

NOTES

On Constitutional *Stare Decisis*

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TABLE OF CONTENTS

INTRODUCTION	535
I. CONTEMPORARY <i>STARE DECISIS</i> IN THE SUPREME COURT	536
A. <i>The Conceptual Indeterminacy of Stare Decisis</i>	536
B. <i>Dobbs</i> as a Model of <i>Stare Decisis</i>	537
II. FORMALISM	539
III. THE NON-FORMALISM OF CONTEMPORARY <i>STARE DECISIS</i>	541
A. <i>Dobbs</i>	541
B. Idiosyncratic Views of <i>Stare Decisis</i>	543
IV. FORMALIST VALUES UNDERMINED BY CONTEMPORARY <i>STARE DECISIS</i>	549
A. <i>Coordination</i>	549
B. <i>Neutrality</i>	551
C. <i>Expertise</i>	552
CONCLUSION	554

INTRODUCTION

Constitutional *stare decisis* as currently practiced at the Supreme Court presents a conundrum for formalists. Following precedent is a neutral rule of decision, but it is not an inexorable command. The Justices have articulated, both individually and in opinions of the Court, various criteria by which they evaluate whether to overturn constitutional precedents. But in many ways, these criteria resemble the very same multifactor balancing standards that formalists typically

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disparage as indeterminate and discretion-enhancing rather than discretion-constraining.

Nevertheless, conventional wisdom holds that *stare decisis* meaningfully advances the core formalist proposition of adherence to legal rules without regard to the background reasons the rules are meant to serve. This conventional wisdom is mistaken. Constitutional *stare decisis* as currently practiced is not formalist. It does not consist of rules at all, but rather of incommensurable factors reviewed under an indeterminate analytical framework. Because of its non-formality, contemporary *stare decisis* does much to undermine the normative values of coordination, neutrality, and expertise that formalism seeks to advance.

Part I of this Note introduces the contours of constitutional *stare decisis* as practiced today at the Supreme Court. Part II conceptualizes legal formalism as utilized throughout the rest of the Note. Part III demonstrates the ways contemporary *stare decisis* is not formalist. Part IV explores how contemporary *stare decisis* undermines the formalist values of coordination, neutrality, and expertise.

I. CONTEMPORARY *STARE DECISIS* IN THE SUPREME COURT

A. *The Conceptual Indeterminacy of Stare Decisis*

The law of precedent at the Supreme Court is woefully underdeveloped. Prior decisions control future applications of law in similar cases—unless they do not. Constitutional *stare decisis*¹ is a rule of decision—but “not an inexorable command.”² *Stare decisis* is at its weakest in constitutional cases—but only the “most convincing of reasons” can justify overruling constitutional precedents.³ The Court has articulated reasons for departing from *stare decisis* and repudiating prior decisions—but has not applied them consistently in either overruling or upholding its precedents.⁴

These features of *stare decisis* reveal a lack of agreement on the Court as to the valid legal source of precedent.⁵ Put differently, the Court does not have a shared

1. AUTHOR’S NOTE: For the sake of parsimony, hereinafter I will omit the modifier “constitutional” from the term “*stare decisis*”. The scope of this Note is limited to constitutional *stare decisis*, and I offer no position on questions of statutory *stare decisis*. Additionally, as this Note addresses only the law of precedent at the Supreme Court, I have omitted the explicit specification of “horizontal” *stare decisis*. Questions of vertical *stare decisis* are beyond the scope of this Note.

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

3. *Compare* *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (“[*Stare decisis*] is at its weakest when we interpret the Constitution because our interpretations can be altered only by constitutional amendment or by overruling our prior decisions.”), and Bryan Garner et al., *THE LAW OF JUDICIAL PRECEDENT* 352–65 (1st ed. 2016), with *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 362 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”).

4. See Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 130–32 (2019); see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 818 n.39 (1982) (“*Stare decisis* is applied so loosely that it seems fair to say that it does not exist as a doctrine.”).

5. See William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 318 (2020).

conceptualization of *stare decisis* as the law of precedent.⁶ Indeed, the very status of *stare decisis* as a form of *law* is unclear given the Court has at times framed it as a “*policy judgment* that ‘in most matters it is more important that the applicable rule of law be settled than that it be settled right.’”⁷

And yet, when the Court discusses *stare decisis*, it is not writing from a blank slate. In *Dobbs v. Jackson Women’s Health Organization*, four other Justices signed on to Justice Alito’s opinion written for the majority, wherein Justice Alito discussed at length the factors the Court has identified in considering whether a constitutional precedent should be overruled.⁸ While *Dobbs* does not comprehensively represent the views of each Justice who signed on to the majority opinion,⁹ it at the very least represents a formulation of *stare decisis* on which those Justices were willing to agree—at least for the purposes of that case.¹⁰ Accordingly, *Dobbs* serves as a useful baseline for approximating the content of *stare decisis* as it is practiced at the Court today.

B. *Dobbs* as a Model of *Stare Decisis*

In the landmark case *Dobbs v. Jackson Women’s Health Organization*, the Supreme Court held that the Constitution does not protect a fundamental right to obtain an abortion.¹¹ The merits of the case are of little relevance for present purposes. Beyond the scope of the Constitution’s protections, *Dobbs* also squarely presented the question of how the Court should consider prior precedent. Before *Dobbs*, *Roe v. Wade* and *Planned Parenthood v. Casey* held for nearly 50 years that the Constitution protected some form of a right to obtain an abortion.¹² In concluding otherwise, the Court was forced to overrule both *Roe* and *Casey*, marking a sea change in the constitutional law of abortion access.¹³

Overruling *Roe* and *Casey*, the *Dobbs* majority identified five factors to evaluate in determining whether to repudiate a constitutional precedent: (1) the nature of the Court’s error; (2) the quality of the prior reasoning; (3) workability; (4)

6. *See id.*

7. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (emphasis added) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

8. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 263–90 (2022).

9. As discussed in greater detail below, several justices have written separately to articulate a more fulsome overview of their own particular views of *stare decisis*. *See, e.g.*, *Gundy v. United States*, 588 U.S. 128, 148–49 (2019) (Alito, J., concurring in the judgment); *Gamble v. United States*, 587 U.S. 678, 710–26 (2019) (Thomas, J., concurring); *Ramos v. Louisiana*, 590 U.S. 83, 115–32 (2020) (Kavanaugh, J., concurring in part); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 416–48 (2024) (Gorsuch, J., concurring).

10. *Supreme Court Procedures*, US CTS. (“A majority of Justices must agree to all of the contents of the Court’s opinion before it is publicly delivered. Justices do this by ‘signing onto’ the opinion.”), <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures#:~:text=A%20majority%20of%20Justices%20must,who%20voted%20in%20the%20majority> [<https://perma.cc/ZAC9-YP5L>].

