Committee has periodically revised the Canons; in 2007, it proposed “substantive and format changes” to the most recent version of the Code.⁵⁴ Still using the Canons for the general ethical principles, the 2007 Code provided “enforceable black letter Rules” and “comments that provide . . . guidance in interpreting” the Code,⁵⁵ which made it similar to the Model Rules of Professional Responsibility and thus more “user friendly.”⁵⁶

B. CURRENT CODE AND APPLICABLE CANONS

The current Code is now organized into four Canons, which are followed by rules and comments.⁵⁷ Importantly, the Code does not apply to Supreme Court justices.⁵⁸ In the 2011 federal judiciary year-end report, Chief Justice John Roberts explained that Article III of the Constitution created the Supreme Court and granted Congress the power to establish lower federal courts.⁵⁹ However, the Judicial Conference, which promulgates the Judicial Code, only oversees the courts created by Congress and does not “prescribe rules or standards for any other body.”⁶⁰ Therefore, Congress’ Code could not regulate the Supreme Court—only those inferior federal courts Congress created.

Nevertheless, Canons One and Two are most relevant to stare decisis considerations. They cover “a judge’s conduct in general” and “conduct relating to the duties of judicial office,” respectively.⁶¹

1. CANON ONE: RULE 1.1 AND 1.2

Canon One broadly covers principles applicable to judges both when performing judicial duties and in their private capacities.⁶² Under this Canon, Rule 1.1

52. See ARTHOR GARWIN ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT ix (2d ed. 2007) (noting in the preface that Chief Justice Taft “chaired the ABA committed on Judicial Ethics” in 1924). [hereinafter ANNOTATED CODE].

53. *Id.*; *cf. id.* (noting that many states adopted this “guide” as “substantives rules, giving the Canons in those states the force of law”).

54. *Id.* at x-xi.

55. Amanda B. Hurst, *Judging the Judiciary*, 40 GA. ST. U. L. REV. 313, 341-42 (2024).

56. *Id.* at 333.

57. See generally MODEL CODE OF JUDICIAL CONDUCT (Am. Bar Ass’n 2020)

58. See John Roberts, 2011 Year-End Report on the Federal Judiciary, 3 (“The Code of Conduct, by its express terms, applies only to lower federal court judges.”).

59. *Id.* at 3-4.

60. *Id.* at 4.

61. Hurst, *supra* note 55, at 341-42. The other two Canons cover extrajudicial conduct and conduct relating to political and campaign activities. See *id.* Because the focus of the Note is on judicial interpretation of stare decisis, rather than on political or extrajudicial activities, these two Canons are not discussed as extensively.

62. Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 262 (2007) (“Canon 1 now articulates the general principals and underlying rules applicable to judges at all times[.]”).

provides: “A judge shall comply with the law, including the Code of Judicial Conduct.”⁶³ The rule promotes public confidence in the judiciary because trust is undermined when judges themselves do not comply with the law.⁶⁴ In other words, the rule aims to promote confidence in the judiciary by punishing judicial hypocrisy. Common violations of Rule 1.1 involve instances in which a judge has engaged in illegal conduct such as theft,⁶⁵ drug use,⁶⁶ or tax evasion.⁶⁷ Yet, a judge failing to follow court rules or ignoring precedents can sometimes trigger a Rule 1.1 violation.⁶⁸ For example, a judge was reprimanded for disregarding two appellate court cases by suggesting the higher court went “astray in those cases.”⁶⁹ Thus, while Rule 1.1’s main concern is a judge’s conduct off the bench, the rule may nevertheless capture some on-bench conduct.⁷⁰

Next, Rule 1.2 provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety.”⁷¹ Rule 1.2’s rationale is largely the same as Rule 1.1’s: When judges engage in misconduct or give the appearance of impropriety, then the public’s confidence in the judiciary is diminished.⁷² Under Rule 1.2, judges cannot make decisions based on “inappropriate outside influences” which would cut against an independent judiciary.⁷³ Additionally, a violation may occur if a judge exceeds her authority to decide issues or otherwise violates the court’s jurisdictional limits.⁷⁴ Rule 1.2 also promotes fairness by disciplining judges who make arbitrary or seemingly arbitrary decisions.⁷⁵ For example, a judge who flipped a coin to determine a custody dispute was found to have undertaken an arbitrary method of judicial decision

63. MODEL CODE OF JUDICIAL CONDUCT, Canon 1, Rule 1.1 (Am. Bar Ass’n 2020).

64. See ANNOTATED CODE, *supra* note 52, at 23 (“A judge who does not comply with the law diminishes public confidence in the judiciary.”).