11. *Dobbs*, 597 U.S. at 292.

12. *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

13. *See Dobbs*, 597 U.S. at 292.

effects on other areas of the law; and (5) the absence of concrete reliance interests.¹⁴ These factors reflect the Court’s attitude that “[o]verruling a precedent is a serious matter. It is not a step that should be taken lightly.”¹⁵ Let us consider each in turn.

1. *The Nature of the Court’s Error* — This factor requires the Court to consider the damaging effects of an erroneous constitutional interpretation.¹⁶ Of particular concern are decisions that wrongly usurp the authority of the democratic process in addressing questions “[o]f profound moral and social importance that the Constitution unequivocally leaves for the people.”¹⁷ A sufficiently erroneous decision can thus be recognized as “egregiously wrong,”¹⁸ where the magnitude of the error can warrant immediate repudiation.¹⁹

2. *The Quality of the Prior Reasoning* — A decision unmoored from grounds in text, history, or precedent is a strong candidate for subsequent repudiation.²⁰ One indicator of such unmoored decisionmaking is when the Court draws lines based on policy “[c]onsiderations that legislative bodies often take into account when they draw lines that accommodate competing interests.”²¹ In contrast to the previous factor, this evinces a distinct concern with the *identification* of erroneous decisions rather than identification of the *magnitude* of such errors.²² After all, one could imagine a poorly-reasoned decision that imposes a low degree of damage to our democratic system, either because it does not usurp democratic authority or because it implicates a comparatively unimportant area of the law. Best then to consider these first two factors as interrelated but analytically distinct.

3. *Workability* — The degree to which a precedent “[c]an be understood and applied in a consistent and predictable manner” is an important consideration in whether the precedent should be overruled.²³ An ambiguous precedent undesirably promotes judicial discretion and inconsistent applications thereof.²⁴

4. *Effects on Other Areas of the Law* — When a precedent causes distortions in unrelated areas of the law, such that other doctrines must be bent or broken to support it, the precedent “has failed to deliver the ‘principled and intelligible’ development of the law that *stare decisis* purports to secure.”²⁵ Another way of

14. *Id.* at 267.

15. *Id.* at 266–67.

16. *Id.* at 268–69.

17. *Id.* at 269.

18. *Id.* at 268.

19. *See id.*

20. *Id.* at 269–70.

21. *Id.* at 274.

22. The Court notes with concern that *Roe*’s reasoning “makes no sense” and is “[e]xceedingly weak . . .” *Id.* at 277, 278.

23. *Id.* at 280–81.

24. *See id.* at 281–84.

25. *Id.* at 286–87 (quoting *June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 376 (2020) (Thomas, J., dissenting)).

conceptualizing this inquiry is that the degree of consistency a precedent has with surrounding law is an important indicator of the precedent's correctness.²⁶

5. *Reliance Interests* — Precedents that do not generate traditional concrete reliance interests have less claim to *stare decisis* adherence.²⁷ Traditional reliance interests are those “where advance planning of great precision is most obviously a necessity.”²⁸

II. FORMALISM

Formalism is a theory of law that stands for a cluster of propositions.²⁹ Despite varying conceptualizations, the core prescription of formalism is adherence to legal rules without regard to the background reasons the rules are intended to serve.³⁰ Put differently, formalism requires decisionmaking according exclusively to the (often textual) content of a legal rule, and thus to the exclusion of other potential considerations.³¹ In legal systems that emphasize written text, this translates to a claim that the law consists of rules that are derived from the linguistic meaning and content of legal texts.³² But formalism is generally about the *form* of legal rules,³³ and those forms can include but are not limited to written legal texts.³⁴

In support of their descriptive claim about the nature of legal rules, formalists posit several normative values that formalism in turn advances. Perhaps foremost, formalism promotes the coordination of various types of behavior.³⁵ “Coordination” generally refers to the effects of judicial decisionmaking that is predictable *ex ante* on the behavior of members of a legal community.³⁶ When formalists describe the advantages of coordination, they refer to (at least) three distinct benefits. First, coordination promotes efficiency gains for society when individuals can order their public and private lives based on their expectations of judicial decisionmaking.³⁷ Second, coordination instantiates the fundamental due process requirement that an

26. See *Ramos v. Louisiana*, 590 U.S. 83, 106–07 (2020); see *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 425 (2024) (Gorsuch, J., concurring) (“[A] precedent is more likely to be correct and worthy of respect when it reflects the time-tested wisdom of generations than when it sits ‘unmoored’ from surrounding law.”).

27. *Dobbs*, 597 U.S. at 287–88.

28. *Id.* at 287 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992)).

29. For thoughtful articulations of the theory of formalism, see generally Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999).

30. Alexander, *supra* note 29, at 531.

31. Schauer, *supra* note 29, at 510.

32. Lawrence Solum, *Legal Theory Lexicon: Formalism & Instrumentalism*, LEGAL THEORY BLOG (Dec. 5, 2021, 9:00 AM), <https://lsolum.typepad.com/legaltheory/2021/12/legal-theory-lexicon-formalism-and-instrumentalism.html> [https://perma.cc/P2JQ-99R3].

33. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 25 (New ed. 2018) (“The rule of law is *about* form.”).

34. Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017).

35. See Alexander, *supra* note 29, at 534.

36. See *id.*; see Schauer, *supra* note 29, at 539–42.

37. See LARRY ALEXANDER & EMILY SHERWIN, *DEMYSTIFYING LEGAL REASONING* 45 (1st ed. 2008).

individual be able to know what the law requires in advance of undertaking a given course of conduct.³⁸ Third, coordination reduces the decisionmaking costs of judges interpreting and applying the law that ordinarily arise due to lack of expertise and other resource constraints.³⁹ Reasoning each case from instrumental or moral first principles in a particularized way can take significant time and effort as compared to reasoning from rules.⁴⁰

For formalism to deliver coordination benefits, legal rules must be determinate, meaning they prescribe specific outcomes when specific factual predicates are satisfied.⁴¹ Rules that involve the application of vague or evaluative terms are not determinate.⁴² Put another way, a rule is determinate only when its own content dictates clearly and specifically how it must be applied. As an example, a rule requiring persons to “drive reasonably” provides little coordination value, because the determination of what qualifies as reasonable driving is ambiguous and subjective.⁴³ The addition of predicate “factors”, instructing persons to “drive reasonably, taking into account the weather, visibility, traffic, and condition of the road,” provides little additional determinacy.⁴⁴ Without determinacy, rules cannot *of themselves* provide a basis for predictable decisionmaking. Predictable decisionmaking is the basis for the formation of expectations that in turn deliver the benefits of coordination.

In addition to coordination, formalists contend that formalism reduces the rate of decisional error produced by a legal system—provided the authoritative decisionmaker in such a system possesses superior expertise.⁴⁵ The desire for a reduction in decisional error reflects an intuition that the participants in a legal system seek not only the coordination value of authoritative settlement, but also that matters be settled correctly.⁴⁶ Of course, the existence of a “correct” answer is contingent upon the degree of determinacy one requires in order to recognize an answer as correct.⁴⁷ Scholars continue to debate whether and when the law “runs out”

38. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); see JOHN FINNIS, *PHILOSOPHY OF LAW* 122–23 (2011).

39. See Frederick Schauer, *Statutory Construction and the Coordination Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 254 (1990); see also Alexander & Sherwin, *supra* note 37, at 48. This coordinative benefit is also referred to as “efficiency” in decisionmaking. See Alexander, *supra* note 29, at 536.

40. Alexander, *supra* note 29, at 536.

41. See *id.* at 542–43; see Schauer, *supra* note 29, at 530–32.

42. See Alexander, *supra* note 29, at 542–43.

43. *Id.* at 543.

44. See *id.* at 543–44.

45. See Alexander, *supra* note 29, at 535. The degree to which formalist, rules-based decisionmaking in fact reduces the aggregate production of erroneous legal decisions is a complex question depending on a variety of factors idiosyncratic to the legal system at issue. See Alexander & Sherwin, *supra* note 37, at 49.

46. Alexander, *supra* note 29, at 535; see also Garner et al., *supra* note 3, at 352.

47. Cf. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (“There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”); see also Randy Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67 (2011).

such that legal rules cannot by themselves provide correct answers.⁴⁸ Leaving this ongoing question unresolved, we can conclude for present purposes that formalists would agree that *when correct answers are available*, the decisional expertise advanced by formalism promotes the identification of those answers.

Finally, formalists contend that formalism serves as what Professor Wechsler terms a “neutral principle”⁴⁹ of constitutional decisionmaking. A neutral principle is one where a court acts not on its own idiosyncratic judgment, but rather where it makes decisions “that res[t] on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”⁵⁰ Neutral principles protect the Court against charges of bias and of rule by unconstrained judicial fiat.⁵¹ Professor Bork argues this requirement of principled decisionmaking also “arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society.”⁵² Judicial discretion unmoored from neutral principles is inconsistent with this democratic pedigree.⁵³

Formalism is a neutral principle, requiring the application of valid legal rules in a way that transcends the immediate result thereof. Extant legal rules are in and of themselves sufficient to resolve a case—even if they produce a result a judge idiosyncratically disagrees with.⁵⁴ In this way, formalism *can* meaningfully constrain judicial discretion.⁵⁵ Put simply, formalism is a neutral principle because it commands the resolution of cases using the same jurisprudential methodology regardless of the particularistic views of any given jurist.

III. THE NON-FORMALISM OF CONTEMPORARY *STARE DECISIS*

A. *Dobbs*

At some degree of generality, formalism and *stare decisis* fit neatly together. Formalism requires the application of pre-existing legal rules according to their terms, and *stare decisis* requires the application of pre-existing legal rules from prior cases. But we must not content ourselves with an abstracted or idealized form of *stare decisis*. Rather, we must grapple with the actual, contingent practice of *stare decisis* and how it interacts with the formalist theory of law. *Dobbs* provides a useful specification of *stare decisis* for this analytical endeavor. Through

48. See Charles F. Capps, *Does the Law Ever Run Out?*, 100 N.D. L. REV. (forthcoming 2025).

49. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1 (1959).

50. *Id.* at 19.

51. *Id.* at 10–12 (“The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law.”).

52. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971); see also Scalia, *supra* note 33, at 9.

53. See Bork, *supra* note 52, at 4.

54. See Schauer, *supra* note 29, at 522.

55. See *id.* at 520–32; see William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2223–28 (2017).

that lens, contemporary *stare decisis* is decidedly not formalist, and significantly impairs the normative values formalism seeks to advance.

The *Dobbs stare decisis* framework is precisely the sort of multifactor balancing standard formalists typically denounce as useless.⁵⁶ It prescribes no specific factual predicates and no specific outcomes. The *Dobbs stare decisis* framework offers no determinate results at all, leaving participants in the legal system to blindly guess when the Court will or will not overrule its precedents. This is not the stuff that formalism is made of.

The *Dobbs stare decisis* framework encapsulates the indeterminacy of multifactor standards. It is largely devoid of formal prescriptive content. The Court notes at the outset that overruling a precedent is “[n]ot a step to be taken lightly.”⁵⁷ (As we will see below, this attitudinal formulation may be doing more of the coordinative work than the factors the Court purports to rely on.) The Court then turns its attention to the factors set forth previously.⁵⁸ While the factors themselves do individually reflect values formalists care about (e.g., coordination and expertise), the only analytical methodology the Court articulates is that the factors must be “considered.”⁵⁹ “Consideration,” like an exhortation to “drive reasonably,” is an ambiguous and evaluative term that prescribes nothing. It provides no guidance as to how the factors are to be evaluated, and whether and to what degree they are even commensurable. How many of the factors need to be satisfied to justify overturning precedent? Can one sufficiently compelling factor suffice? What to do if the factors point in different directions, with varying degrees of intensity?

The *Dobbs* majority offers few hints toward resolving these questions. There, each of the factors pointed in the same direction toward overruling *Roe* and *Casey*.⁶⁰ Accordingly, one might presume that if the same factors were present in a future case (and present to a similar degree), they would favor overruling some other precedent. But one would be left to presumption, as the majority offers no articulation of a *rule* to that effect. The majority also notes that certain cases like *Plessy*⁶¹ and *Gobitis*⁶² were “egregiously wrong” when they were handed down and could be overruled by virtue of their wrongness alone.⁶³ So wrongness can be

56. See Alexander, *supra* note 29, at 542–44, 550; cf. *Wooden v. United States*, 595 U.S. 360, 386 (2022) (Gorsuch, J., concurring) (“[B]eyond easy cases like those lies a universe of hard ones, where a long list of non-exhaustive, only sometimes relevant, and often incommensurable factors promises to perpetuate confusion in the lower courts and conflicting results for those whose liberties hang in the balance.”).

57. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 267 (2022).

58. As a reminder, the factors include: (1) the nature of the Court’s error; (2) the quality of the prior reasoning; (3) workability; (4) effects on other areas of the law; and (5) the absence of concrete reliance interests. *Id.*

59. *Id.*

60. *Id.* at 268.

61. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the separate-but-equal doctrine).

62. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding compelled performance of the pledge of allegiance by public school students).

63. *Dobbs*, 597 U.S. at 293–94.

in and of itself sufficient to repudiate a prior decision. But can the same be said for any of the other factors?