65. See *id.* at 25-26 (“Judges who are guilty of theft may be disciplined under Rule 1.1[.]”).

66. See *id.* at 26 (“A judge’s illegal use of drugs while off the bench violates the Code of Judicial Conduct and is grounds for discipline.”); *accord id.* at 52 (“Judges who are impaired by alcohol or drugs *while on the bench* violate Rule 1.2.”) (emphasis added).

67. See *id.* at 27 (“Tax evasion is another example of a violation of law that may result in a Rule 1.1 violation.”).

68. See *id.* at 28-29 (“[J]udges can be disciplined under Rule 1.1 for violating court rules and procedures.”).

69. In re Cahill 13-32, 13041, 13042 (Minn. Bd. on Jud. Standards 2014).

70. Compare ANNOTATED CODE, *supra* note 52, at 93 (“Although there is some similarity between [Rule 2.2] and Rule 1.1 . . . Rule 1.1 addresses the judge’s duty to comply with the law in his or her daily life[.]”) with *id.* at 28 (“Since the Terminology defines law as including court rules, judges can be disciplined under Rule 1.1 for violating court rules and procedures.”).

71. MODEL CODE OF JUDICIAL CONDUCT, Canon 1, Rule 1.2.

72. *Id.* cmt. [1].

73. ANNOTATED CODE, *supra* note 52, at 38.

74. See *id.* at 53 (“A violation of Rule 1.2 can come from misjudging the scope of one’s judicial role.”).

75. See *id.* at 41 (“Judges who have failed to demonstrate fairness by making decision in an apparently arbitrary manner have been subject to discipline.”).

making, warranting discipline under Rule 1.2.⁷⁶ Such decisions fail to promote public confidence in the fair administration of justice.⁷⁷

Yet, subject to much commentary is whether impropriety and the *appearance* of impropriety ought to be included in Rule 1.2.⁷⁸ Some commentators argue that the standard for appearance of impropriety, without more, is too vague and subjective to be enforceable or workable.⁷⁹ In response, a definition of impropriety was added in the 2007 revision.⁸⁰ This definition includes “conduct that violates the law, court rules, provisions of this Code.”⁸¹ Additionally, the Comments to Rule 1.2 provide a further test: There is an appearance of impropriety if a judge’s “conduct would create in reasonable minds a perception that the judge violat[ed the] code or engaged in other conduct that reflects adversely on the judge’s . . . fitness to serve[.]”⁸²

In sum, Canon One and Rules 1.1 and 1.2 serve as an ethical foundation for judicial conduct in an effort to promote overall confidence in the judiciary. Both Rules achieve public confidence by limiting judges from arbitrarily deciding issues resulting in unpredictable outcomes and through managing judicial appearances—on and off the bench.

2. CANON TWO: RULE 2.2

Canon Two focuses more narrowly than Canon One on principles specifically applicable to on-the-bench judicial duties,⁸³ although Canon Two does contain more rules as compared to Canon One.⁸⁴ Under Canon Two, Rule 2.2 provides that a “judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.”⁸⁵ The comments to the Rule further provide that, notwithstanding a judge’s “unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves . . . [of] the law in question.”⁸⁶ The Rule aims to have every judge preside over cases with an “objective and open mind” to “ensure impartiality and fairness to all parties.”⁸⁷

76. See *In re Brown*, 662 N.E.2d 733 (Mich. 2003).

77. See ANNOTATED CODE, *supra* note 52, at 40-41 (discussing how Rule 1.2 promotes public in confidence in the judiciary through judicial integrity and fairness).