Pulling these strands together, the Justices of the *Dobbs* majority may well have a theory of how *stare decisis* works (after all, five of them were able to coordinate around a decision). But whatever that theory may be, it cannot be characterized as formalist because it is not prescribed by the content of any “rule” the majority purports to be applying. If “consideration” compels the result in *Dobbs*, the majority offers little indication (and no formal framework) as to how or why.

B. Idiosyncratic Views of *Stare Decisis*

Perhaps the best evidence of the indeterminacy of the *Dobbs stare decisis* framework, and of *stare decisis* at the Court generally, is the individual writings of the very same Justices who joined the *Dobbs* majority. Justices Alito,⁶⁴ Thomas,⁶⁵ Kavanaugh,⁶⁶ and Gorsuch⁶⁷ have each written separately to articulate their own idiosyncratic views of *stare decisis*. Those distinct formulations vary materially not only from *Dobbs* but also from one another. Let us consider these separate writings in turn.

1. Justice Alito — *Gundy v. United States* involved a challenge to a federal statute requiring registration of sex offenders as violating the non-delegation doctrine.⁶⁸ Extant doctrine required a delegation from Congress to provide an “intelligible principle” to survive a non-delegation challenge.⁶⁹ A four-justice plurality of the Court voted to uphold the statute and the “intelligible principle” formulation of the non-delegation doctrine.⁷⁰ A three-justice dissent argued that the “intelligible principle” doctrine should be replaced by a more stringent standard.⁷¹ Justice Alito concurred in the judgment, providing the fifth vote to affirm the judgment below while joining neither side of the doctrinal divide.⁷²

In his concurrence, Justice Alito briefly sets forth his view that the “intelligible principle” standard is erroneous and deserving of reconsideration.⁷³ Nevertheless, Justice Alito voted to affirm because a majority of the Court would not vote to reconsider the non-delegation doctrine.⁷⁴ Absent a majority willing to revise the scope of the non-delegation doctrine, Justice Alito concluded, “[i]t would be freakish to single out the provision at issue here for special treatment.”⁷⁵

64. *Gundy v. United States*, 588 U.S. 128, 148–49 (2019) (Alito, J., concurring in the judgment).

65. *Gamble v. United States*, 587 U.S. 678, 710–26 (2019) (Thomas, J., concurring).

66. *Ramos v. Louisiana*, 590 U.S. 83, 115–32 (2020) (Kavanaugh, J., concurring in part).

67. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 416–48 (2024) (Gorsuch, J., concurring).

68. *Gundy*, 588 U.S. at 134.

69. *Id.* at 135.

70. *Id.* at 132.

71. *See id.* at 149–78 (Gorsuch, J., dissenting).

72. *See id.* at 148–49 (Alito, J., concurring in the judgment).

73. *See id.* (Alito, J., concurring in the judgment).

74. *Id.* at 149 (Alito, J., concurring in the judgment).

75. *Id.* (Alito, J., concurring in the judgment).

Justice Alito's concurrence offers a variety of potential insights into his view of *stare decisis*. While he appears to believe that the "intelligible principle" standard is erroneous, perhaps its error is not sufficiently "egregious" to warrant immediate reconsideration. Or perhaps it is sufficiently erroneous, but institutional considerations favor deferral of such reconsideration. If Justice Alito joined the dissent, the Court would have split four-to-four, failing to deliver a majority opinion (Justice Kavanaugh did not participate in the case). Relatedly, perhaps Justice Alito believes reconsideration of an important doctrine should be reserved for when the court is fully staffed. Or perhaps, given Justice Alito's concern with the freakishness of voting to reverse the judgment below absent a majority, his decision here is results-oriented. More charitably, perhaps Justice Alito is grappling with sophisticated questions of how to treat erroneous doctrine that, for whatever reason, will not be wholly overruled.⁷⁶ Intrepid readers might infer Justice Alito's views from these possibilities and seek to stitch them together with the *Dobbs stare decisis* framework. At best, any such endeavor is an exercise in guesswork because, in an important constitutional case raising salient *stare decisis* questions, Justice Alito provided the fifth vote to affirm in an opinion less than 200 words long.

2. Justice Thomas — *Gamble v. United States* involved consideration of whether the Court should retain the "dual sovereignty exception" to the double-jeopardy doctrine.⁷⁷ The majority upheld the exception on the basis of text, history, and precedent.⁷⁸ Justice Thomas agreed the exception should be retained, concluding the "historical record does not bear out [his] initial skepticism of the dual-sovereignty doctrine."⁷⁹ But thereafter, Justice Thomas availed himself of the opportunity to provide a more fulsome explanation of his view of the theory of *stare decisis*.

Justice Thomas disagrees with the Court's "[m]ultifactor balancing test for invoking *stare decisis* [that] has resulted in policy-driven, 'arbitrary discretion.'"⁸⁰ In his view, this multifactor balancing "[e]levates demonstrably erroneous decisions . . . over the text of the Constitution and other duly enacted federal law."⁸¹ To Justice Thomas, *stare decisis* properly consists of two key principles. First, the Court not only can, but *must*, overrule a "demonstrably erroneous precedent" (one that is "not a permissible interpretation of the text")—regardless of other considerations like reliance or workability.⁸² Second, the Court can, but need not, adhere to precedents that are incorrect even if they are not demonstrably erroneous.⁸³

From a formalist perspective, the first prong of Justice Thomas's *stare decisis* framework is to be commended. In contrast to discretionary multifactor balancing, it

76. See Baude, *supra* note 5, at 325–27.

77. *Gamble v. United States*, 587 U.S. 678, 681 (2019).

78. *Id.*

79. *Id.* at 710 (Thomas, J., concurring).

80. *Id.* at 724 (Thomas, J., concurring) (quoting Federalist 78).

81. *Id.* at 711 (Thomas, J., concurring).

82. *Id.* at 718–720 (Thomas, J., concurring).

83. See *id.* at 718, 721 (Thomas, J., concurring) ("Of course, a subsequent court may nonetheless conclude that an incorrect precedent should be abandoned, even if the precedent might fall within the range of permissible interpretations. But nothing in the Constitution requires courts to take that step.").

offers a mandatory rule of decision based upon a single variable: the degree of incorrectness of a prior decision. One might quibble with the determinacy involved in identifying a precedent as “demonstrably erroneous,” but that identification is very much in the ordinary course of interpretation courts can and do perform.⁸⁴ Even if this prong does preserve a degree of judicial discretion, it is categorically different from the balancing of incommensurables the predominant theory of *stare decisis* requires. Justice Thomas’s approach requires specific identification of a precedent as demonstrably erroneous or not, and an explanation for that decision. Critically, this prong specifies internally what reason a Justice must articulate as the basis for their decision to overrule or uphold precedent—the degree of prior error. By contrast, the *Dobbs* framework does not specify internally any particular reason that must be articulated to support overruling or upholding precedent—only a list of factors to be considered. Justice Thomas correctly identifies this latter approach as the sort of arbitrary discretion *stare decisis* is supposed to protect against.

The second prong of Justice Thomas’s *stare decisis* framework, however, reintroduces the very same non-formalist problems that the first prong seeks to resolve. When a precedent is incorrect but not demonstrably erroneous, Justice Thomas concludes the Court can, but *need not*, adhere to it. Fundamentally, this is an exemplar of judicial discretion.⁸⁵ Upon identifying a precedent as incorrect, this prong provides two potential rules of decision: (1) follow the precedent, or (2) do not follow the precedent. No guidance is offered as to when rule (1) or rule (2) should apply. This prong is precisely as determinate as someone saying, “If I flip a coin, it will land on heads or tails.” The statement is tautologically true but carries no prescriptive content. The introduction of such an utterly indeterminate standard is especially ironic given Justice Thomas’s express concern with the arbitrary discretion of contemporary *stare decisis*.⁸⁶

Compare Justice Thomas in *Gamble* to the majority in *Dobbs*. The *stare decisis* analysis of the *Dobbs* majority can be read to introduce the very same arbitrary discretion Justice Thomas denounces in *Gamble*. Specifically, it involves considerations of reliance and workability even after the majority concludes *Roe* was “egregiously wrong.”⁸⁷ If we can presume that an “egregiously wrong” precedent is likely also “demonstrably erroneous,” we can safely conclude Justice Thomas would see no need to proceed further. On the other hand, the *Dobbs* majority never expressly claims the egregious wrongness of *Roe* is *not* an independently sufficient reason to overrule *Roe*. Perhaps then the discussion of the other factors is merely gilding the lily. Or perhaps the discussion of reliance and so on fit into the second prong of Justice Thomas’s framework as relevant considerations for how the Court should exercise discretion in departing from a merely incorrect

84. See generally Caleb E. Nelson, *Stare Decisis and Demonstrably Erroneous Precedents* 87 VA. L. REV. 1 (2001).

85. See Baude, *supra* note 5, at 321.

86. See *id.* at 322.

87. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 268–90 (2022).

precedent. All of these are plausible readings precisely because of the indeterminacy of the *Dobbs* framework. We do not and cannot know for certain which reading is correct because the *Dobbs* majority does not tell us.

3. Justice Kavanaugh — *Ramos v. Louisiana* involved a challenge to the Louisiana state practice of permitting convictions for serious crimes based on non-unanimous jury verdicts.⁸⁸ The Court concluded such a practice violates the Sixth and Fourteenth Amendments.⁸⁹ In so doing, the Court overruled *Apodaca v. Oregon*,⁹⁰ which held previously that criminal convictions did not require unanimous jury verdicts.⁹¹ Justice Kavanaugh concurred in relevant part, concluding the time had come to overrule *Apodaca*.⁹² To explain his decision, Justice Kavanaugh wrote separately to articulate his own view of *stare decisis*.⁹³

At the outset, Justice Kavanaugh notes that “to overrule a constitutional precedent, the Court requires something ‘over and above the belief that the precedent was wrongly decided.’”⁹⁴ To elaborate this threshold requirement, Justice Kavanaugh reviews the various *stare decisis* factors the Court has identified over time, helpfully identifying the central concern a formalist might raise to contemporary *stare decisis*:

“But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.”⁹⁵

To remedy this jurisprudential muddle, Justice Kavanaugh collapses the various factors the Court has previously identified into three broad considerations: (1) whether the precedent was grievously or egregiously wrong; (2) whether the precedent has produced significant negative jurisprudential or real-world consequences; and (3) whether overruling the precedent would unduly upset reliance interests.⁹⁶ Justice Kavanaugh concludes that applying these three considerations, while not a mechanical exercise, nevertheless meaningfully constrains judicial discretion.⁹⁷

Of the individual writings we have reviewed, Justice Kavanaugh’s framework of *stare decisis* most closely resembles that of the *Dobbs* majority. We see the same mode of analysis (comparing holistically a set of disparate factors) and even the same verbiage as to the mode of analysis (“consideration”). From a formalist

88. *Ramos v. Louisiana*, 590 U.S. 83, 87 (2020).

89. *Id.* at 93.

90. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

91. *Ramos*, 590 U.S. at 111.

92. *Id.* at 115 (Kavanaugh, J., concurring in part).

93. *Id.* (Kavanaugh, J., concurring in part).

94. *Id.* at 120 (Kavanaugh, J., concurring in part) (quoting *Allen v. Cooper*, 589 U.S. 248, 259 (2020)).

95. *Id.* at 121 (Kavanaugh, J., concurring in part).

96. *Id.* at 121–22 (Kavanaugh, J., concurring in part).

97. *Id.* at 123 (Kavanaugh, J., concurring in part).

perspective, Justice Kavanaugh's framework suffers from the same deficiencies as that of the *Dobbs* majority. Most acutely, it is similarly indeterminate. It offers no mechanism for evaluating the considerations in relation to one another. And note the distinction between a rule that is mechanical and one that is determinate. Formalism requires the latter but not the former. For example, under the first prong of Justice Thomas's framework, identification of a precedent as "demonstrably erroneous" is not a mechanical exercise, as it requires identification of the range of "permissible interpretations" of written laws that in turn carry a "range of indeterminacy."⁹⁸ But it is nonetheless determinate, because it prescribes a specific result (overruling precedent) when a specific factual predicate (demonstrable error) is present. Neither Justice Kavanaugh's framework, nor that of the *Dobbs* majority, can make the same claim because they do not specify which factors must be present (and to what degree in relation to one another) to justify overruling precedent.

4. Justice Gorsuch — *Loper Bright Enterprises v. Raimondo* involved a challenge to a federal agency interpretation of the Magnuson-Stevens Fishery Conservation and Management Act.⁹⁹ The Court held the agency interpretation to be contrary to law, and in so doing overturned the doctrine of judicial deference to reasonable agency interpretations prescribed by *Chevron v. National Resources Defense Council*.¹⁰⁰ Justice Gorsuch wrote separately to explain why proper application of *stare decisis* favored overruling *Chevron*.¹⁰¹

Justice Gorsuch begins by tracing the origins of common law judging, noting judges were tasked with finding pre-existing law rather than making new law.¹⁰² Only recognized authoritative lawmakers were authorized to create law.¹⁰³ And because judges could not make law, judicial determinations were not considered to be law, but rather something less than law.¹⁰⁴ Accordingly, *stare decisis* did not treat prior judicial determinations as binding on future judges, but instead as mere evidence of law.¹⁰⁵

From these principles, Justice Gorsuch derives two relevant lessons for understanding contemporary *stare decisis*. First, the Court's prior determinations bind parties to a dispute, but they cannot contravene the positive law.¹⁰⁶ To do so would be making rather than finding law, when only the American people and

98. *Gamble v. United States*, 587 U.S. 678, 720–21 (2019) (Thomas, J., concurring).

99. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 383 (2024).

100. *See id.* at 412; *see Chevron, U.S.A. Inc., v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

101. *Loper Bright*, 603 U.S. at 416–48 (Gorsuch, J. concurring).

102. *Id.* at 415 (Gorsuch, J. concurring).

103. *See id.* (Gorsuch, J. concurring).

104. *Id.* (Gorsuch, J. concurring).

105. *Id.* (Gorsuch, J. concurring); *see also* Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 431–35 (2018).

106. *Loper Bright*, 603 U.S. at 423 (Gorsuch, J. concurring).

their elected representatives are authoritative lawmakers.¹⁰⁷ Second, tempering the first lesson, prior judicial determinations are entitled to respect—particularly precedents that are repeatedly affirmed across generations.¹⁰⁸

Unlike the *Dobbs* majority, though, Justice Gorsuch elaborates methodologically what respectful consideration entails. The primary inquiry is the quality of a precedent's reasoning.¹⁰⁹ Just as in Justice Thomas's first prong, Justice Gorsuch thus centralizes the degree of determinacy of prior error as the focal point of the analysis. As a secondary matter, precedents affirmed across generations are more likely to be correct.¹¹⁰ Here again, we see the correctness of precedent as the key concern. Other factors like workability and reliance (endorsed by the *Dobbs* majority as separate considerations) generally do not supply independent reasons for upholding incorrect precedent—and are thus primarily useful only to the extent they help to identify the correctness of prior precedent.¹¹¹

Justice Gorsuch's framework of *stare decisis* is a formalist ray of hope in an otherwise dismal mire of non-formalism. Like Justice Thomas's first prong, Justice Gorsuch offers an analytical framework that emphasizes one primary factor: the degree of incorrectness of the prior decision. Justice Gorsuch's framework implicitly mandates overruling precedents that are erroneous because of his view that the Court is not authorized to issue rules of decision that conflict with the positive law. The frame is not one of discretion, but rather that the Court lacks the power to treat incorrect precedents as binding. Unlike Justice Thomas, Justice Gorsuch does not differentiate between precedents that are demonstrably erroneous and precedents that are merely incorrect. Justice Gorsuch's framework thus in large part satisfies the core elements of determinacy: a specific result (overruling precedent) is prescribed when a specific factual predicate (an erroneous precedent) is present.

But all is not roses, even here. While Justice Gorsuch's framework is more formalist than the others, it leaves a critical question unanswered: how determinately erroneous must a precedent be in order that it in turn must be overruled? Put another way, how confident must one be that a correct answer is available, as opposed to a penumbral zone of indeterminacy? Justice Thomas set this threshold level of determinacy as demonstrable error. Justice Kavanaugh set it as egregious error. Justice Gorsuch does not appear to set this threshold at all. Additionally, however laudable Justice Gorsuch's framework might be, he remains only one of nine Justices on the Court. Let us zoom back out to consider the collective implications of these individual writings.

Our review of the individual writings of the Justices brings to light the indeterminacy of contemporary *stare decisis*. The individual frameworks offered by the Justices vary in their determinacy, and in relation to one another. Some individual

107. *Id.* (Gorsuch, J. concurring).

108. *Id.* at 424 (Gorsuch, J. concurring).

109. *Id.* (Gorsuch, J. concurring).

110. *Id.* (Gorsuch, J. concurring).

111. *See id.* (Gorsuch, J. concurring).

frameworks are more formalist, some are less. For whatever reason, these varying individual views have precluded the Justices from aggregating a determinate framework of *stare decisis* for the Court as a whole. To be sure, some amount of jurisprudential variation is inevitable when nine individual Justices must aggregate votes to make institutional decisions.¹¹² But that variation conflicts with formalism when it precludes the Court as an institution from articulating a framework of *stare decisis* that satisfies the criteria of formality.

Concededly, none of these individual opinions purport to offer a comprehensive framework of *stare decisis*. As such, it may well be that each opinion represents different parts of the elephant of *stare decisis* that can only be perceived in discrete instances.¹¹³ But to a formalist, that merely restates the issue. The complete elephant of *stare decisis* might exist any number of places, but one place we can conclude with confidence it does not exist is within the pages of the U.S. Reports.

IV. FORMALIST VALUES UNDERMINED BY CONTEMPORARY *STARE DECISIS*

A. Coordination

Absent a determinate *stare decisis* framework, the coordination value of the Court's precedents suffers. The law of precedent at the Court is largely a black box. Inputs go in, outputs emerge, but observers have little visibility as to the process of producing those outputs. Accordingly, participants in the legal system cannot develop informed expectations *ex ante* as to which cases the Court will overrule and which cases it will uphold.¹¹⁴ Expectations in turn are the basis for the coordination of private behavior.¹¹⁵ As a methodological matter then, the coordination benefits of contemporary *stare decisis* are a dubious proposition.

A more plausible explanation of whatever coordination benefits the Court's precedents do provide lies in the empirical reality that the current Court overturns few precedents in any given term.¹¹⁶ This empirical reality might derive from various potential sources. Perhaps the attitudinal formulation from *Dobbs* that overruling precedent is "[n]ot a step to be taken lightly" reveals a strong disposition amongst

112. See generally Richard M. Re, *A Law Unto Oneself: Personal Positivism and Our Fragmented Judiciary*, 110 VA. L. REV. 1169 (2024).

113. The parable of the blind men and an elephant refers to a group of blind men who encounter an elephant and seek to ascertain its appearance by touch. Each man feels a different part of the elephant (foot, tusk, tail, trunk, and so on) and recounts his perception of the elephant's appearance based on their own experience. The differing descriptions each provide creates rancor within the group, with each person confident his perception must be correct.

114. See Nelson, *supra* note 84, at 63–65.

115. Alexander & Sherwin, *supra* note 37, at 35–36.

116. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 424 n.1 (2024) (Gorsuch, J., concurring) ("In recent years, we have not approached the pace set by our predecessors, overruling an average of just one or two prior decisions each Term."); see *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONSTITUTION ANNOTATED, <https://constitution.congress.gov/resources/decisions-overruled/> [<https://perma.cc/2R5S-LPL7>]; see also Jonathan Adler, *The Stare Decisis Court?*, THE VOLOKH CONSPIRACY (July 8, 2018, 10:05 AM), <https://reason.com/volokh/2018/07/08/the-stare-decisis-court/> [<https://perma.cc/7ZHM-4YM7>].

the Justices against overruling precedent.¹¹⁷ Perhaps over time the Court has produced few “egregiously wrong” or “demonstrably erroneous” precedents. Perhaps over time the Court has produced few precedents that satisfy all the *Dobbs* factors to a similar degree. Whatever the explanation, it cannot be the result of the formal doctrine of *stare decisis*. As we have seen, contemporary *stare decisis* commands no determinate result at all.