78. See *id.* at 60 (“It may be difficult to determine what is ‘impropriety’ or appearance [of impropriety] without meaningful definitions of these terms. Thus, the language has been subject to criticism by both courts and commentators.”).

79. See generally Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 Hofstra L. Rev. 1337 (2006).

80. See ANNOTATED CODE, *supra* note 52, at 60 (“In 2007, because of the importance of the appearance created by judges, the Commission added a definition of impropriety[.]”).

81. MODEL CODE OF JUDICIAL CONDUCT, Terminology (Am. Bar Ass’n 2020).

82. *Id.* Canon One, Rule 1.2 cmt. [5].

83. Harrison, *supra* note 62, at 262 (“Canon 2 . . . focuses on principles and rules applicable to the duties of judicial office.”).

84. Compare *id.* Canon One, Rule 1.1-1.3 with *id.* Canon Two, Rule 2.1-2.11.

85. MODEL CODE OF JUDICIAL CONDUCT Canon Two, Rule 2.2 (Am. Bar Ass’n 2020).

86. *Id.* Rule 2.2 cmt. [2].

87. *Id.* Rule 2.2 cmt [1].

Accordingly, a judge who knowingly applies the law incorrectly is likely subject to discipline under the Rule.⁸⁸ Yet, it is more difficult to determine whether a judge's errors warrant ethical scrutiny, and, if so, to what degree.⁸⁹ Some argue that stricter ethical discipline that punishes a judge's errors would cut against judicial independence—a separate core principle the Rules seek to promote. These concerns about diminished judicial independence flow from the possibility that an overly strict ethical code could influence judges to base legal decisions, in whole or in part, on ethical obligations or the potential of discipline rather than on what the law at issue commands.⁹⁰ Ideally, focusing on either ethical considerations or accuracy when deciding a case before the court would lead to the same result, but an exceedingly strict code may not account for every scenario. And where ethical codes and the law command different results, judges may implicitly give undue weight to the ethical code compared to the governing law, failing both objectives.

Additionally, some regard appellate review, rather than ethical sanctions, as the correct remedy for judicial legal error.⁹¹ Yet an appeal and an ethical sanction are subtly different because “[a]ppellate review ‘seeks to correct past prejudice to a particular party’ while judicial discipline ‘seeks to prevent potential prejudice to future litigants and the judiciary in general.’”⁹² Moreover, judicial independence need not come at the cost of judicial accountability. Many state courts with similar ethical rules as the ABA supply different standards for distinguishing legal error which should be left for review and legal error which should warrant ethical sanction. There are two main principles from these cases that are instructive on this line drawing issue.

First, the degree of the legal error should be taken into consideration. A judge's legal error is less likely to raise ethical questions if the error occurred when interpreting an ambiguous statute or reviewing a matter of first impression.⁹³ Relatedly, the complexity of the legal analysis is also a factor—*i.e.*, a legal error

88. See ANNOTATED CODE, *supra* note 52, at 94 (“[I]t is easy to see that a judge's willful noncompliance with the law should be disciplined[.]”).

89. See *id.* (“[C]ourts have struggled with the issue of whether a judge's legal error rises to the level of sanctionable conduct under Rule 2.2[.]”); see, e.g., *W. Va. Jud. Inquiry Comm'n v. Doster*, 271 S.E.2d 427 (W. Va. 1980) (holding that discipline does not attach without proof of improper motive).

90. See Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1247 (“[I]f every error of law or abuse of discretion subjected a judge to discipline . . . the independence of the judiciary would be threatened.”); ANNOTATED CODE, *supra* note 52, at 94-95 (reasoning that disciplining “a judge for mere legal error would threaten judicial independence because judges might consciously or unconsciously render decisions based on how they think the disciplinary body would view the decision” rather than using their own legal judgment).

91. See Jefferey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 8-9 (1988) (arguing that judicial disciplinary action “should not be used as a substitute for appeal”).

92. Gray, *supra* note 90, at 1247-48.

93. See ANNOTATED CODE, *supra* note 52, at 95-96; see, e.g., *Harrod v. Ill. Courts Comm'n*, 372 N.E.2d 53 (Ill. 1977) (holding that ethical sanctions should not attach to the error despite being reversed on appeal because the statute had never been subject to judicial interpretation).

made in regard to a convoluted matter will receive less ethical scrutiny than a judge misapplying well-established rules and procedures.⁹⁴ *Second*, the repetition of the legal error should be evaluated. An error that, viewed individually, would not warrant ethical sanction may be sanctionable when repeated unjustifiably.⁹⁵ Ultimately, Rule 2.2 aims to avoid punishing a judge for making good faith mistakes of law which, at any rate, will be remedied on appeal.⁹⁶

IV. THE CANONS AND STARE DECISIS

A. SIMILARITIES IN ENDS: POLICY GOALS

Whether stare decisis has ethical dimensions largely turns on how one characterizes stare decisis itself. On one hand, some view stare decisis as nothing more than an individual judicial philosophy, each judge understanding its operation differently.⁹⁷ In that case, the Rules are largely inapplicable, just as it they are inapplicable to whether a judge is an originalist or a pragmatic.⁹⁸ On the other hand, if stare decisis is a strictly viewed as a method of understanding and applying past precedent, then it more closely resembles a court rule or procedure rather than a subjective principle. Accordingly, when performing a stare decisis analysis under this interpretation, a judge who overturns past precedent without due consideration or arbitrarily departs from settled law would likely raise ethical questions.⁹⁹

What is clear is that both stare decisis and the Canons of Judicial Ethics share similar ends. *First*, both function to promote fairness, predictability, and stability in the law. *Second*, both aim to promote judicial legitimacy and restraint.

1. FAIRNESS AND PREDICTABILITY

Stare decisis promotes fairness by ensuring similarly situated litigants receive equal application of the law. Likewise, Rule 1.2 promotes judicial integrity and condemns impropriety and the appearance of impropriety. Additionally, Rule 2.2 instructs judges to apply the law “fairly” and “impartially.”¹⁰⁰ Thus, a judge

94. See, e.g., *Miss. Comm’n on Judicial Performance v. Britton*, 936 So. 2d 898 (Miss. 2006).

95. See ANNOTATED CODE, *supra* note 52, at 96-97 (explaining that judicial legal error may become actionable when an otherwise “isolated improper judicial decision . . . begin to display a pattern of . . . abuse of power[]” or when a “repeated pattern of legal error calls for a judges removal”).

96. Indeed, some states include the availability of appellate review as a factor when determining whether there was an ethical violation. See *id.* at 97 (“[S]ome courts hold[] that discipline is unnecessary when an error . . . can be corrected on appeal.”). But see *People ex rel. Harrod v. Ill. Cts. Comm’n*, 372 N.E.2d 53, 65 (Ill. 1978) (noting legal error that can be corrected on appeal “does not . . . protect the public from a judge who repeatedly and grossly abuses his judicial power”).

97. See *Mead*, *supra* note 6, at 792 n.32 (“[T]he vast majority of the scholarship views stare decisis as a policy that can be changed at will by the courts.”).

98. See MODEL CODE OF JUDICIAL CONDUCT, Canon Two Rule 2.2, cmt. [3].

99. See, e.g., *In re Cahill* 13-32, 13041, 13042 (Minn. Bd. on Jud. Standards 2014) (criticizing judge for not following precedent).

100. MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Rule 2.2; see also *id.* cmt. [1] (“To ensure . . . fairness to all parties, a judge must be objective and open minded.”).

giving deference to precedent must apply it fairly and predictably—an instruction of both *stare decisis* and judicial ethics. Ethically, a judge cannot ignore precedent nor apply precedent differently to sufficiently similar fact patterns such that it results in unfair outcomes under Rule 1.2 or 2.2 standards.