A note about coordination in relation to Justices Thomas and Gorsuch. I have suggested their respective frameworks of *stare decisis* are more formalist than the others, yet both also subordinate coordination to correctness by favoring overruling incorrect precedents regardless of reliance interests.¹¹⁸ Perhaps counterintuitively, I submit this methodological disregard for reliance interests can nevertheless promote coordination (even if it empirically results in more cases being overturned than are currently). This is so because participants in the legal system can more readily form *ex ante* expectations as to when a case will be overruled when the process by which cases are overruled is well-defined.¹¹⁹ Justice Gorsuch (and Justice Thomas’s first prong) would replace the inscrutable *Dobbs* multifactor framework with a singular assessment of incorrectness. As we have seen, this is methodologically more determinate than the alternatives offered by other Justices. The Justices could further promote the formation of expectations by announcing to the public which cases they believe should be overruled.¹²⁰ If we are to accept a system where the Justices are going to overrule precedent, a formalist would conclude it is better they do so in an intelligible and transparent manner.

To be sure, the *stare decisis* frameworks of Justices Thomas and Gorsuch are not above criticism. I have identified some of their formalist deficiencies above. An additional coordination objection one might raise relates to the strategic behavior of litigants. By signaling it will evaluate prior precedents primarily based on their correctness, would the Court open the door to a flood of litigation by parties expecting to demonstrate sufficiently determinate incorrectness? This is a risk to be sure, but one that is intermediated through various institutional functions of the Court. First, it is mediated by the federal court system and the Court’s certiorari jurisdiction.¹²¹ Any litigant seeking to challenge a precedent must

117. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 267 (2022).

118. *See Gamble v. United States*, 587 U.S. 678, 720 (2019) (Thomas, J., concurring) (“Considerations beyond the correct legal meaning, including reliance [and] workability . . . are inapposite.”); *Loper Bright Enters.*, 603 U.S. at 425 (2024) (Gorsuch, J., concurring) (“The remaining factors, like workability and reliance, do not often supply reason enough on their own to abide a flawed decision . . .”).

119. Nelson, *supra* note 84, at 65–68.

120. *See Dobbs*, 597 U.S. at 332–33 (2022) (Thomas, J., concurring) (describing the substantive due process precedents Justice Thomas believes should be revisited); *see also* AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 240 (2012) (“It is thus important for the Court to tell the public if the justices have indeed erred in the past precisely so that the other branches may ponder their constitutionally permissible options.”).

121. *See* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 16–23 (2016).

navigate a labyrinth of procedural hurdles to even reach the Court. To wit, these hurdles are especially daunting given the Court's comparatively small—and shrinking still—merits docket.¹²² Second, the Court mediates this risk to the extent it affirms its shopworn principle that only the Court itself can overturn its own precedents.¹²³ As such, litigants face a high probability of losing below and a low probability of even reaching the Court, regardless of the Court's approach to *stare decisis*. If expectations are the basis for coordination, these considerations militate against the avalanche of litigation critics of Justices Thomas and Gorsuch might otherwise fear.

B. Neutrality

Just as the indeterminacy of contemporary *stare decisis* undermines the coordinative value of prior decisions, the arbitrary discretion embedded in contemporary *stare decisis* undermines its claim to neutrality. If there is a throughline between the individual formulations of *stare decisis* we have reviewed and *Dobbs*, it is that they each preserve the central role of judicial discretion (apart from Justice Gorsuch's). But if the objective of neutral principles is to displace idiosyncratic judicial decision-making, the mode of discretion the Justices seek to preserve is directly to the contrary.

The central role of judicial discretion lurks throughout the formulations of *stare decisis* we have considered. In *Dobbs*, the Court notes prior cases “[h]ave attempted to provide a framework for deciding when a precedent *should* be overruled, and they have identified factors that *should* be considered in making such a decision.”¹²⁴ The auxiliary verb “should” can express “obligation, propriety, or expediency.”¹²⁵ The *Dobbs* majority's separate use of the term “must” elsewhere in its discussion of *stare decisis* suggests it is using “should” to refer either to propriety or expediency rather than obligation.¹²⁶ In effect then, the *Dobbs stare decisis* framework describes when it is prudential or desirable to overrule prior decisions. That in turn is a matter of discretion.

Discretion is similarly imbued within the individual articulations we have reviewed. In *Gundy*, Justice Alito notes that if a majority of Justices were “willing” to reconsider the intelligible principle doctrine, he would “support” that effort.¹²⁷ In *Gamble*, Justice Thomas articulates a two-pronged version of *stare decisis* that is

122. See generally Michael Heise et al., *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 N.D. L. REV. 1565 (2020).

123. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

124. *Dobbs*, 597 U.S. at 267 (emphasis added). See also *id.* at 269 (the quality of the reasoning in a prior case has an important bearing on whether it *should* be reconsidered.”) (emphasis added). But see *id.* at 292 (“*Roe* and *Casey* *must* be overruled, and the authority to regulate abortion *must* be returned to the people and their elected representatives.”) (emphasis added).

125. *Should*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/should> (“used in auxiliary function to express obligation, propriety, or expediency”) [<https://perma.cc/NW8Y-MVLK>].

126. See *Dobbs*, 597 U.S. at 292 (“*Roe* and *Casey* *must* be overruled, and the authority to regulate abortion *must* be returned to the people and their elected representatives.”) (emphasis added).

127. *Gundy v. United States*, 588 U.S. 128, 149 (2019) (Alito, J., concurring) (emphasis added).

partially mandatory and partially discretionary.¹²⁸ In *Ramos*, Justice Kavanaugh offers “considerations that, in [his] view, can help guide the inquiry” of whether to overrule prior precedent.¹²⁹ Relatedly, as Justice Kavanaugh frames the issue, “[n]o one seriously maintains that the Court *should never* overrule erroneous precedent” and “[n]o one advocates that the Court *should always* overrule erroneous precedent.”¹³⁰ We see throughout these formulations a concern not for what a formal doctrinal rule *requires*, but for identifying a course the Court *should* pursue.

Justice Kavanaugh correctly diagnoses that this doctrinal muddle impairs the Court’s ability to claim *stare decisis* as a neutral principle.¹³¹ Indeed this discretionary mode of *stare decisis* is decidedly non-neutral. It elevates the very same idiosyncratic decisional processes that neutral principles protect against.¹³² Accordingly, the Court opens itself to charges of rule by raw judicial fiat. It also raises the issues of democratic legitimacy Professor Bork identifies when an anti-democratic institution like the Court appears to be—or in this case, is—unconstrained by rules. To clarify, the concern here is not that the Justices are in fact applying their discretion in arbitrary or unprincipled ways. Rather, the concern is that the exercise of their discretion is not constrained by any formal rule commanding the application of specified principles. In effect, the extent to which their exercise of discretion reflects principle is contingent upon the intrinsic virtue of the Justices themselves rather than any extrinsic constraint. Judicial virtue is not a neutral principle.