Where past precedent is egregiously wrong, unworkable, or factually dissimilar, *stare decisis* may be overcome.¹⁰¹ Divergence from precedent in these situations is still predictable, and intelligent developments of the law that result in fair outcomes—especially where the prior decision was “egregiously wrong when decided” or was “unmasked as egregiously wrong based on later legal or factual understandings.”¹⁰² Judicial ethics provide the same advice. A judge applying *stare decisis* correctly nevertheless is applying the law fairly and impartially. It does not follow that, because those considerations correctly counsel for a change in direction from precedent, the decision then transgresses the ethical rules.

2. LEGITIMACY AND JUDICIAL RESTRAINT

Judicial legitimacy—an especially acute *stare decisis* concern recently¹⁰³—is also a critical objective of Model Judicial Code of Ethics. Many of the underlying fairness concerns addressed by the Judicial Code of Ethics, as discussed above, function to support public confidence in the judiciary.¹⁰⁴ Likewise, *stare decisis* promotes judicial legitimacy by focusing judges on using precedent to resolve disputes rather than rendering arbitrary decisions blind to past reasoning.¹⁰⁵

Specifically, Rule 1.2 instructs judges to act in an upright manner to “promote public confidence in independence, integrity, and impartiality of the judiciary[.]”¹⁰⁶ Rule 1.2 also provides that the judge must “avoid . . . the appearance of impropriety” by conducting themselves such that a reasonable observer would perceive the judge as fit to serve.¹⁰⁷ Most critically, Rule 1.2 has prohibited judges from rendering decisions in an arbitrary manner.¹⁰⁸ Additionally, Rule 2.2 instructs judges to apply

101. See generally Thrust and Parry, *supra* note 35 (providing the factors the Supreme Court uses to determine if the presumption of *stare decisis* is overcome).

102. *Ramos v. Louisiana*, 590 U.S. 83, 121-22 (2020) (Kavanaugh, J., concurring in part).

103. See generally Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (June 2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (“[I]t is striking how many commentators—including prominent constitutional scholars, a former Attorney General, and current members of Congress—have recently questioned the legitimacy of the United States Supreme Court.”).

104. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“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[.]”).

105. See Mead, *supra* note 6, at 793 (“[S]tare decision constrains judicial discretion to established rules of law rather than allowing judges to operate on whim or caprice.”); CARDOZO, *supra* note 17, at 149 (describing past precedent as the foundation upon which judges can use to lay their own bricks of reasoning).

106. MODEL CODE OF JUDICIAL CONDUCT, Canon One Rule 1.2.

107. *Id.*; see *id.* cmt [5] (providing the objective test for the appearance of impropriety).

108. See, e.g., *In re Brown*, 662 N.W.2d 733 (Mich. 2003) (using a coin-flip to resolve portion of custody dispute).

the law “fairly and impartially” without regard to the judge’s personal approval of the law in question.¹⁰⁹ Read together, Rule 1.2 and 2.2 achieve broad public confidence in the judiciary by impartial, fair, and reasoned decisions. Stare decisis is involved in an important subset of these two Rules: requiring a judge to treat *precedent* fairly, impartially, without impropriety or appearance of impropriety, and without regard to their own personal approval of the past precedent. In turn, the public gains confidence in the courts, securing the judiciary’s legitimacy as a coequal branch of government.

The overlap is most pronounced when a court overturns past precedent. Poor treatment of precedent, unprincipled reasoning, or lack of judicial restraint may impact public confidence in the courts.¹¹⁰ Of course, judicial legitimacy may also benefit from deviating from stare decisis to correct past mistakes.¹¹¹ However, doing so in accord with the ethical rules best produces the shared objectives of legitimacy and restraint.¹¹² Otherwise, precedent may be overturned on a more frequent basis, undermining judicial legitimacy.¹¹³ Equally likely, a court overturning precedent on a divisive issue may cause the public to reason that the judge merely imputed their personal preferences on the precedent to overrule it.¹¹⁴ In any event, stare decisis and the judicial ethics rules function to promote judicial restraint and legitimacy in the judiciary, often working concurrently in achieving those ends—yet when one is prioritized over the other, the result is usually zero-sum.

B. SIMILARITIES IN MEANS: HOW DO THEY WORK TOGETHER?

With many of the ethical rules written to achieve similar ends as stare decisis, the two are linked in interesting ways. They work together more as gears than separate tools—such that ignoring stare decisis could mean ignoring ethical obligations, frustrating the functioning of the judiciary.

To be sure, the fact the ethical rules and stare decisis share similar objectives does not, by itself, cause them to be linked. Each could plausibly achieve these ends through different means without meeting on the way there. However, the linkage here is a function of the breadth of the ethics rules and the amount of

109. MODEL CODE OF JUDICIAL CONDUCT, Canon Two, Rule 2.2.

110. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 357 (2022) (Roberts, C.J., concurring) (explaining “basic principles of *stare decisis* and judicial restraint” caution against “[t]he Court’s decision to overrule *Roe* and *Casey*” and that decision “is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision . . . would be markedly less unsettling”).

111. See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954); cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (“[T]he country can accept some correction of error without necessarily questioning the legitimacy of the Court.”).

112. Cf. *Casey*, at 866 (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”).

113. *Id.* (“The legitimacy of the Court would fade with the frequency of its vacillation.”).

114. Roosevelt, *supra* note 16, at 1305 (2008) (“If a Court abandons precedent too readily and without adequate explanation, observers may conclude that its decisions are driven by preference rather than principle.”).

overlap in policy objectives. This overlap, as outlined above, occurs because both aim to uphold the judiciary: judicial ethics focusing on judicial conduct and stare decisis focusing on treatment of precedent. The judicial ethics code necessarily covers how judges treat precedent and, therefore, how judges use stare decisis, too.

On one hand, vertical stare decisis instructs a judge to adhere to precedent of supervisory courts in the same way Rules 1.2 and 2.2 admonish judges who deviate from precedent arbitrarily. So, taken together, the Canons provide an ethical edge to vertical stare decisis. On the other hand, the connection between horizontal stare decisis and the ethical code is a little less clear. Rule 2.2 leaves good faith mistakes of fact or law to be dealt with on appeal, not by ethical discipline.¹¹⁵ With the test for stare decisis being anything but clear,¹¹⁶ even poorly hidden judicial misconduct in a decision to overturn precedent may be construed as a good faith mistake—especially in matters without bright line rules. Providing even more complexity is that many commentators and judges view stare decisis as merely a judicial philosophy.¹¹⁷ Therefore, only in the most egregious cases of judges ignoring precedent or arbitrarily overruling previous decisions would ethical inquires be raised regarding a horizontal stare decisis analysis.

V. CONCLUSION

Stare decisis is an old and fundamental tenet of the United States legal system.¹¹⁸ The very nature of a common law system requires judges to rely on precedent. Accordingly, the manner in which judges treat precedent is an important consideration in a healthy and ethical legal system. As such, stare decisis has many overlapping policy goals with the Code of Judicial Conduct, and both often operate concurrently in achieving those goals. However, an asymmetry exists between the system's response to deviation from stare decisis and from applicable ethical rules, despite both resulting in similar detrimental policy outcomes when ineffectively applied or unreasonably transgressed. Without a clearer stare decisis standard or acknowledgement of the doctrine beyond a normative judicial practice, its objectives—chiefly stability, predictability, and legitimacy—will only be moderately realized.

115. See MODEL CODE OF JUDICIAL CONDUCT, Canon Two Rule 2.2 cmt. [3] (“When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this rule.”).

116. See Thrust and Parry, *supra* note 35, at 684 (describing stare decisis as “a malleable rhetorical tool” with which different Justices employ “various modes of reasoning”).

117. See Mead, *supra* note 6, at 792 n.32 (“[T]he vast majority of the scholarship views stare decisis as a policy that can be changed at will by the courts.”).

118. See *Ramos v. Louisiana*, 590 U.S. 83, 150 (Alito, J., dissenting) (“*Stare decisis* has been a fundamental part of our jurisprudence since the founding[.]”).