C. Expertise

Finally, contemporary *stare decisis* subverts the formalist value of expertise. The value of expertise is fundamentally a call for informed decisionmaking so as to reduce the probability of decisional error.¹³³ The question then becomes the identification of the proper expert decisionmaker. Contemporary *stare decisis* situates the Court in ways that on balance may well produce less- rather than more-informed decisionmaking.

The *Dobbs* majority articulates a familiar vision of *stare decisis* as a form of respect for the expertise of a prior Court that reviewed the issue and reached a conclusive determination.¹³⁴ Justice Kagan has offered a similar theory of *stare decisis* as a doctrine of humility.¹³⁵ Doubtless this vision of expertise has merit as

128. See *supra* note 85 and accompanying text.

129. See *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J. concurring in part).

130. *Id.* at 118 (Kavanaugh, J. concurring in part) (emphasis added).

131. See *id.* at 121 (Kavanaugh, J. concurring in part).

132. Baude, *supra* note 5, at 334 (“Modern *stare decisis* doctrine now does the very opposite of what the doctrine was once supposed to do. It introduces elements of the arbitrary discretion it was once meant to constrain.”).

133. Alexander, *supra* note 29, at 534–35.

134. *Dobbs*, 597 U.S. at 264 (2022) (“[*Stare decisis*] restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past.”).

135. *Loper Bright Enters.*, 603 U.S. at 451 (Kagan, J., dissenting) (“*Stare decisis* is, among other things, a way to remind judges that wisdom often lies in what prior judges have done.”).

a story of *precedent*.¹³⁶ But we must be careful to distinguish between stories of precedent and stories of *stare decisis* (as a framework for deciding whether to follow precedent). The accumulated wisdom of prior generations of jurists carries significant weight when contemporary Justices are meaningfully bound to heed that wisdom. But when instead the Justices are free at their discretion to partake of such wisdom when they see fit, it is less clear to what extent it is doing any meaningful work.

Even if contemporary *stare decisis* does vindicate this intergenerational expertise, we must be sensitive to what specific form of expertise is being elevated. Here, the Justices evince an intra-judicial lens for advancing the value of expertise in decision-making. Their concern is the wisdom of *prior judges*. Accordingly, they implicitly elevate the role of the Court itself in interpreting the Constitution. Again, this is a story with merit. The Court is *an* authoritative interpreter of the Constitution.¹³⁷ But consider another story our Constitution tells. In that story, the Court is but one of many actors recognized as possessing expertise in interpreting the Constitution. Others include Congress,¹³⁸ the President,¹³⁹ state courts,¹⁴⁰ and juries.¹⁴¹

When the Court privileges the expertise of its own prior members, it may in turn denigrate the expertise of these other interpreters. A Court that is unwilling to confess error, out of respect for the wisdom of its prior members, runs headlong into the risk of "self-aggrandizement."¹⁴² As an example, consider a hypothetical where the Court issues a constitutional precedent that the President strongly believes to be incorrect. Let us even assume the President fully ventilated this view before the Court in advance of the issuance of the precedent. Time passes, and the President (or their successors) develop new and better arguments based on improved research methods and practical experience. To the extent the President believes in the Court's commitment to *stare decisis*, they might be all the less likely to test their arguments and risk judicial sanction.¹⁴³ And even if the President does bring the issue back before the Court, the gravitational effect of

136. Neil Gorsuch, *A REPUBLIC, IF YOU CAN KEEP IT* 217 (2019) ("Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges.").

137. *Marbury v. Madison*, 1 Cranch 137, 177–80 (1803).

138. Russ Feingold, *The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting*, 67 VAND. L. REV. 837, 839–49 (2014).

139. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 180–85 (2005).

140. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("We have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

141. AKHIL REED AMAR, *THE BILL OF RIGHTS* 98–104 (1998).

142. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 236–37 (2012) ("Yet even as we strive to understand the Court's institutional desire to avoid shouting from the rooftops that the Court itself has blundered badly in the past, we must also note the dangers of unchecked institutional self-aggrandizement.").

143. *Cf.* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 COLO. L. REV. 1011, 1016–25 (2003).

the expertise of prior Justices makes it all the less likely these improved arguments will receive fulsome review.

To be sure, this example includes many assumptions as to the behavioral incentives of both the President and the Court, each of which are contestable. The purpose of the example is not to demonstrate empirically what the effect of *stare decisis* is on informed decisionmaking, but rather to show conceptually how expertise might be undermined in ways formalists should take seriously. Relatedly, the example ignores the other constitutional tools the President has to vindicate their position beyond making arguments to the Court.¹⁴⁴ This exclusion is deliberate, as our focus is on identification of informed decisionmaking, not the ability of a given branch to institute their view by constitutional force.

In sum, a formalist concerned with expertise in decisionmaking has cause for concern when the Court's theory of *stare decisis* elevates its own institutional prerogative at the expense of its constitutional co-equals. As a general matter, judicial review itself might raise similar risks of judicial self-aggrandizement. But I submit the problem is considerably more acute in relation to *stare decisis*. It is one thing to say that an issue must be decided, as judicial review requires. It is another entirely to say that one branch of government (the judiciary) can conclusively and permanently decide that issue. The more tightly a given Justice hues to the expertise of their predecessors, the closer they move toward this latter proposition. That is a form of epistemological closure, insulating the Court's decisions from subsequent review in the light of new information. And such an expansive view of the judicial power arguably contravenes the narrower historical understanding of the authority conferred by Article III.¹⁴⁵

CONCLUSION

In this Note, I have argued that contemporary *stare decisis* is not formalist. Because of its non-formality, *stare decisis* does much to undermine the jurisprudential values of coordination, neutrality, and expertise. This is an issue formalists should take seriously. The law of precedent at the Supreme Court is vitally important and critically undertheorized. Formalism has gained much ground in the jurisprudence of the Court in recent decades,¹⁴⁶ but seemingly to little avail in this paramount area of the law. For those who believe in the rule of law as a law of rules, the present state of affairs is untenable. To confront this problem, formalists should turn their attention toward alternative theories of *stare decisis* that better conform to the theory and values of formalism.

144. To be sure, each branch is equipped constitutionally with a variety of tools to vindicate its prerogatives. See generally Federalist No. 51 (James Madison).

145. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 420–23 (2024) (Gorsuch., J., concurring).

146. As Justice Kagan famously put it, “we’re all textualists now.” Harvard Law School, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), <https://youtu.be/dpEtszFT0Tg> [<https://perma.cc/8D68-GD6U>].